

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

**MEMORANDUM IN SUPPORT
OF MOTION TO DISQUALIFY
DEFENDANTS' COUNSEL**

MEMORANDUM

Plaintiff acknowledges that a sequence of motions have been filed by both parties in close proximity in the past few weeks. The eight week period of expert report preparation followed by the eight week expert deposition period has made necessary motions involving critical case issues. Along with Plaintiff's counsel's duty to bring ethical violations to the attention of the court, the urgency of the matter discussed and the potential prejudice to Defendants, Plaintiff and this court, require the immediate filing of this motion.

Plaintiff respectfully requests this court disqualify the following counsel, law firms and all counsel employed by the law firms listed below from representing either Defendant in this matter:

- 1.Orin Snyder, Partner, Gibson Dunn & Crutcher
- 2.Alexander Southwell, Partner, Gibson Dunn & Crutcher
- 3.Terrance Flynn, Partner, Harris Beach PLLC
- 4.Lisa Simpson, Orrick, Herrington and Sutcliffe, LLP
- 5.Gibson Dunn & Crutcher
- 6.Orrick, Herrington and Sutcliffe, LLP
- 7.Harris Beach, PLLC

Each of these lawyers and law firms has engaged in dual representation of both Defendant Facebook and Defendant Zuckerberg in this matter. Doc. No. 4, Doc. No. 11, Doc. No. 27, Doc. No. 32, Doc. No. 33.

**DUAL REPRESENTATION IS RARELY ETHICAL
UNDER NEW YORK STATE SUBSTANTIVE LAW**

Dual representation poses ethical and legal problems. “It is **extremely rare** where dual representation **does not pose** an ethical and legal problem for counsel.” *Tavarez v. Hill*, 23 Misc.3d 377 Supreme Court, Bronx County, New York. (2009). Emphasis added.

The court in *Tavarez* cited specifically to Code Of Professional Responsibility, EC 5–15. “There are few situations in which the lawyer would be justified in representing in litigation multiple clients with **potentially differing interests....**” *Id.* at *383. Emphasis added.

Tavarez illuminates this difference, analogous to the relationship between Zuckerberg and Facebook, when it says:

“An attorney who undertakes to represent a driver and passenger, and thereafter fails judgment or a concession by the defendant on the issue of liability, will subject himself/herself to all of the adverse consequences [of disqualification and repayment of legal fees earned]. Moreover, it could result in a waste of limited judicial resources since a mistrial would be required if a conflict is ‘discovered’ at trial; or worse, after an appeal is taken.” *Id.*

In a personal injury matter involving a vehicle accident, a passenger may determine that it should sue the driver. A single lawyer could not effectively represent both driver and passenger. Likewise the minority shareholders of Defendant Facebook are likely unaware of the conflict and unaware that Zuckerberg, speeding away from his contractual obligations to Plaintiff, has crashed them into a liability that they have independent rights to litigate. Multiple conflicts existed at the outset of the attorneys’ dual representation. Prudence dictates that an attorney should, at the very beginning, decline to represent multiple parties with potentially conflicting claims. See, *Greene v. Greene*, 47 N.Y.2d 447, 418 N.Y.S.2d 379, 391 N.E.2d 1355 (1979).

Indeed New York’s own ethical obligations of attorneys speak to the obligation to the client first and foremost. Canon 5 of the Code of Professional Responsibility provides in part that “the professional judgment of a lawyer should be exercised ... solely for the benefit of the client and free of compromising influences and loyalties ...” New York Lawyer’s Code of Professional Responsibility, EC 5–1.

This freedom from compromising influences and loyalties is not always apparent. It can reside in what motions do not get filed, what cross claims are not interposed, what questions are not asked at depositions, what arguments are not made at hearings and what investigations of the Plaintiff's and Defendants' evidence are not conducted. It is clear that Defendant Zuckerberg knows a great deal about the evidence that Defendant Facebook is not privy to. (e.g. Harvard era computers, testimony in sealed records of prior cases involving ConnectU and Saverin). That gap in information will entitle independent counsel for Facebook to argue that various facets of this case must be repeated (discovery, depositions, motion practice) to enable them to fully explore the evidence in a way that their previously compromised, dual representing lawyers did not. The pending depositions are just one example of a facet of this case that will be the subject of new and independent Facebook lawyers consideration to seek court authority to repeat.

In this case a disinterested lawyer can see actual conflict and potential conflicts abound.

The Code's Disciplinary Rules further provide as follows:

Conflicts of Interest; Simultaneous Representation

(C) In the situations covered by subdivisions (A) and (B) of this section, a lawyer may represent multiple clients [1] if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and [2] if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. DR 5-105.

THE DR 5-105 TWO FACTOR TEST

DR 5-105 requires satisfaction of two separate factors to enable dual representation:

1. If a disinterested lawyer would believe that the lawyer can competently represent the interest of each; and
2. if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

FACTOR #1 - DISINTERESTED LAWYER

It must be noted that the phrase “disinterested lawyer”, as used in DR 5–105(C) has been interpreted to mean “... that a lawyer is not permitted to seek client consent to a conflict if a disinterested lawyer would advise the client to refuse consent, and that a client consent that is given is not valid if the objective test of a disinterested lawyer is not met.” Emphasis added. *Shaikh*, supra at 56, 710 N.Y.S.2d 873; see also, Code of Professional Responsibility, EC 5–16.

FACTOR #2 - CLIENT CONSENT AFTER FULL DISCLOSURE

The Court of Appeals has held that disclosure alone does not resolve the conflict issues created by dual representation. (*Greene v. Greene*, 47 N.Y.2d 447, 418 N.Y.S.2d 379, 391 N.E.2d 1355 [1979].) In *Greene* it was observed that “[b]ecause dual representation is fraught with the potential for irreconcilable conflict, it will **rarely be sanctioned even after full disclosure has been made** and the consent of the clients obtained” (*Greene*, supra at 451–52, 418 N.Y.S.2d 379, 391 N.E.2d 1355). Emphasis added.

Client consent is only effective after full disclosure. There is no indication that the above named counsel and firms obtained such consent. Even if the dual representing lawyers had obtained Defendant Zuckerberg's consent and the consent of Defendant Facebook (the company for which he is in absolute control), this does not meet the full disclosure and consent rule. Defendant Zuckerberg would essentially be providing consent for both parties thereby relegating the situation to dual representation without effective consent of Defendant Facebook.

Further the defendants counsel has failed to produce evidence of their compliance with these clear rules, a clear violation that has already been illuminated in *Vinokur v. Raghunandan*, 27 Misc. 3d 1239(A), 910 N.Y.S.2d 766 (Sup. Ct. 2010). In *Vinokur* the court disqualified counsel for dual representation. It noted that "it is clear that...the Law Firm failed to, among other things, attach any writing demonstrating that Mario Regina gave his 'informed consent, confirmed in writing.'"

The attorneys and law firms above must meet both prongs of the test. They haven't met either prong. Failure to satisfy one of the two prongs or **any doubt** about whether one of the two prongs is satisfied requires disqualification.

The court went on to further highlight its disapproval of dual representation by noting that "[e]ven if the Law Firm were to have submitted such a writing, it may not be possible, under circumstances here, to show that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client", or that "the representation does not involve

the assertion of a claim by one client against another client represented by the lawyer in the same litigation.” *Vinokur* at *5. (See also *Graca v. Krasnik*, 20 Misc.3d 1127[A], 2008 N.Y. Slip Op 51640[U], at *4. (“Here, the issue giving rise to the conflict of interest, the dismissal of the claim against one defendant shifting liability to the other, rises to a level that full disclosure and consent would not cure.”); The court also cited to *Greene* as Plaintiff has above.

**MERE POSSIBILITY OF CONFLICT OF INTEREST REQUIRES
DISQUALIFICATION**

While several conflicts already exist, the court need not agree with that analysis to still require disqualification. Even the “possibility” or “appearance” of conflict is prohibited. The Code's Disciplinary Rules state that “a lawyer shall decline proffered employment if the exercise of professional judgment on behalf of a client will be OR is likely to involve the lawyer in representing differing interests.” Emphasis added. Code of Professional Responsibility DR 5–105(A)(22 NYCRR § 1200.24).

It has been noted that “The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests.” *Graca v. Krasnik*, 20 Misc.3d 1127(A), 2008 WL 2928557 (N.Y.Sup.2008); *Rotante v. Lawrence Hosp.*, 46 A.D.2d 199, 361 N.Y.S.2d 372 (1st Dept.1974); *Edelman v. Levy*, 42 A.D.2d 758, 346 N.Y.S.2d 347 (2d Dept.1973); *Sidor v. Zuhoski*, 261 A.D.2d 529, 530, 690 N.Y.S.2d 637 (2d Dept.1999).

IF ANY DOUBT EXISTS, THE COURT MUST DISQUALIFY

As observed by the Appellate Division, Second Department, in *Schmidt v. Magnetic Head Corp.*, 101 A.D.2d 268, 277, 476 N.Y.S.2d 151, “in a disqualification situation, **any doubt is to be resolved in favor of disqualification.**” Emphasis added. Cited favorably by (*Hull v Celanese Corp.*, (2nd Cir.), 513 F.2d 568, 571; *Glueck v Jonathan Logan, Inc.*, 512 F Supp 223, 228, affd (2nd Cir.), 653 F2d 746; cf. *Narel Apparel v American Utex Int.*, 92 AD2d 913, 914 (460 N.Y.S.2d 125).

**EXISTING CONFLICTS FOR COUNSEL
FOR DEFENDANTS IN THIS CASE**

Recognizing that the standard requiring disqualification is mere possibility of a conflict, the existence of an actual conflict, in addition to many clear possible conflicts, demands disqualification of the above named lawyers and law firms in their entirety. There are a variety of conflicts of interest already present in the above name counsel and their dual representation of the Defendants in this case.

**FAILURE TO ANALYZE THE HANDWRITING
ON THE FACEBOOK CONTRACT**

Defendants submitted all their expert reports attached to their motion to dismiss. Doc. No. 319. While at least two of their experts were qualified to evaluate the writing on both pages of the contract, neither did. Unless defense counsel is withholding the negative results of such evaluations, they did not occur.

Defendant Facebook, Inc. is a publicly traded corporation. (Stock Symbol: FB). It is clearly in Defendant Facebook’s interest to know whether the contract between Defendant Zuckerberg and Plaintiff is authentic or not. Defendant

Facebook admits in its answers to the Amended Complaint that it lacks sufficient information to know whether Defendant Zuckerberg signed the Facebook Contract while Defendant Zuckerberg flatly denies signing it. Therefore, an evaluation of the writing on the Facebook Contract is a piece of evidence that an independent attorney for Defendant Facebook would have had evaluated. That evaluation of the signature on page two and the “MZ” initials on page one of the Facebook Contract by Defendant Facebook would confirm that contract is authentic. See Blanco Report Doc. No. 415 at 38-53. Plaintiff’s experts’ conclusions on these points are not disputed. Blanco’s conclusions **cannot be disputed** by the conflicted, unethical dual representing lawyers for both Defendants who have made decisions like this one that are favorable to Defendant Zuckerberg but unfavorable to the Defendant Facebook.

Defendant Zuckerberg has only one reason for prohibiting his qualified handwriting experts from evaluating the handwriting on the contract - he knows the answer they are going to get and it is unhelpful to his defense. This willful blindness benefits Defendant Zuckerberg while it harms Defendant Facebook by obscuring the utter weakness of their defense. These interests are clearly in conflict.

Defendants’ failure to examine the location of the Indentations on the uncontested Page 2

Further, Defendants’ experts appear to have performed numerous tests on the indentations present on page two of the Facebook Contract, the so-called ESDA

test. The video of the document examination occurring in July 2011 makes this fact evident. However, Defendants dual representing lawyers have not provided any test results or report from those examinations. Again, the truth benefits Defendant Facebook in assessing its case, its liability and the dissolving nature of any defenses to Plaintiff's claims. Along with the dual representation, it cannot be known whether Defendant Facebook is even aware of the developments in this case given that Defendant Zuckerberg is in control of Defendant Facebook. Therefore, Defendant Zuckerberg is the conduit for information or the impediment to information being provided to Defendant Facebook whose answers to the Amended Complaint demonstrate it needs to gather information to properly respond to the issues in this case. How can Defendant Facebook gather the information they indicate in their answers they lack, while simultaneously waiving their rights in favor of Defendant Zuckerberg? Defendant Zuckerberg's clear conflict of within the case contaminates the dual representing lawyers as well.

There can be no justification for an independently represented Defendant Facebook not wanting to know whether the writing on page one of the Facebook contract is reflected precisely in indentations found on page two of the Facebook Contract.

DEFENDANTS' DIFFERING ANSWERS REFLECT CONFLICTS

An overlooked feature of Defendants conduct in this case from the beginning is the differing answers to the allegations in the complaint. For example, in Paragraph one of the Amended Complaint, Doc. No. 39, Plaintiff alleged that the

parties entered into a written agreement that is at the heart of this case. In the dual represented Defendants' answer, Defendant Zuckerberg denies entering into any such agreement. Doc. No. 40 at ¶1. Meanwhile, Defendant Facebook answers the claim in Paragraph 1 of the Amended Complaint with the following:

Facebook denies the allegations of paragraph 1 of the Amended Complaint on the basis that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein. Doc. 40 at ¶1.

This denial for want of information necessarily imputes to Defendant Facebook's lawyers a duty to discover the "knowledge" Defendant Facebook "lacks" to form a belief as to the truth of the allegation. The conduct of the dual represented Defendant Facebook, instead, has been to lack any ambition to cure this lack of knowledge. See above the failure to analyze the handwriting on the Facebook Contract and the indentations and the failure to seek to depose Plaintiff. This willful blindness is inconsistent with Defendant Facebook's interest, but consistent with Defendant Zuckerberg's interest.

In several more places in the Defendants' joint answer to the Amended Complaint, Defendant Zuckerberg flatly denies allegations while Defendant Facebook denies those same allegations solely on the basis that it "lacks knowledge or information sufficient to form a belief" as to allegation. See, e.g. Doc. No. 40 at ¶2, ¶3, ¶16-¶62, ¶67-¶103.

These disparate answers to the Amended Complaint are glaring examples of why dual representation here is impossible. Defendant Zuckerberg answers with

flat denials, while Defendant Facebook is effectively saying, “perhaps the allegations are true, we just don’t know enough about the evidence to answer.”

That lack of knowledge necessarily means that an independent lawyer for Defendant Facebook would seek to fully examine the evidence to enable an informed answer to the complaint and an informed assessment of Plaintiff’s claims. An independent lawyer for Defendant Facebook would not fail to analyze the handwriting and indentations on the Facebook Contract, the document at the heart of Plaintiff’s claim.

The difference in Defendant Zuckerberg and Defendant Facebook’s answers to the Amended Complaint are akin to a passenger in a vehicle accident case “lacking the information to form a belief” as to whether the driver was at fault because the passenger was sleeping just before the collision. No serious lawyer could, in good faith, argue the ability to represent both of those clients without the possibility of conflicting interests. See e.g. *Shaikh v. Waiters*, 185 Misc.2d 52, 710 N.Y.S.2d 873 (Sup. Ct., Nassau County 2000).

PLAINTIFF’S CLAIM CONTAINS AN INHERENT CLAIM OF FRAUD BY DEFENDANT ZUCKERBERG AGAINST DEFENDANT FACEBOOK, INC.

Plaintiff’s claim of an authentic contract between he and Defendant Zuckerberg necessarily is a claim that Defendant Zuckerberg defrauded Defendant Facebook, Inc. at the moment of its creation. While discovery on this point is yet to be produced by either Defendant, it is known that Defendant Zuckerberg transferred intellectual property among other assets into Defendant Facebook, Inc.

sometime after July 2004 in exchange for stock in Defendant Facebook, Inc.

Plaintiff's claim necessarily means that Defendant Zuckerberg defrauded Defendant Facebook.

**CONFLICT INHERENT IN DEFENDANT ZUCKERBERG'S
CONTROL OF DEFENDANT FACEBOOK, INC.**

One Defendant is an individual and also the controlling shareholder of the other Defendant while both are liable for Plaintiff's claims in the complaint. But, are the two Defendants liable in the same way or to the same extent? Once a verdict is rendered in Plaintiff's favor, Defendant Zuckerberg is clearly liable for damages for his breach of the underlying contract. Defendant Facebook, however, never signed an agreement with Plaintiff and would obviously seek, if represented by independent counsel, to minimize its liability by attempting to shift it to Defendant Zuckerberg.¹

No matter the amount, Defendant Facebook's liability will be borne by all the shareholders of the company. Following Defendant Facebook's recent IPO, there are now publicly reported to be 420 million shares that were sold to the public resulting in hundreds of thousands if not millions of individual and entity shareholders. In addition to the dual representation problems noted herein, it cannot be argued that Defendant Zuckerberg's interest are aligned with those of the minority shareholders of Defendant Facebook, Inc. An independent lawyer for

¹ Plaintiff is by no means acknowledging that such a shift of liability from Defendant Facebook to Defendant Zuckerberg is appropriate under existing law.

Defendant Facebook would instantly recognize this risk and do everything in its power to eliminate or minimize this risk.

Multiple lawsuits have been filed on the heels of that IPO alleging all manner of malfeasance by Defendant Facebook and Defendant Zuckerberg. That litigation mapped over this litigation also represents a morass of conflicting interests not only in legal strategy, but business decision making necessary to resolve those matters in the best interest of Defendant Facebook which may or may not coincide with Defendant Zuckerberg's best interests.

DEFENDANT FACEBOOK'S REFUSAL TO REVIEW
DEFENDANT ZUCKERBERG'S HARVARD ERA COMPUTERS

Defendants submitted expert reports indicate they did not seek a review or forensic analysis of Defendant Zuckerberg's Harvard era computers. Defendants' refusal to review Defendant Zuckerberg's Harvard era computers is favorable to Defendant Zuckerberg only if those computers contain information helpful to Plaintiff's claim. Defendants' refusal to review those computers is harmful to Defendant Facebook, however, because it deprives them of valuable information about the lack of strength of their own defense to Plaintiff's claims. It also prevents Defendant Facebook from assessing evidence that may motivate what is now obviously a necessary cross claim against Defendant Zuckerberg given the overwhelming and mostly undisputed expert evidence and conclusions provided to this court on June 4, 2012 demonstrating the authenticity of the Facebook Contract.

ALTERNATIVE DISPUTE RESOLUTION

Here again, a publicly traded corporation and an individual are likely to have differing interests when evaluating a decision to pursue ADR remedies. This is not to argue that Plaintiff is willing to pursue any such remedy at all. Given the overwhelming and largely undisputed expert evidence now before the court and the Defendants, ADR remedies seem far more likely to be favored by the Defendants than the Plaintiff. Considering the publicity of this case in the national media and Defendant Facebook's flailing stock value² it would seem ADR would be an obvious choice for Defendant Facebook. Either way, it is a decision that an independent lawyer representing Defendant Facebook would discuss with Defendant Facebook free of the urge to protect Defendant Zuckerberg's interests to the detriment of Defendant Facebook's.

REMEDIES UNDER NEW YORK LAW FOR THE UNETHICAL DUAL REPRESENTATION

ALL LAWYERS AND LAW FIRMS ARE DISQUALIFIED

Once disqualification is determined, neither client can retain any lawyer noted above nor any law firm noted above. When a conflict exists, counsel is thereafter disqualified from representing anyone in the action. *Alcantara v. Mendez*, 303 A.D.2d 337, 756 N.Y.S.2d 90 (2d Dept.2003). *Sidor v. Zuhoski*, 261 A.D.2d 529, 690 N.Y.S.2d 637 (2d Dept.1999); *Quinn v. Walsh*, 18 A.D.3d 638, 795

² <http://abcnews.go.com/Technology/wireStory/weekly-facebook-stock-prices-16581469#.T900riuXSSM>

N.Y.S.2d 647 (2d Dept.2005); *Matter of H. Children*, 160 Misc.2d 298, 608 N.Y.S.2d 784 (Fam. Ct. Kings Cty.1994).

ALL LAWYERS AND LAW FIRMS MUST REPAY ALL FEES CHARGED

Once disqualification is determined all of the above lawyers and law firms must disgorge all attorneys fees paid during their unethical dual representation. *Tavarez* at *380. If a conflict is found to exist, the sanction imposed includes a forfeiture of all fees claimed or received for services rendered. *LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dept.2006); *Pessoni v. Rabkin*, 220 A.D.2d 732, 633 N.Y.S.2d 338 (2d Dept.1995); *Alcantara v. Mendez*, 303 A.D.2d 337, 756 N.Y.S.2d 90 (2d Dept.2003); *Sidor, Quinn. Shaikh v. Waiters*, 185 Misc.2d 52, 710 N.Y.S.2d 873 (Sup. Ct., Nassau County 2000); *Dorsainvil v. Parker*, 14 Misc.3d 397, 829 N.Y.S.2d 851 (Sup.Ct. Kings County 2006); *Ferrara v. Jordache Enters. Inc.*, 12 Misc.3d 769, 819 N.Y.S.2d 421 (Sup. Kings 2006); *Wolfram*, Modern Legal Ethics § 7.3.3, at 353 (West Publ. Co. 1986). (For discussion of dual representation in other contexts, see *Greene; Mullery v. Ro-Mill Construction Corp.*, 76 A.D.2d 802, 429 N.Y.S.2d 200 (1st Dept.1980).

**ALL DISCOVERY SHOULD BE STAYED
UNTIL THIS COURT RULES ON THIS MOTION**

Plaintiff has filed multiple motions seeking to begin regular discovery. It seems evident that the next phase of this lawsuit will be regular discovery. Despite Plaintiff's strong desire to immediately begin regular discovery, it is in both parties' interest and that of the court to stay discovery until this motion is ruled on.

As of this writing, Defendants have noticed all of Plaintiff's experts for deposition. Without a stay of that limited expert discovery, Doc. No. 348, while the court rules on this motion, it is likely that a waste of party and judicial resources is imminent.

Once disqualification is determined, if some or all of the Defendants' currently noticed depositions have been conducted, new and independent counsel for both Defendants will undoubtedly seek to repeat those depositions. The court can reasonably anticipate solid arguments about questions asked or not asked at those depositions that the conflicted, dual representing lawyers engaged in resulting in a prejudice to one or both Defendants. Defendant Facebook, Inc. is, or ought to be, interested in the truth, either way, to protect themselves from Defendant Zuckerberg's fraud. Defendant Zuckerberg's interest is in squashing this litigation, unfairly if necessary, to avoid any pursuit of the truth.

If a second repeat deposition is sought by new and independent counsel, Plaintiff would have a right to oppose that request on several grounds leading toward needless motion practice and potentially hearings. If those depositions are permitted to be repeated, it will add cost to both parties that can be completely be avoided by a stay of the discovery pending the outcome of this motion. This court obviously has the authority to stay discovery.

**NEW REPRESENTATIVE FOR DEFENDANT FACEBOOK
MUST PROVIDE DECLARATION**

Defendant Zuckerberg is the controlling shareholder of Defendant Facebook. Merely requiring the two defendants to choose new counsel does not solve the dual representation conflict. This court should also order that Defendant Zuckerberg have **no role** in the selection of Defendant Facebook's new counsel. This court should further order that Defendant Zuckerberg have **no communication** with Defendant Facebook's new counsel throughout this litigation and no role in the decision making between Defendant Facebook and its new counsel throughout this litigation. Without these protections, even two seemingly independent counsel remain essentially engaged in dual representation as Defendant Zuckerberg controls them both; hiring, firing and strategy.

The court should order that Defendant Zuckerberg shall not have any direct or indirect control over the selection of Defendant Facebook's new counsel. The court should order that Defendant Zuckerberg shall not have any direct or indirect communication with Defendant Facebook's new counsel or the representative of Defendant Facebook within the company about this case during this litigation and thereafter. The court should order that Defendant Facebook's new counsel file a declaration confirming that its client's obligations under these two orders have been met.

Only these above orders will insure that the current dual representation is not merely continued in the form of two ostensibly independent lawyers/law firms which are, in reality, still controlled by Defendant Zuckerberg.

Plaintiff respectfully moves for an expedited briefing schedule on this motion. Expedited briefing is appropriate in the interest of judicial economy. Several depositions are already being planned between the parties in the upcoming weeks that require significant travel time, travel expense and advanced planning and preparation. These depositions are necessarily already compromised by both Defendants about to be represented at those depositions by the ethically conflicted dual representing current counsel.

CONCLUSION

It is now without a doubt that the dual representation of the two Defendants in this case is improper. There are numerous actual and possible conflicts demonstrated in this motion. There is more than ample doubt about the ability of the lawyers listed above to offer dual representation without competing, conflicting interests fouling their ethical duties. After having successfully walked a tightrope across Niagara Falls on Friday, June 15, 2012, even Nik Wallenda could not balance these Defendants' conflicting interests. New York state's ethical considerations and disciplinary rules along with all relevant case law prohibit the dual representation occurring in this case.

For the reasons set forth above Plaintiff respectfully requests:

1. That the court stay all currently pending discovery until a decision is made regarding this motion; and
2. This court issue an order disqualifying, Orin Snyder, Partner, Gibson Dunn & Crutcher; Alexander Southwell, Partner, Gibson Dunn & Crutcher; Terrance Flynn, Harris Beach PLLC; Lisa Simpson, Orrick, Herrington and Sutcliffe, LLP; The law firm of Gibson Dunn & Crutcher and all counsel within the firm; Orrick, Herrington and Sutcliffe, LLP and all counsel within the firm; The law firm of Harris Beach, PLLC and all counsel within the firm from further representation of either Defendant in this case; and
3. That all the above named counsel and their respective law firms be ordered to refund to their client(s) all attorneys fees paid in this matter to date; and
4. The above named attorneys and law firms be ordered to pay, as a sanction, the attorneys fees, expert fees and costs incurred by Plaintiff from the beginning of this litigation to date; and
5. That a representative of Defendant Facebook, Inc. file a declaration that he or she has been made aware of this court's order that Defendant Zuckerberg can have no role or communication with, directly or indirectly, the selection and management of counsel hired to replace the conflicted current counsel throughout this litigation and thereafter; and
6. That the declaration in #5 above also include the representative's acknowledgment that he or she has communicated this prohibition regarding

Defendant Zuckerberg to all board members and the employees of Defendant Facebook as well.

Respectfully submitted,

/s/Dean Boland

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