

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

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

**REPLY TO DEFENDANTS'
RESPONSE TO PLAINTIFF'S
MOTIONS DOC. NO. 385, 389 and
396.**

MEMORANDUM

Plaintiff will reply to each of Defendants' response in turn.

**MOTION TO STRIKE WITNESS LAPORTE, HIS REPORT AND
DEFENDANTS' MOTION RELIANT ON THAT FRAUDULENT REPORT**

It is important for the court to appreciate a list of now undisputed facts about this motion:

1. The witness, Gerald LaPorte, does not dispute that he violated Rule 26
2. The witness, Gerald LaPorte, does not dispute that he intentionally concealed relevant cases from his Rule 26 disclosures that are material to the assessment of his testimony.
3. The witness, Gerald LaPorte, does not dispute that his testimony in the prior cases directly contradicts his claims of reliability of the PE test in this case.
4. The only matter for the court then is determining the appropriate sanction for the witness' intentional concealment of cases containing impeaching

information.

THE OPTIONS OF SANCTIONS THE COURT CAN CONSIDER

Fed.R.Civ.P. 26(a)(2)(B)'s expert disclosure requirements include, among other things, “a complete statement of all opinions to be expressed ... and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Fed.R.Civ.P. 37(c) authorizes exclusion of expert testimony in the event of a party's failure to disclose the requisite Rule 26(a)(2)(B) information unless there is **substantial justification** for the failure to disclose or the failure to disclose is **harmless**. Emphasis added. *Fyfe v. Baker*, 1:06-CV-28, 2007 WL 1866882 (D. Vt. June 28, 2007).

LaPorte's obvious attempt to shield these cases (and perhaps others still unknown to this court) that directly contradicted his false claims in his report is not “substantially justified” or “harmless” by any logic. Defendants were warned by Plaintiff's counsel about LaPorte's junk science PE test in open court. Transcript of Hearing on April 4, 2012 at 91. Defendants should not have retained him without properly vetting his junk science test and vetting his disclosures as well. So-called experts who defy Rule 26 in an attempt to shield their testimony from proper scrutiny should not be hired by Defendants. *Fyfe* at *1. (stating “experts should not be offering their services in federal court if they cannot (or will not) comply with the Federal Rules and attorneys should not be retaining such experts”).

Defendants' do not argue that this omission was mere negligence or they do not argue that the omission is “substantially justified” or “harmless.” Therefore, the

omission is substantially unjustified and it is not harmless to Plaintiff. What is more harmful to a party than the opposition party's lead expert concealing impeaching information about the very validity of his test?

What is more harmful to Plaintiff and to the Court than LaPorte concealing the unreliability and the "inconclusive" nature of his test results by omitting these cases and attempting to shield his testimony about the PE test's unsuitability for cases precisely like this one?

CASE LAW REGARDING RULE VIOLATION

A court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs. *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135-36 (2d Cir.1998). See generally *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.' ") (quoting *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812)).

Plaintiffs additionally seek sanctions pursuant to Fed.R.Civ.P. 37 due to defendants' and LaPorte's intentional, deceitful failure to accurately produce LaPorte's testifying history pursuant to Rule 26(a)(2)(B)(v) and of the Federal Rules of Civil Procedure ("Rule 26(a)(2) material").

Fed.R.Civ.P. 37(c) authorizes exclusion of expert testimony in the event of a party's failure to disclose the requisite Rule 26(a)(2)(B) information unless there is

substantial justification for the failure to disclose or the failure to disclose is harmless. See *Fyfe*. The court in *Fyfe* struck an expert merely because through arrogance or laziness the expert declined to provide a list of past cases in which he testified. Here, the witness has intentionally omitted two cases, that we know of, that directly provide impeaching information.

Going forward, it will never be known what other cases the witness has concealed to shield his potentially perjurious past testimony. If mere laziness about providing the list that Rule 26 requires is sufficient to strike the witness, certainly intentional fraud on the court in selectively omitting cases containing impeachable material satisfies Plaintiff's burden to have the witness struck.

Defendants have been aware of this violation of the rules by their so-called expert since Plaintiff's motion was filed and have still, even in their response, declined to even attempt to cure the violation.

LaPorte's defiance in intentionally concealing this impeaching information, "frustrates the spirit and purpose of Rule 26 expert discovery and threatens to turn the trial into a game of blindman's bluff." *Stephen v. Hanley* 2009 WL 1437613, E.D. New York.

WORD GAMES

Defendants' deceitfully attempt to misdirect this court that LaPorte's testimony on his test was sliced thinner than Plaintiff presented: "Mr. LaPorte testified that there is no scientifically reliable way to determine 'exactly when ink was put to paper.'" Doc. No. 413 at 8, citing to Doc. No. 386-1 at 54. Emphasis by

Defendants' in Doc. No. 413.

The full quote, however, is below:

“There is no scientifically reliable methodology that could be used to determine the age of the ink or to determine when exactly they were placed on that piece of paper.” Doc. No. 386-1 at 54. Emphasis added. Notice the disjunction in between what LaPorte said and the end of the quote. The court may ask itself, what precisely is he saying about the PE test? since this quote seeks to have it both ways. Well, the remainder of LaPorte's comments in this deposition leave no doubt.

“[LAPORTE]: Well, of course. I can't tell you when these entries could have been created. I am a scientist, so I can't speculate on when the entries were put down.” Id. at 70. The court can notice the absence of any qualifying words such as “exactly” or even “within two years” as LaPorte offers in this case.

“[LAPORTE]: Based on my ink analysis, I can't render a conclusion at all. There is nothing to indicate that this document was not created on the purported day, and there is nothing I can say that it wasn't created on the purported date.” Id. at 71. Again, the weasel word “exactly” is absent. There is no attempt by LaPorte to offer the obvious qualifier “well, I can tell within two years, but no farther out than that.” Anywhere along in his string of denials about the unreliability of the PE test to date ink, he might have taken the opportunity to offer the supposed two year limitation if it were true.

“[LAPORTE] My testimony is that, yes, I can't render a conclusion as to

when it was produced.” Id. at 74. At some point in this testimony one would presume he would qualify “exactly” or over some time frame, but none surfaces and with good reason - there is no science to support it and LaPorte knows this fact.

“[ATTORNEY ON CROSS EXAMINATION]. So it could have been placed on there at any time prior to 3 when you actually looked at the documents, right?

[LAPORTE]. Yes, in theory, yes. When I received it April 19th of 2006.” Id at 61.

As to his PE test, he states without qualification that “I have never testified about using that particular -- like then I found a positive result.” Id. at 66.

As a reminder, this string of unqualified statements about the unreliability of his PE test occurred in 2007. He had suggested his PE test as a potential dating methodology as recent as 2004. This means, as of 2007, he had never used PE to get a “positive” result. As of 2007, PE was not reliable to date ink as he stated in the above testimony multiple times without qualification.

Now, we turn to 2009. LaPorte offered no declaration in support of Defendants’ response highlighting the dramatic scientific breakthroughs, if any, in the development, refinement or validation of his PE test between his 2007 testimony and his 2009 testimony.¹

He is directly asked in 2009 whether he has ever testified that PE testing is not scientifically reliable. “[D]id you ever testify in your career that ink dating

¹ This testimony arises in one of the two cases that LaPorte intentionally withheld in violation of Rule 26, a violation that Defendants do not dispute.

involving [PE] was not scientifically reliable?” Doc. No. 386-2 at 12. “No, I have not.” Id.

Defendants’ do not even attempt to square his repeated statements in 2007 of there being no reliable method to date ink (which necessarily includes PE as it was suggested by him three years earlier) with the above 2009 statement. Saying in 2007 that no reliable method exists (and PE has been suggested by LaPorte in 2004) and then saying in 2009 that he has never testified that PE is unreliable, is a clear example of perjury. Defendants’ attempt to hide the words to no avail just as LaPorte attempted to hide the case from which the word arose.

As of August 2009, 22 months before testing in this case, LaPorte acknowledges, shockingly, that “I believe that all the reports that I’ve issued have been inconclusive...They have been inconclusive.” Id. at 26. LaPorte has not offered any supplemental declaration detailing what dramatic improvements or refinements occurred in those intervening 22 months suddenly making his PE test not only reliable, but sufficient to justify issuing conclusive reports that an ink sample is less than two years old.

This is not the case for Defendants’ to persuade the court to run an experiment on the American judicial system with this speculative test from a questionable witness

To divert the court’s attention regarding LaPorte’s former supervisor and main training supervisor for the two years he learned document examination, they take personal and fraudulent shots at Larry Stewart.

IF YOU HAVE NO RESPONSE, ATTACK THE MESSENGER

Facebook describes Laporte as follows:

“Laporte is a highly distinguished forensic chemist and document dating specialist who trained with the United States Secret Service and has nearly two decades of experience in forensic science.” Doc. No. 413 at 6.

Defendants fail to point out that the bulk of Laporte’s “vast” experience as a forensic scientist has been as an autopsy assistant and then as a urine tester at private, county and state level facilities. Doc. No. 326 at 30. From 1993 until 1996, Laporte was an autopsy assistant in Jefferson County Alabama. Id. From 1996 until 2001 he tested urine for illicit drugs at a private and then at a state laboratory. Id.

Laporte cloaks his PE testing method of the ink as one that has great following and Facebook describes it as a “well-established chemical ink dating test.” Doc. No. 413 at 4. The test is not *established* at all, much less “well established.” Defendants’ counsel cannot have in good faith described the PE test as well established when they know it has never satisfied Daubert in any court in the country. It is as well established as a qualified area of admissible expert testimony as astrology, Tarot card reading and basing conclusions on the contents of fortune cookies. The court can take judicial notice that those three areas of information, analysis and reliance by the general public are far more “well established” than is the junk science of PE.

Laporte has failed to disclose that his methodology is **not** the same as is used by any other practitioner in the field. Laporte's PE test is a variation of a test first developed by Plaintiff's expert, Larry Stewart in 1985. (Stewart Decl. Doc. No. 416, Exhibit 19).

It was later adapted to detect PE by Aginsky in 1997. Since then it has been modified by many others, including LaPorte, all searching in vain for a reliable methodology. No state or federal forensic scientist uses the Laporte or even the Aginsky method for ink age determination. (Stewart Decl. Doc. No. 416, pgs 76-79)

Even Laporte's own agency doesn't trust the technique enough to use it in casework. The lead forensic laboratory for the Department of Justice (Laporte's employer) does not use the Laporte method. The FBI Handbook of Forensic Services states that "Examinations cannot determine how long ink has been on a document." Apparently, Laporte didn't get that memo.

Laporte's fraudulent report concluded, with "virtual scientific certainty" that the ink was placed on the Facebook Contract less than 2 years prior to his ink testing. It is important to note that LaPorte nor Defendants has disclosed the results of their first set of ink analysis results conducted back in July, 2011. The court did note, however, that the Defendants' need for further samples was an ominous sign that they were not getting the results they wanted. Transcript of August 17, 2011 hearing at 151.

In June 2011, Defense counsel Snyder declared "[i]t's impossible that my experts will say that [the Facebook Contract is] authentic." Hearing Transcript of

June 2011 at 33.

“In his Motion to Strike, Ceglia challenges the validity of the ink dating analysis performed by Laporte. But Ceglia fails to cite a single source of authority—not one scholarly article, research paper, case or anything else—that supports his bald assertions that Laporte’s analysis is unreliable.” Doc. No. 413 at 6-7.

Mr. Snyder filed Doc. No. 413 just hours before Plaintiff’s experts filed their declarations and reports. Snyder and this court now realize that there are volumes of information from articles, books, Daubert hearings and court testimonies, regarding the inadequacies of Laporte’s PE testing procedure for ink age determination. LaPorte, however, knew about the existence of all the information provided by Plaintiff’s experts, and withheld that from this court, and by the nature of Defendants’ response to the motion to strike, he also withheld some or all of it from Defendants’ counsel.

Defendants call the claim that LaPorte was prohibited from using the PE in government agency case work as “reckless.” Doc. No. 386 at 4. At the time of the Rago² case, the Secret Service Standard Operating Procedures prohibited its use. Stewart Decl. Doc. No. 416, Exhibit 28. Therefore, LaPorte used the PE test in case work in direct violation of the rules of his government agency employer.

Left with no real arguments, Defendants attempt to disparage one of the world’s true leaders in forensic science at Doc. No. 413 at 6, in footnote one. Larry Stewart has been involved in some of this world’s biggest and most notorious

² *United States v. Rago*, No. 1:08-cr-10268 (D. Mass., filed Sep. 11, 2008).

forensic cases. He has received a litany of accolades and awards during his nearly 3 decades of federal service. He has personally received the Inspector General's Integrity Award and under his direction, his laboratory received the Secretary of the U.S. Department of Treasury's Honor Award. He has been asked to testify before U.S. Congress three times as a forensic document expert.

LAPORTE'S TRAINING UNDER LARRY STEWART

As referenced in the ASTM standard for training requirements of a forensic document examiner, that process usually takes 2 years. Stewart Decl. Doc. No. 416, Exhibit 7.

Laporte worked at the U.S. Secret Service as a trainee during his first 1-2 years, or from 2001 to 2003. The SOP for the Secret Service forensic laboratory clearly puts the responsibility of acceptance of newly researched lab techniques on the shoulders of the Laboratory Director, at that time Mr. Stewart. Stewart Decl. Doc. No. 416, Exhibit 28.

Defendants mislead the Court stating that Mr. Stewart was "lab director only until May 2004..." Mr. Stewart held his position within the Secret Service until June of 2005 when he retired with a credited 27 years federal government tenure.

Since his retirement from government service, Mr. Stewart has been contracted or requested to perform forensic work for numerous federal agencies to include the Department of State and the Department of Justice. He was also requested to perform contract work on behalf of the United Nations. The allegations beyond this are red herrings and all fizzled to nothing reliant on

witnesses who were either not believed by juries or recanted pre-trial in shame.

MOTION FOR DISCOVERY REGARDING HARVARD EMAILS

As with the previous motion, it is important to note several now undisputed facts:

1. Defendant Zuckerberg does not deny deleting emails that are in the body of other emails.
2. Defendant Zuckerberg does not deny receiving emails from Plaintiff from about March or so until June 2, 2003 relating to Facebook with him.
3. Defendant Zuckerberg does not deny receiving an email from Plaintiff with the Facebook Contract attached in electronic form for him to review before signing it on April 28, 2003.
4. Defendant Zuckerberg does not deny deleting all “sent” emails from his Harvard email account that he sent after November 2003.

The acknowledgement in number 3 above, alone, serves as the basis for the court to dismiss Zuckerberg’s Motion To Dismiss for fraud on the court because he admits receiving the Facebook Contract in electronic form in Spring of 2003.

Any claimed testimony or hearsay statements typed into Defendants response by Snyder are not reliable or relevant on what Zuckerberg did or did not receive with emails and should be stricken from their response motion. In the alternative, the court should permit the deposition of Snyder regarding his personal knowledge about Defendant Zuckerberg’s email sending, receiving and retention habits in 2003 and 2004.

Defendants did not offer their computer expert's testimony or declaration disputing Plaintiff's assertion that emails were deleted. Instead, they offered lawyers commentary posing as expert witness testimony. Mr. Snyder's supposition about technology should be stricken from their response or this court should authorize Plaintiff to depose Snyder to probe what makes him qualified to make those technology statements. Did he lose Stroz's phone number disabling Defendants from seeking a declaration from them? Was the Stroz Friedberg email server not working? Defendants did not bother to consult their computer experts about their client's obvious destruction of evidence?

FAILURE TO REBUT PLAINTIFF'S DECLARATION REGARDING EMAILS BEFORE JUNE 2003

Plaintiff declared plainly that he ran his Craigslist advertisement in February or March of 2003. Doc. No. 398 at 1. Defendant Zuckerberg responded to that advertisement on or about February or March of 2003. Id. Defendant Zuckerberg does not dispute Plaintiff's recitation of their meeting in this way.

The parties exchanged emails including an email with the Facebook Contract attached so that Zuckerberg could review it before their meeting and signing of the Facebook Contract on April 28, 2003. Id. at 1-2. Zuckerberg's decision to not offer a declaration in response to the motion regarding emails concedes this point making the Motion to Dismiss for Fraud moot. If Zuckerberg tomorrow or later disputes this contention, that he never received such an email, this automatically justifies a review of all potential sources of emails from that period to resolve what is

potentially a case-ending discovery of a single email. This is precisely the scenario that Plaintiff's counsel referenced to the court at the April 4, 2012 hearing. Hearing Transcript, 4-4-2012 at 140-141. Plaintiff's counsel promised the court that a single email could erupt all over their avalanche melting it to nothing and now we have proof that the email exists, somewhere, and likely on the computers and other items Defendants are so desperately working to conceal from view.

MOTION FOR DISCOVERY REGARDING MATERIALS NOT PROVIDED THAT THEIR EXPERTS HAD ACCESS TO

Defendants' do not deny their experts captured numerous images, scans and other photographs of the Facebook Contract. They do not deny they obtained from each of Plaintiff's experts native format copies of all images, scans and other photographs they captured while performing their work.

Defendants do not deny that their experts used, reviewed and relied on in preparing their expert reports, those images, scans and photographs received from Plaintiff's experts pursuant to this court's orders.

Defendants do not deny that they have not provided Plaintiff with all the images, scans and photographs captured by their experts as part of their evaluation of the Facebook Contract.

Doc. No. 83 required Defendants to provide "Defendants shall provide to the Court and Plaintiff **all** reports documenting the findings of that examination." Doc. No. 83 at 3. Emphasis added. The court's definition of "all" is well documented. The word "all" was the subject of intense debate throughout this case as it was

applied to Plaintiff's duty to provide "all" copies of the Facebook Contract from "all" sources which turned out to include all lawyers, former lawyers and expert witnesses. The word "all" included originals, copies, copies of copies, copies attached to filed pleadings in this case, and copies obtained by Stroz Friedberg via their access to lawyers and experts' computers.

Defendants now argue that "all" does not really mean all. This court has already spoken about the "heightened" concern for fairness in this case given its seriousness. That fairness cuts both ways. Defendants had more than ample and more than fair access to Plaintiff's experts' images, scans and other photographs. Fairness, at least, demands that Plaintiff have access to the same items from their counterparts.

Plaintiff's expert reports filed June 4, 2012 document numerous instances of misleading use of images, scans and photographs by Defendants' experts. On some occasions they used their own images, scans and photographs for these detours of logic. Other times, they used Plaintiff's images, scans or photographs to lead the court astray with their illogical arguments.

Considering the overwhelming evidence that Plaintiff has now produced, there is clearly a strong showing that this case should be in regular discovery. The far off predictions of Mr. Snyder, so many months ago, that there would be no dueling experts have fallen apart.

CONCLUSION

For the foregoing reasons and those in Plaintiff's initial motion, this Court should strike Facebook and Zuckerberg's Motion to Dismiss for Fraud and award Plaintiff his reasonable attorneys' fees in evaluating that motion, reviewing the expert reports and composing the response to LaPorte's perjurious report and any associated costs under Rule 37, order Defendants to provide the requested discovery regarding images, scans and photographs and authorize Plaintiff to search for relevant emails Defendant Zuckerberg has obviously deleted.

Respectfully submitted,

/s/Dean Boland

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