

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Civil Action No. : 1:10-cv-00569-RJA

Plaintiff,

MEMORANDUM OF LAW
REGARDING MOTION FOR
DISCOVERY

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

MEMORANDUM

“Defendant shall produce all emails in their original, **native** and hard-copy form between Defendant Zuckerberg and Plaintiff and/or other persons associated with StreetFax that were captured from Zuckerberg's Harvard email account.” Doc. No. 83 at 3. Emphasis Added.

Defendants produced a selection of emails to Plaintiff in response to this court's order, Doc. No. 348. Defendants conducted their search of the Harvard email record without being ordered by the court. They did this to use that record as a comparison to the email exchanges Plaintiff produced which they disputed. Their rationale has always been, if Plaintiff's email exchanges do not appear in the Harvard email record as Defendants recovered it, then Plaintiff's emails are fakes.

The sample of emails produced by Facebook was self selected. It was not intended to be complete or all inclusive, but rather to mislead the court about what

emails were available. They did not search the Harvard email server backup tapes or the personal computers used by Zuckerberg during 2003-2004 that were obvious places to look for emails sent and received by Zuckerberg during the relevant time. Defendants production of these emails is a red herring to make the court believe that all of the emails between the parties had been produced.

On April 4, 2012, the court found Plaintiff complied with duties under the Doc. No. 83, and ordered Defendants to provide the Harvard emails forthwith. Doc. No. 348.

Defendants produced 233 emails in native and hard-copy format in response to this court's order in Doc No. 348. The native format of those emails was a file format extension of .msg.

Plaintiff's counsel has reviewed those emails. There are a significant number of relevant emails not produced by Facebook and Zuckerberg.

EARLY EMAILS NOT PROVIDED

The parties signed the Facebook Contract on April 28, 2003. See Complaint, Exhibit 1. The first email produced from Defendant Zuckerberg's Harvard email account, however, dates to June 2, 2003. That leaves more than a month of email exchanges between Plaintiff and Zuckerberg that were not produced.

Plaintiff posted a Craigslist advertisement on or about January or February 2003 to which Zuckerberg responded which initiated their relationship. Declaration of Paul Ceglia at ¶2-4. Plaintiff's phone number was not included in that ad. Id. at ¶ 3. The only means of responding to the advertisement was via email which

Zuckerberg did on or about February or March of 2003. Id. at ¶4-5.

Throughout February, March and April of 2003 time Plaintiff exchanged emails with Mark Zuckerberg. Id. at ¶6. Dozens of emails were exchanged with Mark Zuckerberg in those three months. Id. Those emails exchanged during those months included drafts of what became the eventual Facebook Contract that the parties signed on April 28, 2003 in Boston. Id. at ¶7. The parties both arranged a meeting in Boston for April 28, 2003 to sign an agreement, now known as the Facebook Contract. Id. at ¶8. After the parties met and signed the Facebook Contract in Boston they discussed via email some work related concerns of Mark Zuckerberg. Id. at ¶9. During the week of May 24 through May 31, 2003, countless emails were exchanged as continual issues arose that required Plaintiff's input. Id. at ¶10. In November of 2003 the parties again began to communicate regularly via email. Id. at ¶12. Mark Zuckerberg sent Plaintiff numerous emails between November 2003 and December 31, 2003. That email communication continued into 2004. Id. at ¶¶12-13.

There are no emails during the critical timeframe when the work under the Facebook Contract was supposed to begin and end. The contract sets the start time for Zuckerberg's work at May 24, 2003. He was to conclude his work on May 31, 2003. This start time of May 24, 2003 coincides with the ending of Harvard's spring semester which happened on May 23, 2003.

CONCLUSIVE EVIDENCE OF DELETED EMAILS THAT WERE NOT PROVIDED

Even based on the limited sample Defendants produced, Plaintiff was able to identify specific emails that were deleted and other patterns of deletions. Not less than 22 original emails exchanged between the parties were deleted by Zuckerberg or someone on his behalf after November 1, 2003. The proof of the deletions is evident in the Harvard emails Defendants produced. Copies of those 22 deleted emails, also known as threads, were contained in other emails in the Harvard record. See Exhibits C and D.

We can identify patterns of deletions as well. Of the 149 emails produced that were dated between June 2, 2003 and November 1, 2003, 92 of them were sent by Mark Zuckerberg to either Plaintiff or another recipient. The Harvard emails contain 84 emails after November 1, 2003, but none of those 84 were sent by Mark Zuckerberg. This is clear proof that the sent items emails between Mark Zuckerberg and people associated with the Plaintiff dating to after November 2003 were deleted. With the limited discovery Plaintiff has had thus far, it is still undetermined whether these emails were deleted during the pendency of this litigation.

Plaintiff produced copies of 16 of the 19 emails that Mark Zuckerberg sent him between July 16, 2003 and November 1, 2003. Doc. No. 224. Plaintiff also received 13 emails from Mark Zuckerberg that were sent by Mark Zuckerberg after November 1, 2003. The deletion from Mark Zuckerberg's Harvard email account of all sent items emails after November 1, 2003 precludes the Defense from asserting that Plaintiff's emails are forgeries because they are not contained in Defendants'

produced Harvard email record.

IDENTIFICATION OF THE 22 MISSING EMAILS

A native format msg email file produced by Defendants and required by the court's orders contains the following:

1. From, To, Date, CC and Subject information; and
2. The text of the body of the email itself; and
3. email header information. See Exhibit E at 1.

The contents of the msg file produced by Defendants for the typical email produced is shown on Exhibit E at 1. The email header information that comes along with the native file format of the msg file is shown at the bottom of Exhibit E at 1.

However, among the produced msg emails, were 22 examples of emails containing not only a message between relevant parties, but below that message, the "parent" or previous message between those parties. An example of such an email is on the top of Exhibit E at 2.

The email at the top of page 2 of Exhibit E was exchanged between the parties on June 2, 2003 at **11:28 pm**. The email header information for that email is at the bottom of page 2 of Exhibit E.

In that email at the top of page 2 of Exhibit E, the body of that email has a series ">" symbols within it below the main email message. The email information next to that series of ">" symbols contains another email exchanged between Zuckerberg and Plaintiff on June 2, 2003 at **1:08:55 am**. However, this 1:08:55 am

email **was not produced** to Plaintiff in any

The email header information at the bottom of page 2 of Exhibit E is only that for the email sent on June 2, 2003 at 11:28 PM. It does not (and would not) contain any email header information, as required in a native format production, of the parent email sent by Mark Zuckerberg at 1:08:55 am. (i.e the one shown next to the ">" symbols. Defendants' production also necessarily omits any attachments that may have been sent along with the email that was sent on Jun 2, 2003 at 1:08:55. As is noted above, attachments to emails between the parties are crucial pieces of evidence.

This failure of production regarding these parent emails occurs within 22 of the emails that Defendants did produce. See Exhibits C and D. This is objective, scientific and indisputable proof that Zuckerberg or someone at his request, deleted emails from his Harvard email account. Moreover, these intentionally deleted emails are emails that are relevant to this case.

DEFENDANTS' RESPONSE TO THE MISSING EMAILS THEY FAILED TO PRODUCE

Plaintiff's counsel attempted to resolve this matter by pointing out the missing emails that Defendants' failed to produce in compliance with this court's order. Exhibit A.

Defense Counsel Alex Southwell's response to this attempt is attached as Exhibit B. In that response, Southwell admits Defendants have produced all the emails they are capable of producing based upon their experts' efforts thus far.

CONCLUSION

For the time being, Plaintiff accepts Defendants' response that they have produced all emails they could recover from their analysis of the Harvard email system. A review of their production proves, without any doubt, that Defendant Zuckerberg deleted emails from his account that are relevant to this case. A review of the Stroz report demonstrates that Stroz failed to examine the Harvard email server backup tapes. Stroz also failed to review computers Zuckerberg used during the 2003-2004 time frame to determine if those computers contained these emails Defendants were ordered to produce, but did not produce.

Therefore, Plaintiff asks for an order from this court authorizing a subpoena to be issued to Harvard University for all backup tapes of the Harvard email server from 2003-2004 containing or potentially containing the email account of Defendant Zuckerberg. Also, Plaintiff requests an order authorizing Plaintiff's computer forensics expert to acquire all native format email messages from Defendant Zuckerberg's computers used during 2003-2004 forensic copies of which are currently in the possession of Parmet and Associates.

Respectfully submitted,

/s/Dean Boland

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