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

RESPONSE TO DEFENDANTS' MOTION FOR EXTENSION OF TIME

MEMORANDUM

Defendants' motion for a one week adjournment, Doc. No. 429, is without merit. Plaintiff notes that the Defendants' instinct toward urging the court to treat Plaintiff differently than Defendant appears in their first paragraph.

Their proposed reset of the due date of their response extends their time to respond by seven days. Doc. No. 429 at 1. However, their proposed time for Plaintiff to reply to their response, as they suggest, remains the same as in the court's order of June 8th - two days.

The bulk of their motion is a re-hashing of virtually verbatim filler that has welcomed many of their recent motions and responses onto the docket. The court will note that as to all the motions and responses they list, those were all submitted to this court before June 8, 2012. Therefore, as of June 8, 2012, Defendants had no responses pending to the court. In short, the law firm of Gibson, Dunn and

Terrence Flynn and The Orrick Law Firm whom are focused on this matter were all without tasks on their to-do list regarding this court's docket.

Defendant's mis-characterize Plaintiff's motion, Doc. No. 427, as a request to "conduct wide-ranging fact discovery." Id. at 2. The motion sought vacation of this court's order, Doc. No. 348, and the scheduling of a 16(b) conference. This court remains in control of how wide or narrow the "range of discovery" ultimately is. Defendants' fearfulness of "wide ranging discovery" is something that should arouse the court's interest. This is especially the case in light of Defendants' key witness violating court rules (i.e. LaPorte and FRCP 26(a)), Doc. No. 425 at 1-12, the deletion of relevant emails by their client Zuckerberg, Id. at 12-14, their computer experts' (Stroz Friedberg) failure (or inability) to provide all emails contemplated by this court's orders and their acknowledgement that their document and ink experts were provided scans, images and photographs from Plaintiff's experts for which they feel no equity in reciprocity, Id. at 14-16.

By the lower portion of page 2 of their 2 page motion, Defendants finally get to the meat, or more precisely the gristle, of their argument:

> **In his latest motion, Ceglia seeks, yet again, to make an end-run around this Court's scheduling order by raising, for the first time, entirely new legal arguments based on New York State law related to challenging judgments and the propriety of seeking relief on the basis of fraud.** Doc. No. 429 at 2.

It is Defendants who have the audacity to not even hint at an apology for the more than nine months of expedited one-sided discovery based upon a legal argument that is obviously, indisputably without legal foundation. They have

succeeded, to this point, in making an **end-run around the entire discovery process** of ordered litigation to which parties across the country must adhere. Hundreds of thousands of dollars expended, hundreds if not more in people hours by the court, court staff and Plaintiff's counsel and experts all reliant on what is now clearly an argument that is not warranted by existing law.

No declaration was provided by Defendants of what effort was made on Friday, June 8, 2012, Saturday, Jun 9, 2012, Sunday, June 10, 2012 nor what effort could be made on Monday, June 11, 2012 and all of Tuesday, June 12, 2012 up to midnight Tuesday evening. No declaration was provided by Defendants regarding the unavailability of lawyers. Therefore, all of Gibson, Dunn's lawyers are and have been available to research all facets of this issue since Friday at 11:30 am. Likewise, Terry Flynn and his firm have also been available to perform that research. The Orrick Law Firm, still active counsel in this case, were not argued to be unavailable to assist with legal research on this matter either. Defendants make no representation regarding how much legal research has been done thus far highlighting their diligence to adhere to the court's generous allotment of time given the paucity of legal issues in Plaintiff's motion that could even be weakly argued by Defendants. See argument below.

The court read Plaintiff's memorandum, Doc. No. 427 on Friday, June 8, 2012 and set a schedule for Defendants' response based upon its review of the memorandum. Defendants make no argument that the court misconstrued the memorandum or motion it supported, was somehow unaware of the anticipated

research (or lack of research necessary, see argument below) that a response would require. Nothing has changed about the legal arguments in the memorandum which triggered the court's schedule in its order of June 8, 2012 to Sunday, June 10, 2012 and the Defendants' request for an extension within which to respond.

No declaration was provided arguing that the legal issues in the memorandum, that the court reviewed, involve a complexity that their team of lawyers is unable to manage within the time allotted by the court.

Plaintiff's due date for their recently filed expert reports expansively and decisively rebutting all of Defendants' intrinsic fraud claims was June 3, 2012, a Sunday. By rule, Plaintiff was entitled to file those reports on the following Monday. There is no basis for Defendants' to doubt that Plaintiff was working, and working long hours, as was Plaintiff's counsel and Plaintiff's experts on the Friday, June 1, 2012, Saturday, June 2, 2012 and Sunday, June 3, 2012. Plaintiff was finally able to complete the work necessary to file those reports at approximately 10:00pm on Monday, June 4, 2012. It is not unreasonable for this court to expect Defendants to engage in the same level of effort over a weekend, recognizing that nothing like that effort is needed to respond to the black letter law underlying Plaintiff's motion.

The law presented in Plaintiff's memorandum to his motion to vacate, Doc. No. 427, is not complicated nor in dispute. Below is a list of the legal issues that Defendants **do not** have to research as they are firmly established legal concepts throughout the federal circuits.

The Defendants' have no good faith basis to argue against the following contained in Plaintiff's motion to vacate Doc. No. 348 and, therefore, need no time to perform legal research in any of these areas. Doc. No. 427:

1. This court is sitting in diversity; and
2. This court is required to apply substantive New York state law; and
3. Substantive New York state law recognizes a distinction between allegations of intrinsic and extrinsic fraud; and
4. Substantive New York state law prohibits a remedy relating to a motion to dismiss for intrinsic fraud at any point in litigation; and
5. Defendants' persistent and repetitive allegations meet the definition of intrinsic fraud claims and do not meet any definition of extrinsic fraud claims; and
6. 2nd Circuit authority is in accord with Plaintiff's argument on all points above. (see, e.g. Alleghany Corp. v. Kirby, 218 F. Supp. 164, 183-84 (S.D.N.Y. 1963) aff'd, 333 F.2d 327 (2d Cir. 1964) on reh'g, 340 F.2d 311 (2d Cir. 1965)). Rowe v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 265, 266 (W.D.N.Y. 1998). ("It is, of course, incumbent upon Federal District Court sitting on a diversity action to apply substantive State law."); and
7. No federal case has held that when a litigant argues fraud on the court reliant on intrinsic fraud, to a federal court sitting in diversity, that court can ignore substantive state law; and

Defendants undoubtedly completed legal research on the issues in Plaintiff's memorandum over the weekend. They did not find such a case. There is a reason

for that. Such a case does not exist because that is not the law of the 2nd Circuit, nor any other Federal Circuit. And no existing case can be transformed into one that contains that holding. As the Supreme Court has held, court decisions are not reliable authority for something a party claims is implicit in their holding. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925); see also *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952). They must have done that research as they cannot roll the dice that this court will somehow regard the motion differently on June 11, 2012 than it did on June 8, 2012. Therefore, Defendants' need for additional time is merely a delay perhaps for other issues they are confronting related to the exposure of their lead expert witness as hawking a pseudo-scientific test in this case as reliable knowing that it is not, the deletion of emails and the inexorable slide toward providing equivalent discovery to Plaintiff.

The Defendants have had more than nine months to compose their motion to dismiss for fraud on the court. They have advertised this motion and its basis, fraud on the court reliant on intrinsic fraud, throughout that time. This court has indicated some question about the viability of the remedy they have been seeking at several points in the past:

In response to Defendants' assertion that other cases supported the remedy they sought, the court had the following colloquy with Mr. Snyder:

"THE COURT: No. What I'm asking is either in that case or Judge Larimer's case were there dueling experts?
MR. SNYDER: I don't believe so, but I don't regard there to be dueling experts in this case --
THE COURT: Yet." Hearing Transcript, June 30, 2011 at 38.

In another exchange, the court directly addresses whether inherent power can be used to wade in between dueling experts and declare one expert the more reliable:

"[COURT] So what I'm getting at is, if it turns out that the plaintiff's experts, after concomitant testing, using the same protocols, come to a completely different conclusion, even under inherent power, which is the first time I've heard that that's your strategy here procedurally, how does the case terminate? The case seems to me to go forward to jury trial." Id. at 31.

In the above exchange, the court was clearly struggling with the notion that something other than a jury trial is the appropriate remedy to Defendants' claims claims of Plaintiff's fabricated evidence and fraud. This instinct turns out to be the law of New York state as pointed out in Plaintiff's motion to strike Doc. No. 348.

Later in that same hearing, the court continued probing the issue of how Defendants' argument for dismissal based upon intrinsic fraud would proceed.

"THE COURT: How does the court do that then? If there are conflicting expert opinions, does the court conduct a bench trial, or is it a jury trial, an advisory jury trial? I've never heard of such a thing. This is a totally new concept. Inherent power I understand. <u>But in this context, your papers don't elaborate</u>, and that's why I'm asking these questions." Id. at 35. Emphasis added.

Plaintiff's motion to vacate, now, does elaborate. That elaboration is comprised of black letter law from start to finish. Unfortunately for the court, court staff and the parties, we have all now spent significant time and financial resources,

the "proverbial marching up the mountain only to have to march down again...." Id.

The court posed its concern to Defendants' counsel directly:

> **"THE COURT: Let's put it this way. I want to make sure that once we launch this in the way that you're requesting, that we know exactly where we're going procedurally." Id.** Emphasis added.

In response, Defense Counsel Snyder cited to the *Campos* case authored by Judge Larimer. "Plaintiff, Vladimir Campos, appearing pro se, commenced this action under 42 U.S.C. § 1983." *Campos v. Correction Officer Smith*, 418 F. Supp. 2d 277, 277 (W.D.N.Y. 2006). Obviously, this case is a federal question and not a diversity case making it irrelevant to the framework involved in Defendants' motion to dismiss for intrinsic fraud in this diversity case.

The court then appeared persuaded by this reference.

> **"THE COURT: Thank you. That's enough. So there's authority for the court on its own motion or on motion of the opposing party to make a factual finding of fraud, dismiss the complaint, and if you don't like it, take an appeal.**
> **MR. SNYDER: Correct."** Id. at 37.

Plaintiff's motion to vacate makes plain that Mr. Snyder's representation was false, perhaps not knowingly false, but false nonetheless. Defendants' motion to dismiss for fraud is reliant upon an allegation of intrinsic fraud.

Further, recently, Plaintiff filed a motion for an extension of time, Doc. No. 392, which Defendants successfully opposed. Doc. No. 407. Additionally, in granting former Plaintiff's counsel's motion to withdraw as counsel, the court advised Plaintiff that any request for delay related to the departure of that counsel would be viewed with "disfavor" based upon Defendants' authority in their motion

opposing that withdrawal. The court clearly advanced its position that needless requests for delay would not be tolerated. Defendants zeal to move things along quickly has now abruptly reversed course when confronted with a motion that requires the case be scheduled for regular discovery.

The court can take judicial notice of the fact that Plaintiff has strenuously disagreed with the claims of intrinsic fraud throughout this matter. Plaintiff's rebuttal to Defendants' claims have now included confirmation of the authenticity of the Facebook Contract by nationally recognized forensic experts in all fields in which Defendants have raised defenses, and then some. Defendants, now more than week after the filing of those reports, have failed to rebut one of the key claims of just one of those experts: That is, that Mr. Zuckerberg wrote his own initials on page one of the Facebook Contract and that he himself signed his name to page two of the Facebook Contract. Doc. No. 415 at 45-50.

One has to assume Defendants' counsel performed some legal research starting on Friday, June 8, 2012 given the Tuesday, June 12, 2012 deadline set by the court. There is no justification for them being unable to complete the minimal research appropriate to respond to Plaintiff's motion although that research will result in no authority in support of the remedy they seek in their motion to dismiss for intrinsic fraud. Most importantly, Defendants offer no declaration or other argument that the amount of legal research required by the motion demands additional time. They simply claim that the arguments within the motion are new to them. However, "new" is not the standard for additional time. Defendants

should have performed this research before urging the court to base nine months of decisions on a motion to dismiss for intrinsic fraud that is unsupported in the law.

The amount of work actually involved in responding to Plaintiff's arguments in his memorandum is minimal given that the case law and principles embodied in the legal arguments within Plaintiff's motion are not new, novel or in dispute. Further, the central legal principle within Plaintiff's motion to vacate Doc. No. 348 is something that Defendants should have confronted more than a year ago before they filed papers setting in motion the one-sided expedited discovery that has brought all of us to this point.

Defendants have until Tuesday, June 12, 2012 to respond to, at most, one legal issue in Plaintiff's motion that they may be able to muster an easily dispatched argument against. The motion to vacate Doc. No. 348 was filed more than nine months after Defendants' began rambling on about preparing and filing a motion to dismiss for fraud on the court. Their response is limited to a narrow issue as noted above. These arguments have been known to the Defendants, or should have been known to them, for nearly a year. They have already examined the cases, as they put them in their motion to dismiss proper. This is pure eleventh-hour gamesmanship. They have no response and a week will not generate anything additional. Plaintiff's right to mutual discovery has been withheld for nearly a year now by the court solely because of Defendants insistence that the law permits an abridgement of Plaintiff's rights. As the court knows, unnecessary delays are not only unfair, they are unwarranted now in light of Defendants withered support for

the odyssey of one-sided discovery that has, at this point, resulted in prejudice to Plaintiff in at least one critical area of evidence.

In a response to the misunderstanding that the court was asking about the integrity of the Defendants' Harvard emails, Snyder told the court nearly one year ago, the following:

> **THE COURT: Is there any possibility of spoliation as to these emails?**
> **MR. SNYDER: None.**
> **THE COURT: They've already been stored, haven't they?**
> **MR. SNYDER: Belt and suspenders. Harvard University is --** Hearing Transcript of June 30, 2011 at 113.

A year long delay in mutual discovery is a significant prejudice. It has now resulted in the deletion of emails by Defendant Zuckerberg or his cohorts.

Defendants have had continuous access to online legal libraries and platoons of lawyers able to parse every word of every motion, research every case, etc. They are not caught flat footed with this motion, they are just caught. There is a difference.

BLACK LETTER LAW
FOR WHICH LITTLE OR NO RESEARCH TIME IS NEEDED

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court held that the Constitution required federal district courts, when sitting in diversity, to apply substantive state law unless the matter concerned a federal question. Id. ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not

a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."). 39 Pepp. L. Rev. 645, 700.

The rationale behind *Erie-Tompkins* case is well trod ground. The Erie doctrine serves two distinct purposes. It discourages forum-shopping by litigants by requiring federal courts ruling on state law claims to apply the same statutes and case law as would a state court. This ensures that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York*, supra, 326 US at 109, 65 S.Ct. at 1470. The second rationale is that it avoids unfairness. Litigants able to select a federal forum (nonresidents of the forum state) obtain no advantage over litigants unable to do so (forum residents), thus avoiding inequitable administration of the laws. "The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer* (1965) 380 US 460, 467, 85 S.Ct. 1136, 1141. Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 1-B.

"A federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." *Guaranty Trust Co. of New York v. York* (1945) 326 US 99, 108, 65 S.Ct. 1464, 1469; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (2010)

559 US, 130 S.Ct. 1431, 1442. Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 1-B.

Thus, "[a]s opposed to a fraud against an adverse party, a fraud upon the court will only be found where the misconduct at issue 'seriously affects the integrity of the normal process of adjudication.'" *Sanchez v. Litzenberger*, No. 09 Civ. 7207(THK), 2011 U.S. Dist. LEXIS 18528, at *9 (S.D.N.Y. Feb. 24, 2011) (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988)). "Perjury alone does not constitute fraud upon the court." Id.

Plaintiff has researched all of Defendants cases supporting their motion to dismiss for fraud on the court. None of them provide precedent for the remedy they are seeking from the court, i.e. a dismissal for fraud on the court citing intrinsic fraud in a diversity case.

CONCLUSION

Plaintiff respectfully requests this court deny Defendants' request for more time to research a legal issue that is minimal, at best, given the black letter law supporting Plaintiff's motion to strike Doc. No. 348. Defendants have delayed Plaintiff an entire year now, cost him hundreds of thousands of dollars in expert fees, and other legal expenses, much to his prejudice as noted above. Defendants' year long odyssey has also cost the court considerable resources. Therefore, any further delay is unwarranted. The team of lawyers arrayed on behalf of Defendants provided no declaration that they would be unable to divide up whatever legal research they think they need to do and complete it in the time this court allotted.

Respectfully submitted,

/s/Dean Boland

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