UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' OPPOSITION TO CEGLIA'S MOTION FOR EXTENSION OF TIME

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On April 4, 2012, this Court heard more than four hours of oral argument on Defendants' Motion to Stay Discovery. The Court ultimately entered a calibrated Order (Doc. No. 348) giving Ceglia 60 days to file expert reports opposing Defendants' Motion to Dismiss (Doc. No. 319). The long-standing deadline by which Ceglia must file those expert reports is Monday, June 4, 2012—ten weeks after Defendants filed their Motion to Dismiss and accompanying expert reports.

The expert reports are limited to a narrow issue: whether the Work for Hire Document and Purported Emails on which Ceglia rests his lawsuit are authentic. Ceglia claims that these documents have been in his exclusive possession since years before the inception of this fraudulent lawsuit. Indeed, Ceglia's experts had already repeatedly examined those documents long before Defendants filed their Motion to Dismiss, and in November 2011, Ceglia submitted declarations from his experts Larry Stewart and Jim Blanco regarding their examinations. Doc. Nos. 192, 194. In short, Ceglia has had substantial time to prepare expert reports regarding the authenticity of documents that have been in his exclusive possession since their creation, and which his experts have already inspected. The Court itself made this point during the April 4, 2012 hearing, observing that Ceglia has had continuous access to "all of the discovery" since the commencement of this lawsuit, and that his experts have already inspected the relevant documents. Apr. 4, 2012 Hearing Tr. at 97:2-7.

And yet, despite this Court's generous schedule and Ceglia's continuous access to the relevant documents, Ceglia now seeks an open-ended, indefinite extension of the deadline to submit expert reports. This is pure eleventh-hour gamesmanship. Ceglia bases his request primarily on the pendency of three motions: (1) his Rule 72 Objections to the April 4 Order (Doc. No. 355); (2) his Motion to Strike Defendants' Motion to Dismiss and the accompanying

expert Report of Gerald M. LaPorte (Doc. No. 386); and (3) his Motion to Compel (Doc. No. 390). *See* Doc. No. 392 at 2. But none of his three pending motions remotely justifies an extension.

Ceglia also demands an extension based on purported "misdirection" in the Stroz Friedberg report that supposedly required his lawyers to devote "extra hours" to reading it. But every claim that Ceglia makes about the Stroz Friedberg report is demonstrably false. These made-up ambiguities do not come remotely close to warranting an eleventh-hour extension to the deadline that has long been in place.

I. Ceglia's Three Pending Motions Do Not Warrant An Extension

First, filing Rule 72 objections does not warrant a stay. *See* Doc. No. 119 (Arcara, J.) ("The desire to file objections to a magistrate judge's order does not, by itself, warrant a stay of that order."); *American Rock Salt Co. v. Norfolk Southern Corp.*, 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005) ("Merely filing a motion for . . . relief does not excuse the moving party from fully complying with the order appealed from until a court grants a stay and relieves the party of its obligation to comply with a challenged order."); *Herskowitz v. Charney*, No. 93-cv-05248, 1995 WL 104007, at *3 (S.D.N.Y. Mar. 8, 1995) ("In the absence of a stay, the fact that litigant has appealed to the District Court from a Magistrate Judge's discovery order does not excuse failure to comply with that order.").

Second, Ceglia's Motion to Strike—a scurrilous attack on Mr. LaPorte based on misleadingly excerpted deposition testimony, which Defendants will oppose in accordance with the Court-ordered schedule (Doc. No. 404)—does not even purport to bear on Ceglia's ability to timely submit expert reports. Rather, that Motion seeks to strike the entirety of Defendants' Motion to Dismiss—a 74-page document supported by seven sworn expert reports and declarations—exclusively on the basis of Mr. LaPorte's allegedly "perjured testimony." Doc.

No. 386 at 1. Ceglia's Motion to Strike is substantively baseless.[1] It is also procedurally premature: the Court's April 4 Order gives Ceglia the opportunity to oppose Defendants' Motion to Dismiss in October 2012, after the completion of the "limited period of expert discovery" that Ceglia obtained. Doc. No. 348. The mischaracterizations and outright falsehoods contained in Ceglia's Motion to Strike can be just as capably presented in that opposition, and do not remotely warrant an extension of his deadline to submit expert reports.

Third, Ceglia's Motion to Compel likewise does not justify Ceglia's requested extension. To begin, Ceglia had weeks to make this motion, but waited until the eleventh hour and then demanded a stay. In any event, Ceglia's Motion seeks the production of numerous documents that the Court's Orders simply do not require. Specifically, Ceglia asserts that the Court's July 1, 2011 Order (Doc. No. 83) and Defendants' representations during the April 4, 2012 oral argument necessitate the production of voluminous discovery underlying Defendants' experts' examinations. This argument fundamentally misconstrues the Court's expedited discovery orders and should be rejected.[2]

In its April 4 Order, this Court granted Ceglia 60 days to submit expert reports and 60 days thereafter to conduct expert depositions. *See* Doc. No. 348. It did not, however, grant Ceglia's request for "expert written discovery under Rule 26" related to Defendants' experts, made during oral argument by Ceglia's lawyer Sanford Dumain (who now seeks permission to withdraw from this case). Apr. 4, 2012 Tr. at 203:11-12. Furthermore, in granting Defendants'

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[1] By way of example, in his Motion to Strike, Ceglia disfigures Mr. LaPorte's testimony from the 2007 *Padilla* trial, claiming that Mr. LaPorte "specifically denies that PE is a reliable test." Doc. No. 386 at 6. Mr. LaPorte did no such thing during the *Padilla* trial, nor has he ever. In fact, the transcript confirms that Mr. LaPorte simply said there is no scientifically reliable way to determine "*exactly* when ink was put to paper." Doc. No. 386-1 at 54 (emphasis added). As Mr. LaPorte outlined in his Report in this case, PE testing determines whether ink was applied to paper *within a two-year time period*, not on an exact date. *See* Doc. No. 326 at 7-8. Mr. LaPorte does not claim anywhere in his Report that he can determine an exact date an entry was written.

[2] Defendants will oppose Ceglia's Motion to Compel in accordance with the Court-ordered schedule (Doc. No. 404).

Motion to Stay Discovery in part, the Court's April 4 Order confirmed that "general discovery" under Rule 26 was "stayed." Doc. No. 348. Going forward, only the "limited period of expert discovery" expressly authorized by that Order would be permitted. *Id*.

Ceglia's Motion to Compel—and the underlying May 7, 2012 letter from Mr. Dumain that it incorporates by reference, *see* Doc. No. 390 at 1—impermissibly attempt to broaden this "limited period of expert discovery." Ceglia does not seek a small number of identified documents necessary to respond to specific findings in Defendants' expert reports. Rather, the Motion to Compel and underlying May 7 letter propound overbroad document requests that, taken together, constitute an end-run around this Court's explicit stay of "general" plenary discovery. Doc. No. 348. For example, Ceglia demands a native copy of Zuckerberg's email records from Harvard, *see* Doc. No. 390-1 at 2, a request this Court has already repeatedly rejected. *See* Doc. Nos. 272, 348. Ceglia also demands computer forensic analysis of the so-called Parmet assets, *see* Doc. No. 390-1 at 2, to which the Court has already repeatedly denied him access. *See* Doc. Nos. 249, 250, 348.

Ceglia fails to identify any authority in support of his unwarranted requests. Contrary to Ceglia's claim, the Court's July 1 Order does not obligate Defendants to report every factual observation made by Defendants' experts or to produce every piece of paper documenting their findings. The July 1 Order simply directs Defendants "to provide to the Court and Plaintiff *all reports* documenting the findings of [their] examination." Doc. No. 83 at 3 (emphasis added). Defendants have fully complied with this directive, filing publicly each and every report prepared by Defendants' experts during expedited discovery. Notwithstanding Ceglia's assertions, the July 1 Order simply says nothing about the production of underlying

documentation, including the "case notes," correspondence with counsel, and "verbal" reports that Ceglia seeks. Doc. No. 390 at 5.

Ceglia's citation of various colloquies from the April 4, 2012 oral argument is similarly unavailing. As described above, the Court rejected Ceglia's request for "expert written discovery under Rule 26" related to Defendants' experts. Apr. 4, 2012 Tr. at 203:11-12; Doc. No. 348. In his Motion to Compel, Ceglia notes that the Court asked Mr. Dumain whether his client wanted some "sort of . . . safety mechanism" to capture documents on which Defendants relied but did not "reveal." Apr. 4, 2012 Tr. at 203:23-204:1; *see* Doc. No. 390 at 3. Ceglia then misleadingly asserts in his Motion that Mr. Dumain "respectfully deferred the issue until something arose that the [C]ourt needed to address[,] to which the [C]ourt responded favorably." Doc. No. 390 at 3. But in fact, Mr. Dumain responded that the parties would "deal with" any newly disclosed documents "*in the deposition*"—an admission that any dispute regarding document discovery would be resolved *after* the submission of expert reports and during the two-month phase of the case dedicated to expert depositions. Apr. 4, 2012 Tr. at 204:2-4 (emphasis added).

Defendants agree with the position Ceglia took during the hearing: requests for the production of specific documents necessary to prepare for and conduct expert depositions should be addressed during the next phase of the case. Defendants are willing to meet-and-confer with Ceglia immediately after the submission of his expert reports to resolve consensually and without Court intervention any such specific requests. But the broad production of documents that Ceglia now demands is not supported by any of the Court's expedited discovery orders, nor has Ceglia shown that he would be entitled to these documents under the Federal Rules in any

event. Accordingly, the pendency of Ceglia's Motion to Compel does not warrant an extension of Ceglia's long-standing deadline to submit expert reports.

II. Ceglia's False Claims About The Stroz Friedberg Report Do Not Warrant An Extension

The remainder of Ceglia's Motion for Extension of Time concerns purported "misdirection" in the sworn expert report of Stroz Friedberg, which Ceglia claims necessitated "an inordinate amount of time" to "decipher." As an initial matter, criticism of the organization and content of a single expert report is patently insufficient, on its face, to warrant an open-ended, indefinite extension. A litigant—particularly one, like Ceglia, who has filed abusive serial motions for stays and has instructed his attorneys to defy this Court's orders—should not be permitted to self-help to an extension simply by professing difficulty with comprehension.

In any event, Ceglia identifies five allegedly misleading statements or omissions in support of his Motion. *See* Doc. No. 390 at 2-6. Each and every claim that Ceglia makes about the Report of Stroz Friedberg is demonstrably false.

First, Ceglia alleges that Stroz Friedberg "provided no serial numbers, model numbers or other information to precisely identify and link particular computers or drive to their report conclusions." Doc. No. 392 at 5. That is false. In its Report, Stroz Friedberg provided model numbers for the computers and hard drives that Ceglia produced and Stroz Friedberg inspected (which inspection occurred in the presence of representatives of Plaintiff). Doc. No. 325 at 11. Moreover, in July 2011 at the conclusion of each acquisition in Chicago, Illinois, Buffalo, New York, and Sarasota, Florida—at which Ceglia's own representatives were present—Stroz Friedberg provided to Ceglia's counsel an acquisition log *at their request*. These acquisition logs listed the identifier that Stroz Friedberg gave to each piece of media, and detailed available information regarding each piece of media's type, brand, model, serial number, size, hash tag

identifiers, and other information. In addition, when Stroz Friedberg has provided to Ceglia presumptively relevant electronic files under the Electronic Asset Inspection Protocol, it has identified every file by specific source file path and name, designating the piece of media from which that file came. *See, e.g.*, Doc. No. 241-2.

Second, Ceglia alleges that Stroz Friedberg "dropped as a needle in a computer haystack" evidence of Ceglia's use of a hex editor, a type of program that is often used to create fraudulent electronic documents. Doc. No. 392 at 3. That is false. In its Report, Stroz Friedberg identified by source file path and name, and described the full contents of, the six Microsoft Word files showing Ceglia's use of a hex editor.[3] These six files are contained on one of twelve total CDs that Ceglia produced to Stroz Friedberg in Sarasota, Florida. It should have taken Ceglia, and his attorneys and experts, no more than ten minutes to identify the relevant CD in this "computer haystack." These six files were specifically identified and produced to Ceglia by Stroz Friedberg on July 27, 2011, pursuant to the Electronic Asset Inspection Protocol. *See* Doc. No. 241, ¶ 11. Accompanying this production was a spreadsheet listing the file path (which includes the filename) and a description of each file. Ceglia and his counsel reviewed these very files, designating them as "Confidential" on their August 2, 2011 privilege log. *See* Doc. No. 241-2 at 7. The file path for these six files indicates that they were on the Ceglia Media Item "FL03I." If Ceglia referenced the acquisition log Stroz Friedberg provided to his counsel on July 15, 2011—the day the electronic assets were acquired in Florida—he would know that this is the 700MB Memorex CD he produced and have its MD5 hash values.

Third, Ceglia alleges that Stroz Friedberg "misleadingly refers to all items it analyzed as 'Ceglia Media' knowing full well that only some of that media belonged to or was ever used by

[3] Because Ceglia designated as confidential the six relevant Microsoft Word files, Defendants redacted the names and description of the contents of those files from the publicly-filed Report of Stroz Friedberg, in accordance with the parties' Joint Stipulated Protective Order (Doc. No. 86). *See* Doc. No. 325 at 45-46.

Paul Ceglia." Doc. No. 392 at 2-3. That is false. In its Report, Stroz Friedberg explains that the term "Ceglia Media" refers to the hundreds of computers, hard drives, floppy disks, and CDs "produced by Mr. Ceglia." Doc. No. 325 at 6. That description is entirely accurate. Moreover, Ceglia produced these electronic assets in response to the Court's July 1 Order, which required him to produce "all computers and electronic media *in Plaintiff's possession, custody, or control*." Doc. No. 83 at 2 (emphasis added). Ceglia now conveniently disclaims responsibility for the electronic media containing the most damning electronic evidence in the case, including the StreetFax Contract, as owned and used by his parents, Carmine and Vera Ceglia. *See* Doc. No. 392 at 3 n.1. But of course, Ceglia produced all of these computers, hard drives, floppy disks, and CDs as media in his "possession, custody, or control," without any caveats about his purported non-use.

Fourth, Ceglia alleges that Stroz Friedberg's description of the StreetFax Contract as found on two different Ceglia hard drives is a "misleading headline" and a "triviality" designed to "prop up their report." Doc. No. 392 at 3-4. That is false. As Stroz Friedberg explained, it discovered the StreetFax Contract on two different Ceglia hard drives—the Seagate Hard Drive produced by Ceglia in Sarasota, Florida, and the Forensic Image Created by Plaintiff's Expert produced by Ceglia in Chicago, Illinois. *See* Doc. No. 325 at 11, 15. This fact is highly relevant because it directly rebuts—along with substantial additional forensic evidence—Ceglia's absurd allegation that Mark Zuckerberg or his agents recently planted the StreetFax Contract on Ceglia's hard drive. *See* Doc. No. 319 at 11. Rather, as Stroz Friedberg confirmed, the StreetFax Contract existed on the Seagate hard drive when it was imaged by Ceglia's own experts in March 2011, *before* it was ever produced to Stroz Friedberg and accessible to Defendants.

Fifth, Ceglia alleges that, "[f]or no reason that is scientifically sensible, Stroz Friedberg's entire report is based upon data they found on the copy of the Seagate drive they captured after the drive had been returned to its owner. They intentionally declined to review or analyze for their report, the most relevant and accurate data available, the earliest forensic image of the Seagate drive." Doc. No. 392 at 5.[4] That is false. Stroz Friedberg analyzed both the Seagate Hard Drive produced in Florida and the earlier forensic image of that drive created by Ceglia's expert and produced in Illinois. Its Report clearly and repeatedly refers to its analysis of both drives. *See, e.g.*, Doc. No. 325 at 15 ("A redacted screenshot of the relevant contents of the "Sent Items.dbx" file found on the Seagate Hard Drive and the Forensic Image Created by Plaintiff's Expert is below."), 19 ("Stroz Friedberg identified other evidence on the Seagate Hard Drive and the Forensic Image Created by Plaintiff's Expert that corroborates that the StreetFax Emails were sent on March 3, 2004."), 50 ("Stroz Friedberg determined that the Windows operating system on the Seagate Hard Drive and the Forensic Image Created by Plaintiff's Expert of that drive was reinstalled on at least two occasions. Again, the Seagate Hard Drive and forensic image of that drive are the two pieces of Ceglia Media on which the StreetFax Contract was found."). Ceglia's accusation that Stroz Friedberg "intentionally declined" to analyze the earlier forensic image is, like every other claim he makes about Stroz Friedberg's Report, utterly false, and does not remotely justify his requested extension.[5]

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[4] Ceglia's unfounded accusations regarding Stroz Friedberg's analysis of the forensic image of the Seagate hard drive ring particularly hollow considering that Ceglia initially withheld this very image in defiance of the Court's orders. Ceglia was explicitly required to produce this forensic image on July 15, 2011, as one of the items listed June 17, 2011 Declaration of John Evans. *See* Doc. No. 83 at 2. Ceglia did not, although he did submit a false sworn declaration stating that he had. *See* Doc. No. 97, ¶¶ 20-22; Doc. No. 88 ¶ 2(B)(iv). Ceglia did not produce this image until July 18, 2011, *three days after* he swore he had done so, and only after Defendants' counsel specifically demanded that the image be produced. *See* Doc. No. 97, ¶¶ 20-22.

[5] Ceglia also cites as an example of Stroz Friedberg's "obviously forensically un-sound approach to this case" the fact that they "imaged the Seagate hard drive themselves on July 15, 2011," given that Ceglia's expert had previously imaged the Seagate hard drive on March 29, 2011. Doc. No. 392 at 4. But of course, Stroz

CONCLUSION

Plaintiff's motion for an extension of the deadline to produce expert reports should be denied.

Dated: New York, New York
May 31, 2012

Respectfully submitted,

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Friedberg *did not know*, on July 15, 2011, whether the earlier forensic image would be produced for inspection, and once received, whether it would be a forensic image of the same Seagate hard drive that had been produced. In fact, as Stroz Friedberg explained in its Report and as described in note 4, *supra*, Ceglia did not produce the forensic image until *three days later*, on July 18, 2011 in Chicago, Illinois. *See* Doc. No. 325 at 11. Only then could Stroz Friedberg analyze that drive and determine that it "contained a series of E01 files, which a forensic image file format, meaning that the data … was a forensic image of another piece of digital media. *Id*.