

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, and  
FACEBOOK, INC.,

Defendants.

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**DECISION  
and  
ORDER**

**10-CV-00569A(F)**

APPEARANCES:

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## **JURISDICTION**

This case was referred to the undersigned by Honorable Richard J. Arcara on May 27, 2011, for all pretrial matters. The matter is presently before the court on Defendants' Sixth Motion to Compel (Doc. No. 381), filed May 24, 2012, Plaintiff's Motion to Strike Declaration/Report of Gerald LaPorte for Fraud (Doc. No. 385), filed May 24, 2012, Plaintiff's First Motion to Compel Defendants (Doc. No. 389), filed May 27, 2012, Plaintiff's Motion for Discovery Regarding Harvard Emails (Doc. No. 396), filed May 30, 2012, Plaintiff's Motion to Vacate Doc. No. 348 (Doc. No. 426), filed June 8, 2012, and Plaintiff's Motion to Disqualify Defendants' Dual Representing Counsel (Doc. No. 437), filed June 16, 2012.

## **BACKGROUND and FACTS**<sup>1</sup>

The central issue in this action is the authenticity of a Work for Hire contract ("the Contract"),<sup>2</sup> allegedly executed on April 28, 2003, between Plaintiff Paul D. Ceglia ("Plaintiff" or "Ceglia"), and Defendant Mark Elliot Zuckerberg ("Zuckerberg"), that grants Plaintiff 50% ownership of Defendant Facebook, Inc. ("Facebook") (together, "Defendants"), the social networking website created by Zuckerberg while a student at Harvard University ("Harvard"). The putative Contract provides that Plaintiff would hire Zuckerberg to perform programming for StreetFax.com ("StreetFax"), an on-line database developed by Plaintiff, and Plaintiff would help fund the development of

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<sup>1</sup> The Facts are taken from the pleadings and motion papers filed in this action.

<sup>2</sup> A copy of the contract is attached as Exhibit A to the Amended Complaint (Doc. No. 39).

Facebook in exchange for a one-half interest in Facebook. To describe the ensuing legal proceedings as contentious would be more than diplomatic with numerous motions regarding discovery, and objections to court orders having been filed, several of which pertain to the instant motions and, as such, are discussed.

On July 1, 2011, the undersigned granted expedited discovery (Doc. No. 83), limited to determine whether the Contract and emails attached as exhibits to the Amended Complaint to demonstrate that Zuckerberg breached the Contract (“the supporting emails”), are authentic, as Plaintiff claims, or forgeries, as Defendants maintain. While engaged in the limited discovery, Defendants filed multiple motions to compel and for sanctions, and Plaintiff filed multiple motions to stay discovery pending resolution of other motions and objections Plaintiff routinely filed to the undersigned’s orders. As relevant here, on February 21, 2012, Defendants filed their Fifth Motion to Compel (Doc. No. 294) (“Defendants’ Fifth Motion to Compel”), seeking, *inter alia*, Plaintiff’s delivery for *in camera* review eleven documents withheld from production on the basis of various asserted privileges.

Despite the various discovery disputes, Defendants managed to complete sufficient discovery to file on March 26, 2012, two dispositive motions including a motion to dismiss the instant action (Doc. No. 318) (“Defendants’ Motion to Dismiss”), asserting the contract is a forgery such that Plaintiff, by relying on the contract in pursuing his claims, is perpetrating a fraud on the courts, and a motion for judgment on the pleadings (Doc. No. 320) (“Defendants’ Motion for Judgment on the Pleadings”), arguing the factual allegations of the Amended Complaint establish Plaintiff’s claims are time-barred or, alternatively, are barred by the doctrine of laches. Defendants’ Motion

to Dismiss is supported by its expert witnesses's reports including, *inter alia*, the written report of forensic document examiner and chemist Gerald M. LaPorte ("LaPorte"), retained by Defendants. (Doc. No. 326) ("LaPorte Report"). Upon filing their dispositive motions, Defendants also moved on March 26, 2012, to stay discovery and defer setting a schedule for general discovery pending resolution of the dispositive motions, asserting the need for general discovery would be negated should either of Defendants' dispositive motions be granted (Doc. No. 322) ("Defendants' Motion to Stay"). Plaintiff, however, opposed the requested stay on general discovery, asserting that some discovery was necessary to permit Plaintiff to draft papers in opposition to Defendants' dispositive motions. At the conclusion of oral argument held on April 4, 2012, Defendants' Motion to Stay was granted in part and denied in part with general discovery stayed, but a limited period of expert discovery was granted to permit Plaintiff to prepare his opposition to Defendants' dispositive motions. (Doc. No. 348) ("April 4, 2012 Order").

In a Decision and Order filed April 19, 2012 (Doc. No. 357) ("April 19, 2012 D&O"), the undersigned granted in part and denied in part Defendants' Fifth Motion to Compel, directing Plaintiff to produce, as relevant here, Privilege Log Item 379, an April 19, 2011 email from Plaintiff's counsel Paul Argentieri ("Argentieri") to Plaintiff, containing emails with other former co-counsel, including Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz"), DLA Piper LLP ("DLA Piper"), and Lippes Mathias Wexler Friedman LLP ("Lippes"), and attachments, on the basis that Plaintiff, by disclosing Item 379 to one Jason Holmberg ("Holmberg"), without establishing Holmberg, who is not an attorney, had any reason to know or receive the information contained within Item 379,

had waived the attorney-client privilege and work-product protection as to the item. April 19, 2012 D&O at 8-11. Within Item 379 is a reference to an attachment consisting of a letter from Kasowitz to DLA Piper and Lippes, advising of Kasowitz's decision to withdraw as Plaintiff's co-counsel in this action ("the Kasowitz Letter").

On May 24, 2012, Defendants filed their Sixth Motion to Compel (Doc. No. 381) ("Defendants' Sixth Motion to Compel"), seeking an order compelling Plaintiff to produce the Kasowitz Letter which Defendants maintain Plaintiff should have produced as an attachment to Item 379 which the April 19, 2012 Decision and Order directed Plaintiff to produce. Defendants' Sixth Motion to Compel is supported by Defendants' Memorandum of Law in Support of Their Sixth Motion to Compel and for Other Relief (Doc. No. 382) ("Defendants' Memorandum"),<sup>3</sup> and the Declaration of Alexander H. Southwell, Esq. (Doc. No. 383) ("Southwell Declaration"), with attached exhibits A through E (Docs. Nos. 383-1 through 383-5) ("Defendants' Exh(s). \_\_\_").

On May 24, 2012, Plaintiff filed a Motion to Strike Expert Report and Motion to Dismiss (Doc. No. 385) ("Plaintiff's Motion to Strike"), seeking to strike the LaPorte Report on the basis that it contains fraudulent statements regarding the reliability of a specific ink dating test LaPorte used in examining the Contract. Plaintiff also seeks to strike Defendants' Motion to Dismiss as predicated on the alleged fraudulent LaPorte Report. Plaintiff's Motion to Strike is supported by a Memorandum of Law (Doc. No. 386) ("Plaintiff's Memorandum - Motion to Strike"), with attached exhibits A through C

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<sup>3</sup> Although a redacted version of Defendants' Memorandum is electronically filed in the court's case management/electronic court filing system ("CM/ECF"), an unredacted version has been submitted to the court.

(Docs. Nos. 386-1 through 386-3) (“Plaintiff’s Motion to Strike - Exh(s). \_\_\_”), and the Declaration of Nathan A. Shaman, Esq. (Doc. No. 387) (“Shaman Declaration”).

On May 27, 2012, Plaintiff filed his First Motion to Compel Discovery (Doc. No. 389) (“Plaintiff’s First Motion to Compel”), seeking a court order compelling Defendants to produce all documents, data, and other information on which Defendants’ experts relied in reaching the conclusions in their expert witnesses’s reports. Plaintiff’s First Motion to Compel is supported by a Memorandum of Law (Doc. No. 390) (“Plaintiff’s Memorandum - First Motion to Compel”), with attached exhibits A and B (Docs. Nos. 390-1 and 390-2) (“Plaintiff’s First Motion to Compel - Exh(s). \_\_\_”). On May 30, 2012, Plaintiff filed a Motion for Discovery Regarding Harvard Emails (Doc. No. 396) (“Plaintiff’s Motion for Discovery”), along with supporting papers including the Memorandum of Law Regarding Motion for Discovery (Doc. No. 397) (“Plaintiff’s Memorandum - Discovery”), with attached exhibits A through E (Docs. Nos. 397-1 through 397-5) (“Plaintiff’s Motion for Discovery - Exh(s). \_\_\_”), and the Declaration of Paul D. Ceglia (Doc. No. 398) (“Plaintiff’s Declaration”).

On June 4, 2012, Defendants filed Defendants’ Omnibus Opposition to Plaintiff’s Motion to Strike, First Motion to Compel, and Motion for Discovery (Doc. No. 413) (“Defendants’ Omnibus Response”). On June 6, 2012, Plaintiff filed his Reply to Defendants’ Response to Plaintiff’s Motions Doc. No. 385, 389 and 396 (Doc. No. 425) (“Plaintiff’s Omnibus Reply”).

On June 8, 2012, Plaintiff filed a Motion to Vacate Doc. No. 348 (Doc. No. 426) (“Plaintiff’s Motion to Vacate”), seeking to vacate the court’s April 4, 2012 Order and schedule a discovery conference pursuant to Fed.R.Civ.P. 16(b) (“Rule 16(b)

conference”), and a supporting Memorandum of Law (Doc. No. 427) (Plaintiff’s Memorandum - Motion to Vacate”). On June 11, 2012, Plaintiff filed his Response in Opposition to Sixth Motion to Compel (Doc. No. 432) (“Plaintiff’s Response - Defendants’ Sixth Motion to Compel”).

On June 15, 2012, Defendants filed Defendants’ Opposition to Ceglia’s Motion to Vacate Doc. No. 348 and Schedule Rule 16(b) Conference (Doc. No. 433) (“Defendants’ Response - Motion to Vacate”), Defendants’ Reply Memorandum of Law in Support of Their Sixth Motion to Compel (Doc. No. 434) (“Defendants’ Reply - Sixth Motion to Compel”), and the Declaration of Alexander H. Southwell, Esq. (Doc. No. 435) (“Southwell Reply Declaration”).

On June 16, 2012, Plaintiff filed a Motion to Disqualify Defendants’ Dual Representing Counsel (Doc. No. 437) (“Plaintiff’s Motion to Disqualify Counsel”), and the Memorandum in Support of Motion to Disqualify Defendants’ Counsel (Doc. No. 438) (“Plaintiff’s Memorandum - Motion to Disqualify Counsel”). In a Decision and Order filed June 20, 2012 (Doc. No. 451) (“June 20, 2012 D&O”), the undersigned denied Plaintiff’s Motions to Vacate and to Disqualify Counsel insofar as Plaintiff requested a stay of discovery pending resolution of the motions. On June 22, 2012, Defendants filed Defendants’ Opposition to Ceglia’s Motion to Disqualify Defendants’ Counsel (Doc. No. 452) (“Defendants’ Response - Motion to Disqualify Counsel”). On June 25, 2012, Plaintiff filed a Reply to Defendants’ Response to Motion to Disqualify (Doc. No. 454) (“Plaintiff’s Reply - Motion to Disqualify”), with exhibits A (redacted), and B. Oral argument was deemed unnecessary.

Based on the following, Defendants’ Sixth Motion to Compel is GRANTED;

Plaintiff's Motion to Strike is DENIED; Plaintiff's First Motion to Compel is DENIED; Plaintiff's Motion for Discovery is DENIED; Plaintiff's Motion to Vacate is DENIED; and Plaintiff's Motion to Disqualify Counsel is DENIED.

## **DISCUSSION**

### **1. Defendants' Sixth Motion to Compel**

In their Sixth Motion to Compel, Defendants seek a court order compelling Plaintiff to produce a copy of a letter dated April 13, 2011, from attorneys at the New York law firm of Kasowitz, Benson, Torres & Friedman LLP to co-counsel at DLA Piper LLP and Lippes Mathias Wexler Friedman LLP ("the Kasowitz Letter"). The Kasowitz Letter was an attachment to an email, identified in Plaintiff's privilege log as Item 379 ("Item 379"), which the undersigned reviewed *in camera* and, upon determining that any attorney-client privilege or work product doctrine protection that may have attached to Item 379 had been waived by Plaintiff's disclosure of Item 379 to a third party, Holmberg, without establishing Holmberg had a need to know such information, ordered Plaintiff to produce Item 379. April 19, 2012 D&O at 8-11. Defendants maintain the Kasowitz Letter will establish that the Kasowitz law firm decided to withdraw as co-counsel for Plaintiff upon learning that certain forensic experts retained by Plaintiff had determined the Contract is a forgery. Defendants' Memorandum - Sixth Motion to Compel at 1.

Defendants argue the Kasowitz Letter must be produced because a court's order directing disclosure of an email extends to all of the email's attachments, Defendants' Memorandum - Sixth Motion to Compel at 4-5, such that insofar as the April 19, 2012



D&O directed Plaintiff to produce Item 379, the Kasowitz Letter is responsive to the expedited discovery orders of this court, *id.* at 5-8, and Plaintiff has waived any privilege that may have attached to the Kasowitz Letter by failing to listing the Kasowitz Letter in Plaintiff's privilege log, thereby concealing its existence, and by disclosing the letter's subject matter to Holmberg, a non-attorney for whom no need to know such information has been established, *id.* at 8-11. Alternatively, Defendants request the court review the Kasowitz letter *in camera* to determine whether it must be produced. *Id.* at 2.

In opposition, Plaintiff asserts that he has already produced Item 379 with all attached files, such that Defendants should already be in possession of the Kasowitz Letter, Plaintiff's Response - Defendants' Sixth Motion to Compel at 1, Plaintiff has never been ordered to produce the Kasowitz Letter, *id.* at 2; the Kasowitz Letter is protected from disclosure by the attorney-client privilege, *id.* at 2-3, Plaintiff has already revealed to Defendants the names of various consultants whose services Plaintiff has retained in connection with this action, including the Kasowitz firm and its computer forensics consultant, Capsicum Group LLC ("Capsicum"), *id.* at 3, that all forensic images obtained by the Kasowitz firm and Capsicum were transferred to Project Leadership Associates ("PLA"), and made available to Stroz Friedberg LLC ("Stroz Friedberg"), a digital forensic consulting firm whose services Defendants have retained in connection with this action, and whose representatives visited PLA's Chicago office on July 19, 2011, *id.* As such, Plaintiff maintains the information within the Kasowitz Letter was never concealed from Defendants, and Defendants's inability to locate such information is the fault of Defendants' computer experts. *Id.* at 3-4.

In further support of the motion, Defendants deny that Plaintiff ever produced the

Kasowitz Letter, Defendants' Reply - Sixth Motion to Compel at 1, and direct the court's attention to Plaintiff's failure to respond to Defendants' arguments that the April 19, 2012 D&O order directing the production of Item 379 extended to the attached Kasowitz Letter, that Plaintiff failed to disclose in his privilege log the existence of the Kasowitz Letter, *id.*, and that such failure to disclose has resulted in a waiver of any privilege that would otherwise attach. *Id.* Defendants also remark on the apparent inconsistency between Plaintiff's insistence that the Kasowitz Letter is protected from disclosure by privilege and Plaintiff's assertion that he has already made the Kasowitz Letter available to Defendants' experts. *Id.* at 3.

Insofar as the Kasowitz Letter may have been protected from disclosure by the attorney-client privilege or as work product, such protection has been waived by Plaintiff's failure to timely assert any privilege in Plaintiff's privilege log. When a party withholds relevant information that is discoverable, pursuant to Fed.R.Civ.P. 26(b)(1), on the grounds of privilege, a party is obligated to promptly provide the adverse party with notice of the claimed privilege by preparing and serving a privilege log sufficiently describing the withheld information to enable the adverse party to assess the validity of the asserted privilege. Fed.R.Civ.P. 26(b)(5)(A); see *also* W.D.N.Y. Local R.Civ.P. 26(e)(2) (requiring assertion of privilege "be furnished in writing when the party responds to such discovery or disclosure"). A failure to comply with this requirement results in a waiver of the asserted privilege in the withheld information. See *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (failure to provide adequately detailed court-ordered privilege log waives privilege); *Robbins & Meyers, Inc. v. J.M. Huber Corp.*, 2010 WL 2595332, at \*5 (W.D.N.Y. June 24, 2010)

(plaintiff required to produce two documents plaintiff asserted was protected because any privilege that may have attached to two documents was waived by failing to list the documents in a privilege log provided to defendants); *Bove v. The Allied Group*, 2004 WL 5902631, \*1 (W.D.N.Y. Oct. 28, 2004 (failure to provide privilege log complying with local rule waives privilege); *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, 2000 WL 1538003, \*3 n. 1 (S.D.N.Y. Oct. 17, 2000) (citing *PKFinans Int'l. Corp. v. IBJ Schroder Leasing Corp.*, 1996 WL 525862, \*3 (S.D.N.Y. Sep't. 17, 1996) (“party’s failure to produce [privilege] log results in a waiver of any privilege that might otherwise be asserted” (citing caselaw))).

Here, Plaintiff does not dispute that the Kasowitz Letter contains relevant information or that, but for the asserted privilege, would be discoverable. Nor does Plaintiff deny failing to list the Kasowitz Letter in his privilege log in response to Defendants’ discovery requests. Moreover, that any privilege or protection that may have attached to the Kasowitz Letter has been waived is evident from Plaintiff’s assertion in opposition to the motion that the information contained within the Kasowitz Letter was made available to Defendants at PLA’s Chicago office on July 19, 2011, when Defendants’ forensic computer experts visited.

Because it is so clear that Plaintiff has failed to preserve any privilege that attached to the Kasowitz Letter, the court does not reach Defendants’ remaining arguments in support of its Sixth Motion to Compel.

Defendants’ Sixth Motion to Compel is GRANTED.

## 2. Plaintiff's Motion to Strike

Plaintiff moves to strike the report of Defendants' expert, forensic document examiner chemist Gerald M. LaPorte ("LaPorte"), and award sanctions under Fed.R.Civ.P. 37 for alleged perjury, on the basis that LaPorte intentionally failed to list several cases in which LaPorte gave testimony directly contradicting statements LaPorte made in his expert report prepared for Defendants in connection with the instant action ("LaPorte Report").<sup>4</sup> Plaintiff's Memorandum - Motion to Strike at 1-2. Plaintiff particularly challenges LaPorte's use of and reliance on a chemical ink-dating test involving the measurement of a solvent, called phenoxyethanol ("PE"), found in many inks, including the ink used to sign the Contract. Defendants' Ominbus Response at 4. In the so-called "PE test," the subject ink is "dated" by comparing PE levels of the ink before and after heating. *Id.* Evaporation of more than 25% of the pre-heating PE after heating indicates the ink is less than two years old or "fresh." *Id.* According to LaPorte's expert witness report, testing LaPorte performed on the ink from the signatures and initials in the Contract confirms the ink is less than two years old, supporting Defendants' assertion that because Plaintiff has alleged the Contract was executed in April 2003, the Contract is a forgery, or that the quantity of PE in the captured ink sample was too low to provide an accurate measurement for ink-dating using the PE test. LaPorte Report at 7-8, 15-16. Based on the PE test, LaPorte concluded it was "highly probable" that the ink taken from the first page of the Contract, which includes the disputed handwritten language granting Plaintiff a one-half interest in

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<sup>4</sup> The LaPorte Report (Doc. No. 326), is filed as Exhibit B in support of Defendants' Motion to Dismiss.

Facebook, was less than two years old. *Id.* at 2 & n. 2.

Plaintiff maintains that LaPorte published a paper in 2004 in which LaPorte questioned the reliability of the PE test on which LaPorte's examination of the ink used to sign the Contract is based, later corroborating his technical representations regarding the test's reliability in expert testimony given in several unrelated legal actions.

Plaintiff's Memorandum - Motion to Strike at 6-9. Specifically, Plaintiff asserts LaPorte's admission he never received a conclusive result from any PE testing renders LaPorte unqualified to use the test, *id.* at 9-11, and that Plaintiff's submission of the LaPorte Report is an egregious attempt to mislead the court, justifying striking the LaPorte Report and sanctioning Defendants by awarding Plaintiff attorney's fees. *Id.* at 11-14.

In opposition, Defendants argue Plaintiff's Motion to Strike relies on unsupported claims and patent mischaracterizations of LaPorte's alleged "perjured testimony," which Defendants maintain Plaintiff has intentionally distorted. Defendants' Omnibus Response at 3-7. Defendants further maintain that Plaintiff's Motion to Strike is procedurally improper because the April 4, 2012 Order permits Plaintiff to depose LaPorte in preparing Plaintiff's response to Defendants' pending Motion to Dismiss, that Plaintiff's deposition of LaPorte provides Plaintiff with the opportunity to confront LaPorte with the accusations regarding LaPorte's credibility contained in the instant motion, and that any statements made by LaPorte in response to Plaintiff's questions at his deposition, which Plaintiff may contend undermine LaPorte's opinion that the Contract is a fake, can be incorporated into Plaintiff's response to be filed in opposition to Defendants' Motion to Dismiss. *Id.* at 7-8.

In further support of Plaintiff's Motion to Strike, Plaintiff asserts Defendants have

not denied violating Rule 26's disclosure requirement or that LaPorte gave testimony as an expert witness in other cases that contradicts statements in the LaPorte Report, such that the court must strike the LaPorte Report and it is only necessary for the court to consider what sanctions to award Plaintiff. Plaintiff's Omnibus Reply at 1-4.

According to Plaintiff, LaPorte repeatedly testified that it was not possible to determine, based on ink analysis, when a document was created. *Id.* at 4-7. Plaintiff further maintains that because the PE test's reliability has never been established, it is nothing more than "junk science" which is not used by any state or federal forensic scientist, including the U.S. Secret Service where LaPorte previously worked as a forensic document examiner. *Id.* at 8-12.

The essence of Plaintiff's argument in support of Plaintiff's Motion to Strike is that Defendants, by failing to identify several legal actions in which LaPorte gave expert testimony contradicting statements in the LaPorte Report, also failed to comply with the disclosure requirement under Fed.R.Civ.P. 26(a)(2)(B)(v) ("Rule 26(a)") of "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." A party who fails to disclose as required under Rule 26(a) "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified *or is harmless.*" Fed.R.Civ.P. 37(C)(1) (*italics added*). In the instant case, although Defendants neither deny they failed to disclose every case in which LaPorte testified as an expert at trial or by deposition during the four previous years, nor have Defendants offered any justification for failing to include the omitted actions from the list of such cases, the failure to disclose was harmless because the construction urged by Plaintiff of LaPorte's

testimony in the omitted cases is, at best, strained, and, more correctly, a gross misrepresentation which would be detected by even the marginally literate.

In particular, the cases Defendants omitted from the list of cases in which LaPorte testified as an expert include *United States v. Padilla*, Docket No. 04-60001-CR-Cooke, Southern District of Florida, Miami Division (“*Padilla*”), at which LaPorte testified on July 12, 2007,<sup>5</sup> *Giorgio v. Rosenblum*, Docket No. MON-L-2652-06, Superior Court of New Jersey, Monmouth County, Law Division (“*Giorgio*”), for which LaPorte was deposed as an expert on August 26, 2009,<sup>6</sup> and *United States v. Rago*, Docket No. 08-CR-10268-WGY (D. Mass.) (“*Rago*”), a criminal action in which the Government, following an examination of LaPorte to determine whether LaPorte’s PE test satisfied the requirements for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), withdrew LaPorte as a witness.<sup>7</sup> Plaintiff describes LaPorte’s trial testimony given during the *Padillo* trial as establishing that LaPorte testified he had never achieved a conclusive result from a PE test. Plaintiff’s Memorandum - Motion to Strike at 6-7 (citing *Padillo* Trial Tr. at 54, and 66). A plain reading of the referenced trial testimony, however, establishes only that LaPorte testified that, as of July 12, 2007, the date LaPorte testified as an expert in *Padillo*, no

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<sup>5</sup> A transcript of LaPorte’s expert witness trial testimony in connection with *Padilla* is attached as Exhibit A to Plaintiff’s Memorandum - Motion to Strike. References to “*Padilla* Tr. at \_\_\_” are to the page of such transcript.

<sup>6</sup> A transcript of LaPorte’s testimony given at his deposition as an expert witness in *Giorgio* is attached as Exhibit B to Plaintiff’s Memorandum - Motion to Strike. References to “*Giorgio* Deposition Tr. at \_\_\_” are to the page of such transcript.

<sup>7</sup> A copy of motion papers filed by the criminal defendant in *Rago* referencing the Government’s decision to withdraw an expert report prepared by LaPorte is attached as Exhibit C to Plaintiff’s Memorandum - Motion to Strike. References to “*Rago* motion at \_\_\_” are to the page of such motion.

scientifically reliable methodology existed to “exactly” determine the age of the ink at issue, or when the ink was placed on the paper, and that although LaPorte had previously testified about the PE test procedure, LaPorte had never, in connection with the same action, performed a PE test, obtained a result indicating the subject ink was less than two years old, and testified as to such result. *Padillo* Tr. at 54, 65-66.

LaPorte also testified that although it is impossible to determine exactly when ink is placed on a piece of paper, it is nevertheless possible to determine, using the PE test, whether ink taken from different writings on either the same paper or papers stored under the same environmental conditions were the same age. *Id.* at 67. LaPorte further testified that he had published articles on the PE test, and would use the PE test in situations where LaPorte believed the examination was pertinent, but that if the particular circumstances of a writing did not support use of the PE test, such as where two inks to be compared were not stored under the same conditions, LaPorte would not use it. *Id.* at 69, 76. In short, LaPorte’s testimony at trial in *Padillo* thus is completely consistent with the expert representations made in the LaPorte Report, and Plaintiff’s misrepresentation of such testimony fails to support Plaintiff’s Motion to Strike.

According to Plaintiff, LaPorte’s deposition testimony in *Giorgio* denying ever having testified that the PE test is not a scientifically reliable ink-dating methodology “is an obvious [*sic*] false statement compared to [LaPorte’s] 2007 [*Padillo*] testimony about PE testing’s unreliability.” Plaintiff’s Memorandum - Motion to Strike at 9 (bracketed material added). However, as discussed above, Plaintiff has grossly mischaracterized LaPorte’s expert testimony in *Padillo*. Discussion, *supra*, at 15-16. Moreover, the balance of LaPorte’s deposition testimony in *Giorgio* is consistent with LaPorte’s expert



witness testimony at trial in *Padillo*, insofar as LaPorte stated that PE testing is the “third approach ... most commonly used in laboratories throughout the world and at the Secret Service . . . ,” *Giorgio* Deposition Tr. at 11, that LaPorte had found PE testing to be highly reliable under the circumstances for which PE testing was developed, specifically, for determining whether multiple documents, created using the same ink yet bearing different dates, were created at the same time, *id.* at 14, that LaPorte, as of August 26, 2009, the date of the *Giorgio* Deposition, had never testified in a court of law he had determined to a degree of scientific certainty that, based on PE testing, a specific entry was not written on a certain date, *id.* at 18, and that LaPorte did not consider PE testing to be “100 percent accurate” because “it really depends on the situation at hand and the conclusion” to be drawn, although it was possible to reach a definitive conclusion using PE testing under appropriate circumstances. *Id.* at 21. As such, Plaintiff’s reliance on LaPorte’s statements made during his deposition in connection with the *Giorgio* case also fail to support Plaintiff’s Motion to Strike.

It is not clear from the record the precise reason for the Government’s decision to withdraw LaPorte as an expert witness in *Rago*, a case in which LaPorte, as a Secret Service employee, performed PE testing on ink samples. A plain reading of the *Rago* motion, an *in limine* motion seeking to exclude LaPorte from testifying at a criminal trial, which Plaintiff submits in support of the instant motion to strike, indicates that the decision was based on reading of LaPorte’s expert witness testimony provided in *Padillo*, that is similarly improper to the reading of such testimony urged by Plaintiff in this case. See, e.g., *Rago* motion at 3 (referencing *Padillo* Tr. at 55 (LaPorte, responding to question, “Are you aware of any scientifically reliable way to make such a

determination looking only at the ink for a document like this?” with, “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.”)). Significantly, the basis for the Rago defendant’s *in limine* motion to exclude LaPorte’s testimony was that the PE testing performed by LaPorte featured “differences in ink and unknown storage conditions.” *Rago* motion at 7 n. 1. As such, the defendant’s references to LaPorte’s trial testimony in *Padillo* was relevant to establish that the circumstances under which PE testing performed in connection with the criminal proceedings in *Rago* were not, based on LaPorte’s previous trial testimony, similar to those likely to yield reliable results, including that the specifically identified ink in question be written on the same paper and stored under the same, known, environmental conditions. *Id.* at 7-8. Rather than establishing any fraud by LaPorte in performing the PE testing in connection with the *Rago* criminal proceeding, the *Rago* motion papers cast doubt on the decision of Larry F. Stewart (“Stewart”), LaPorte’s then supervisor at the Secret Service to request LaPorte to perform the PE testing.<sup>8</sup> Accordingly, references in the *Rago* motion papers to LaPorte provide no support to Plaintiff’s Motion to Strike.

Finally, Plaintiff referenced in support of his assertion that LaPorte published in 2004 “a paper suggesting the experimental potential of PE testing,” a footnote in the LaPorte Report (“LaPorte Footnote”) Plaintiff’s Memorandum - Motion to Strike at 6 (citing LaPorte Report at 8 n. 12). The entirety of the LaPorte Footnote consists of the

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<sup>8</sup> Plaintiff has retained Stewart as his forensic document and chemistry expert in connection with this action. See Plaintiff’s Memorandum - Motion to Strike at 4 (“Plaintiff’s expert, Larry Stewart, was LaPorte’s supervisor while LaPorte was at the Secret Service.”); Defendants’ Omnibus Response at 5 (same).

name of an article, *The Identification of 2-Phenoxyethanol in Ballpoint Inks Using Gas Chromatography/Mass Spectrometry*, authored by LaPorte, J. Wilson and A. Cantu, published in 2004 a forensic science journal. LaPorte references such article in support of his statement that “[a]fter 24 months, PE no longer evaporates at a significant or measurable rate. PE is found in over 85% of blue and black ballpoint writing inks.” LaPorte Report at 7. How Plaintiff manages to construe this statement as indicating LaPorte’s 2004 article establishes that PE testing is “purely experimental,” Plaintiff’s Memorandum - Motion to Strike at 6, is simply beyond the court’s comprehension.

As such, none of the information on which Plaintiff relies in support of his Motion to Strike provides even colorable support for the motion. Accordingly, Plaintiff’s Motion to Strike is completely without merit and is DENIED.

### **3. Plaintiff’s First Motion to Compel**

Plaintiff’s First Motion to Compel seeks a court order compelling Defendants to provide (1) all reports documenting the findings of Defendants’ forensic computer experts’ examination of the hard-copy documents and electronic assets as directed by the July 1, 2011 Order, Plaintiff’s Memorandum - First Motion to Compel at 1-2, and (2) the data underlying Defendants’ forensic computer experts’ reports as directed by the April 4, 2012 Order, *id.* at 2-3. In particular, Plaintiff seeks Defendants’ experts’ laboratory notes, electronic scans of any document examined, digital images captured by digital camera, images stored using laboratory instrumentation, instrument printouts, instrument calibration information, maintenance records for image generating devices, and metadata pertaining to any electronic data relevant to this matter. *Id.* at 5.

According to Plaintiff, all such information should be produced in its native format to be examined by Plaintiff's experts, and Defendants' continued failure to provide such information "is designed to further obscure their experts' spurious claims and conclusions." *Id.* at 6. Plaintiff further maintains that the lack of any information regarding results of tests that Defendants' experts "should have performed if they were competent . . ." establishes that Defendants are withholding information that is unfavorable toward them. *Id.* at 6.

In opposition, Defendants assert that Plaintiff's motion seeks extensive discovery of documents that is not required by the July 1, 2011 or April 4, 2012 Order, and, as such, impermissibly seeks to broaden the limited expert discovery that was ordered by the court, and renews requests for information the court has already denied.

Defendants' Omnibus Response at 8-9. Defendants further maintain that the July 1, 2011 Order does not obligate Defendants to report each and every factual finding made by their experts, or to produce each piece of paper documenting the experts' findings. *Id.* at 9. Rather, the July 1, 2011 Order simply directs Defendants to provide Plaintiff and the Court with copies of the "reports" documenting Defendants' experts' findings, but is silent with regard to any underlying documents, case notes, correspondence, and verbal reports. *Id.* Similarly, Defendants maintain Plaintiff has misrepresented the colloquy at the April 4, 2012 oral argument during which the court rejected Plaintiff's request for expert written discovery and Plaintiff, in response to the court's inquiry as to whether Plaintiff desired a "safety mechanism" to capture documents on which Defendants relied but did not reveal, stated he intended to "deal with" newly disclosed documents in the deposition of the experts, thereby making a binding admission that

any dispute regarding document discovery would be resolved during the two-month period for expert depositions following the submission of expert reports. *Id.* at 9-10. Defendants also reiterate their willingness to meet and confer with Plaintiff after the submission of expert reports to resolve any such specific requests without court intervention. *Id.* at 10. In further support of his motion to compel, Plaintiff urges the court to construe Defendants' failure to deny they did not provide Plaintiff with all the information Plaintiff seeks to compel establishes that Defendants have withheld expert images, scans, and photographs that are not favorable to Defendants' position in this action. Plaintiff's Omnibus Reply at 14-15.

Plaintiff's argument on this motion relies on a misconstruction of the July 1, 2011 and April 4, 2012 Orders. In particular, the July 1, 2011 Order directs that "Defendants shall provide to the court and plaintiff all reports documenting the findings of that examination [of the Hard-Copy Documents and Electronic Assets]." July 1, 2011 Order at 3. Plaintiff maintains that such language requires Defendants to provide Plaintiff with all the images, scans, and photographs their experts had captured in preparing their expert reports, yet the July 1, 2011 Order is not so broad. Rather, the references to the "Hard-Copy Documents" and "Electronic Assets" are to separate orders, also filed July 1, 2011, including the Hard-Copy Document Inspection Protocol (Doc. No. 84), and the Electronic Asset Inspection Protocol (Doc. No. 85) (together, "the Protocol Documents").<sup>9</sup> The Protocol Documents specify those items the parties agreed should

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<sup>9</sup> The term "Hard-Copy Documents" pertains to the original, hard-copy of the Contract and the emails attached to the Amended Complaint, whereas "Electronic Assets" pertains to the native electronic versions of the same.

be made available for examination by the parties' experts. Neither Protocol Document, however, contains any language indicating any images, scans, or photographs captured, or notes prepared as a result of the experts' examination of any of the Hard-Copy Documents or Electronic Assets is to be made available for inspection by the other party; rather, only the "reports documenting the findings" of the examination by Defendants' experts of the Hard-Copy Documents and the Electronic Assets were to be produced. See July 1, 2011 Order at 3. The July 1, 2011 Order, however, does not require Defendants also make available for Plaintiff's inspection Defendants' examining experts' notes, images, scans, or photographs created as a result of such experts' examination.

Further, testing that required extraction of a physical sample from the Hard-Copy Documents was required to be performed in the presence of representatives from both parties, Hard-Copy Document Inspection Protocol ¶ 4, and an audiovisual recording of Defendants' examination of the purported original Contract was permitted to be made. *Id.* ¶ 5. Plaintiff has not explained why these provisions were insufficient to protect Plaintiff's interests with regard to Defendants' examination of the Hard-Copy Documents. Nor does Plaintiff dispute that during the April 4, 2012 oral argument, Sanford Dumain, Esq. ("Dumain"), then of counsel to Plaintiff, agreed that any dispute regarding document discovery would be resolved after the submission of expert reports during the 60-day period dedicated to deposition of the parties' expert witnesses. Defendants' Omnibus Response at 10. Although Mr. Dumain no longer represents Plaintiff, (Doc. No. 423, June 5, 2012 Text Order granting Mr. Dumain and his law firm leave to withdraw), Defendants reiterate their agreement that requests for production of

specific documents necessary to prepare for and conduct expert depositions should be addressed after the submission of expert reports, but that expanding the scope of discovery beyond that ordered by the court on July 1, 2011 and April 4, 2012 is premature. *Id.*

Accordingly, Plaintiff's First Motion to Compel, the motion is DENIED.

#### **4. Plaintiff's Motion for Discovery**

Plaintiff's Motion for Discovery seeks a court order directing Defendants to search the Harvard email server backup tapes and the personal computers used by Zuckerberg at Harvard during the years 2003 and 2004 for any email exchanges between Plaintiff and Zuckerberg ("the Harvard emails"). Plaintiff's Memorandum - Motion for Discovery at 1-2. According to Plaintiff, both the July 1, 2011 Order and the April 4, 2012 Order, direct Defendants to produce the Harvard emails. *Id.* at 2. In support of his assertion that Defendants have failed to produce the Harvard emails, Plaintiff argues that the alleged business relationship between Plaintiff and Zuckerberg commenced in January or February 2003, when Zuckerberg responded to a Craigslist advertisement placed by Plaintiff for software development writing services in connection with Plaintiff's StreetFax project. *Id.* Because Plaintiff's Craigslist advertisement did not include any contact information other than Plaintiff's email address, Plaintiff asserts Zuckerberg must have communicated with Plaintiff through email. *Id.* at 2-3. Plaintiff further maintains that he communicated with Zuckerberg, via email, throughout February, March, and April of 2003, when Plaintiff and Zuckerberg met for the first time in Boston, Massachusetts, where the Contract memorializing the

business agreement reached during their email exchange was signed. *Id.* at 3. During the week of May 24 through May 31, 2003, immediately after Harvard's spring 2003 semester ended on May 23, 2003, subsequent to executing the Contract, Plaintiff and Zuckerberg exchanged "countless emails" in which Plaintiff alleges he addressed "continual issues" about the work to be performed under the Contract, yet the first Harvard email Defendants produced is dated June 2, 2003. *Id.* at 2-3. Regular email communications between Plaintiff and Zuckerberg resumed in November 2003 and continued into 2004, but Plaintiff asserts that Defendants produced only a "sample" of such emails, and that proof that Defendants deleted some emails is evident from the emails that were produced which reference other emails in "threads" that were not produced. *Id.* at 3-5. According to Plaintiff, in response to Plaintiff's counsel's inquiries regarding the alleged missing emails, Defendants steadfastly maintain they have produced all emails their computer forensic experts have been able to retrieve from the Harvard email servers, an explanation which Plaintiff accepts, except for the fact that a review of the report prepared by Stroz Friedman demonstrates that the Harvard email server backup tapes were not reviewed, nor were Zuckeberg's computers used during 2003 and 2004 reviewed. *Id.* at 6-7. Plaintiff concludes with a request that the court authorize a subpoena for Harvard University to produce the Harvard email server backup tapes for 2003 and 2004 as well as permitting Plaintiff's computer forensics expert to acquire all native format email messages from Zuckerberg's computers during the same time period, for which forensic copies are currently in the possession of Parmet and Associates, a forensics consulting firm used by the parties in connection with an unrelated action filed in the District of Massachusetts. *Id.* at 6.



In opposition, Defendants argue Plaintiff's Motion for Discovery seeks information that is beyond the scope of discovery authorized by the July 1, 2011 and April 4, 2012 Orders. Defendants' Omnibus Response at 11. According to Defendants, their compliance with the July 1, 2011 Order directing Defendants to produce, in original, native, and hardcopy format, all emails exchanged between Plaintiff and Zuckerberg and anyone else associated with StreetFax, retrieved from Zuckerberg's Harvard email account, was acknowledged in the April 4, 2012 Order. *Id.* Defendants further maintain that Plaintiff's assertion that "he 'accepts' that Defendants 'have produced all emails they could recover from their analysis of the Harvard email system,'" *id.* (quoting Plaintiff's Memorandum - Motion for Discovery at 7), demonstrates the absence of any dispute on the matter. *Id.* at 11-12. Defendants further maintain that in addressing Plaintiff's motions seeking sanctions for alleged spoliation by Defendants of the same Harvard emails, filed on November 1, 2011 (Doc. No. 198), and to preclude Defendants from challenging the authenticity of the emails attached to the Amended Complaint, filed November 17, 2011 (Doc. No. 223), the court has already considered and rejected the same requests by Plaintiff for expansive discovery of Harvard's email servers, such that Plaintiff's Motion for Discovery is an attempt to reargue the point. *Id.* at 12-13 (citing December 16, 2011 Order (Doc. No. 272) (withdrawing Doc. No. 198 and denying Doc. No. 223)). As such, Defendants maintain Plaintiff's present discovery demands seek to reargue motions already disposed of by the court without any justification for doing so. *Id.* at 13. Defendants further maintain Plaintiff's present discovery demands seeks information Plaintiff speculates may exist and which contradicts Plaintiff's own allegation the Amended Complaint that Plaintiff and

Zuckerberg engaged in contract negotiations over the telephone. *Id.* at 14-15 (citing Amended Complaint ¶ 21 (explaining that Plaintiff prepared the Contract at his home office in Wellsville, New York, combining and modifying two different form contracts “to capture the terms that Zuckerberg and Ceglia agreed to *over the telephone.*” (italics added))). Finally, Defendants assert that the emails Plaintiff maintains are referenced in other email “threads” were already produced to Plaintiff, and that if Plaintiff is unhappy with the emails produced from Stroz Friedberg, Plaintiff can always explore that issue during depositions. *Id.* at 15-16.

Plaintiff’s argument in further support of Plaintiff’s Motion for Discovery focuses on Zuckerberg’s failure to deny receiving or deleting any of the emails Plaintiff seeks, and that by failing to deny the same operates as an admission that Zuckerberg received and then deleted such emails, including the email from Plaintiff attached to which was a copy of the Contract at issue. Plaintiff’s Omnibus Reply at 12-14. According to Plaintiff, Zuckerberg’s contention that he never received an email from Plaintiff with the attached Contract, without more, “automatically justifies a review of all potential sources of emails” sent during the relevant time-frame in 2003 and 2004 “to resolve what is a case-ending discovery of a single email.” *Id.* at 13-14. Plaintiff’s Motion for Discovery is without merit.

As Defendants assert, Defendants’ Omnibus Response at 13, Plaintiff’s Motion for Discovery seeks to reargue discovery motions already disposed of by the court without any justification for doing so. Specifically, the undersigned, in the July 1, 2011 and April 4, 2012, precisely limited the scope of discovery to that necessary to determine an issue crucial to this action, *i.e.*, the authenticity of the Contract and the

supporting emails. In doing so, requests for information that does not bear on the authenticity of the Contract and the supporting emails Plaintiff attached to the Amended Complaint in an attempt to establish the contract's legitimacy were denied.

Significantly, Plaintiff has not explained how the emails he maintains must have existed, yet been deleted by Defendants, would establish the authenticity of the Contract and the supporting emails attached to the Amended Complaint. Plaintiff's allegation, Amended Complaint ¶ 21, that the Contract's terms were negotiated with Zuckerberg over the telephone strongly undermines Plaintiff's assertion that Defendants' failure to produce any emails from the Harvard email server backup tapes dated prior to June 2, 2003 establishes Zuckerberg destroyed such evidence, and supports that Plaintiff is embarking on a fishing expedition for emails Plaintiff speculates may exist. See *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, 2011 WL 1549450, at \* 6 (Apr. 21, 2011) (denying the defendant's motion to conduct discovery regarding the plaintiff's document preservation efforts where the lack of any factual basis for the defendant's asserted spoliation established the motion was an attempt "to initiate a 'fishing expedition' based on mere speculation.").

Moreover, a consideration wholly ignored by Plaintiff in this motion is that any email sought by Plaintiff would necessarily have been sent from Zuckerberg to Plaintiff, such that Plaintiff would already have a copy of it, as to which the instant motion is moot.

Plaintiff's Motion for Discovery is DENIED.

## 5. Plaintiff's Motion to Vacate

Despite relying in support of his Motion to Compel on the April 4, 2012 D&O (Doc. No. 348), which grants Plaintiff limited discovery necessary to prepare papers opposing Defendants' Dispositive Motions, but stays general discovery pending resolution of the Dispositive Motions, Plaintiff moves to vacate the April 4, 2012 D&O and requests the court conduct a scheduling conference pursuant to Fed.R.Civ.P. 16(b) and enter a scheduling order setting deadlines for, *inter alia*, general discovery. Plaintiff's Motion to Vacate is predicated on Plaintiff's assertion that Defendants' Motion to Dismiss is without any foundation in law because Defendants' challenges to the authenticity of the Contract and the supporting emails attached to the Amended Complaint assert intrinsic fraud, a matter of substantive law which the court, sitting in diversity, must decide under New York law. Plaintiff's Memorandum - Motion to Vacate at 4-5. Plaintiff further maintains that a critical distinction under New York law permits collateral attack upon any judgment only when extrinsic fraud is established. *Id.* at 5-8. According to Plaintiff, there is no remedy available under New York law for dismissal for intrinsic fraud, and as this court is sitting in diversity, it is obligated to apply New York law. *Id.* at 12-14.

In opposition, Defendants assert that federal law provides ample authority for a district court, sitting in diversity, to exercise its inherent powers to dismiss for fraud, regardless of any state-law limitation on the power to sanction. Defendants' Response - Motion to Vacate at 1-4. Defendants further assert that the cases on which Plaintiff relies in support of his Motion to Vacate involve collateral attacks to set aside a final judgment on the basis that it was procured by fraud. *Id.* at 4-5.

In further support of the Motion to Vacate, Plaintiff asserts that Defendants' assertion of the "fraud on the court" supports only an "intrinsic fraud" argument. Plaintiff's Reply - Motion to Vacate at 1-2. Plaintiff further maintains that the 19 cases on which Defendants rely are factually distinguishable from the instant case insofar as the cited cases include twelve cases involving matters of federal, rather than state, substantive law, *id.* at 3-4, one case involve admitted attorney misconduct, *id.* at 4-5, two cases of admitted fraud, *id.* at 6, a failure to prosecute action, *id.*, and three diversity actions in which no state substantive law is raised. *Id.* at 6-9.

Plaintiff's motion is based on New York case law which permits collateral attacks on judgments obtained by extrinsic, but not intrinsic fraud. Plaintiff's Memorandum - Motion to Vacate at 4 (citing *Altman v. Altman*, 542 N.Y.S.2d 7, 9 (1<sup>st</sup> Dept. 1989)). See N.Y. CPLR 5015 (providing for motion to vacate judgment in civil action on basis of fraudulent procurement). As Plaintiff explains, fraud that is collateral to the issue to be decided by the court is extrinsic, whereas fraud that relates to the very issue to be decided by the court is intrinsic. *Id.* at 4-5 (citing cases). According to Plaintiff, because the fraud Defendants assert Plaintiff is perpetrating on the court in the instant action, *i.e.*, submitting as proof of Plaintiff's action the Contract, particularly, the first page of the Contract with the challenged handwritten emendations allegedly initialed by Zuckerberg, and the supporting emails which are forgeries, is the very matter to be decided by the court, Defendants' Motion to Dismiss asserts a claim for intrinsic fraud which is prohibited under New York law. *Id.* at 5-8. There is no merit to Plaintiff's argument.

First, the cases on which Plaintiff relies in support of his Motion to Vacate all

involve collateral attacks seeking relief from *final judgments* on the basis that such judgments were procured through fraudulent means, such as perjured testimony, witness tampering, or some other means that deprived a party of an adequate opportunity to present his claim or defense. See, e.g., *DiRusso v. DiRusso*, 287 N.Y.S.2d 171, 178-79 (N.Y.Sup.Ct. Nassau Cty. 1968) (first wife's withholding notice of stipulation acknowledging validity of Alabama divorce decree in subsequent New York action collaterally attacking Alabama divorce decree was intrinsic, rather than extrinsic, fraud, providing no basis for collateral attack). In contrast, in the instant case, there has yet to be any judgment, let alone a final judgment, regarding the authenticity of the Contract and supporting emails, such that Defendants' Motion to Dismiss is not a collateral attack on a judgment.

Moreover, it is settled that federal courts sitting in diversity have inherent power to dismiss an action for fraud. In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991), the Supreme Court articulated that a federal court's authority "to fashion an appropriate sanction for conduct which abuses the judicial process" is inherent. Such sanctions within the court's discretion range from an assessment of attorney's fees for less severe abuse of judicial process, to the most severe sanction of "outright dismissal" of an action. *Chambers*, 501 U.S. at 45 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)). The district court's dismissal of an action for failure to prosecute based on the plaintiff's attorney's failure to attend a scheduling conference, offering an "inadequate excuse" for his nonappearance, and in light of litigation's "drawn-out history," was held a proper exercise of the court's discretion under its inherent powers. *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)).

Significantly, courts within the Second Circuit have dismissed actions upon determining the actions were based on forged documents or fabricated evidence. See *Shangold v. Walt Disney Co.*, 275 Fed.App'x. 72, 73-74 (2d Cir. 2008) (affirming district court's dismissal of complaint as sanction after finding the plaintiffs had committed a fraud upon the court when the plaintiffs attempted to manipulate the judicial process by submitted as evidence certain documents, the fabrication of which was established by the use of certain terms which did not exist in the English lexicon as of the dates of the documents); *McMunn v. Memorial Sloan-Kettering Cancer Center*, 191 F.Supp.2d 440, 461 (S.D.N.Y. 2002) (dismissing, upon defendant's motion and in exercise of court's inherent power, employment discrimination claim and awarding defendant costs and fees to sanction plaintiff who committed fraud on the court by intentionally and in bad faith engaged in multiple instances of misconduct, including withholding credit card account statements and receipts that conclusively established plaintiff's whereabouts at time of alleged employment discrimination were inconsistent with plaintiff's claims, rendering her claims impossible); and *Cerruti 1881 S.A. v. Cerruti, Inc.*, 169 F.R.D. 573, 583-84 (S.D.N.Y. 1996) (exercising discretion and inherent power to protect court's integrity against abuse of judicial process, by granting plaintiff's motion to strike defendant's answer and counterclaims, entering judgment for plaintiff on merits, and imposing as sanction costs and fees against defendant who presented false documents and deposition testimony in opposition to plaintiff's claims and in support of counterclaims). Thus, the extrinsic-intrinsic distinction on which Plaintiff relies is of a procedural, not a substantive nature, not binding on this court and, moreover, is irrelevant as Defendants' Motion to Dismiss is based on the court's well-established

inherent authority to reject at the outset of a case claims based on demonstrable fraud.

Accordingly, it is Plaintiff's Motion to Vacate, rather than Defendants' Motion to Dismiss, that is without any foundation in law. Plaintiff's Motion to Vacate is DENIED.

## **6. Plaintiff's Motion to Disqualify Counsel**

Plaintiff moves to disqualify Defendants' counsel asserting the contemporaneous representation of both Zuckerberg and Facebook potentially presents a conflict of interest because "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." Plaintiff's Memorandum - Motion to Disqualify at 3. In connection with the motion, Plaintiff seeks an order directing (1) Defendants' counsel, including the law firm of Gibson Dunn & Crutcher ("Gibson Dunn"), and its attorneys Orin S. Snyder, and Alexander H. Southwell, the law firm of Harris Beach PLLC ("Harris Beach"), and its attorney Terrance P. Flynn, and the law firm of Orrick, Herrington and Sutcliffe, LLP ("Orrick Herrington"), and its attorney Lisa T. Simpson, to refund to Defendants all attorneys fees paid to date; (2) an award of sanctions, including attorneys fees, to Plaintiff; (3) a Facebook representative to file a declaration establishing awareness that Zuckerberg is to have no role in selecting or communications with substituted Facebook counsel; and (4) that such declaration be communicated to all members of Facebook's board of directors. *Id.* at 2.

Defendants, in opposition, assert the instant motion is a thinly-veiled attempt to disrupt the expedited discovery schedule set by the April 4, 2012 Order insofar as



Plaintiff included in the motion a request to stay discovery, since denied by the undersigned, and indicated his intention not to attend the expert witness depositions noticed by Defendants. Defendants' Response - Motion to Disqualify at 1 (citing Plaintiff's Memorandum - Motion to Disqualify at 17). In particular, Defendants maintain that Plaintiff is without standing to raise the disqualification issue, *id.* at 1, and that Plaintiff's motion is based on the New York Disciplinary Rules that have been replaced by the New York Rules of Professional Conduct under which, absent an actual conflict of interest, Defendants' counsel's representation of both Zuckerberg and Facebook is permitted, *id.* at 1-2. Defendants also request the court order Plaintiff to show cause why Plaintiff and his attorneys should not be sanctioned for filing this motion, the only purpose of which is to unreasonably and vexatiously multiply the proceedings. *Id.* at 2.

In further support of the motion Plaintiff argues that disqualification of counsel for representing different parties whose interests in the litigation may be adverse depends on whether the same attorney represents the parties in successive litigation, or provides dual representation in the same litigation. Plaintiff's Reply - Motion to Disqualify at 1-2. Plaintiff also maintains that because all attorneys have an ethical obligation to bring a possible ethical violation to the attention of the court, any attorney has standing to bring the motion to disqualify counsel on the ground of conflict of interest. *Id.* at 2-3. Plaintiff also maintains the motion to disqualify is not subject to any timeliness argument, *id.* at 3-4, that Defendants have admitted their own interests in the instant litigation are diverse, thus presenting an actual conflict requiring separate counsel, *id.* at 4-5, and that such conflicts are both unforeseen and non-consentable. *Id.* at 5-8. Further, Plaintiff maintains that the failure of some of Defendants' counsel to sign

Defendants' Response - Motion to Disqualify establishes the non-signing counsel are not opposed to disqualification, *id.* at 9, and that Defendants have failed to deny the merits of the Motion to Disqualify. *Id.* at 9-10.

Insofar as Plaintiff relies on New York Disciplinary Rule 5-105 ("DR 5-105"), which prohibits an attorney from representing multiple clients with even the potential for differing interests, New York's Disciplinary Rules, including DR 5-105, were replaced on April 1, 2009 by the New York Rules of Professional Conduct ("Rules of Professional Conduct"), 22 N.Y.C.R.R. § 1200.0.<sup>10</sup> As relevant, Rule 1.7 ("Rule 1.7") provides that,

- (a) . . . a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
- (1) the representation will involve the lawyer in representing differing interests; or
  - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Rule 1.7(a).

Nevertheless,

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7(b).

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<sup>10</sup> Attorneys practicing in the Western District of New York are required to adhere to New York's Rules of Professional Conduct. Local Rules of Civil Procedure - Western District of New York Rule 83.3(a).

Plaintiff, however, maintains Rule 1.7(b) is construed the same as DR 5-105 because courts considering dual representation issues continue to cite to cases decided before the Disciplinary Rules were replaced by the Rules of Professional Conduct and, further, that Rule 1.7(b), like DR 5-105, requires that parties give written consent to dual representation. Plaintiff's Reply - Motion to Disqualify at 1. Even if, however, the joint representation of both Defendants is a violation of Rule 1.7(b), such violation does not automatically warrant disqualification. *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010) (analyzing motion to disqualify based on joint representation under Rule 1.7, and citing *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (analyzing motion to disqualify based on joint representation under DR 5-105)). Rather, "disqualification is warranted only if 'an attorney's conduct tends to taint the underlying trial.'" *GSI Commerce Solutions*, 618 F.3d at 209 (quoting *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)).

Disqualification of counsel "is a matter committed to the sound discretion of the district court." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) (citing cases). "The authority of federal courts to disqualify attorneys derives from their inherent power to 'preserve the integrity of the adversary process.'" *Hempstead Video*, 409 F.3d at 132 (quoting *Nyquist*, 590 F.2d at 1246). In exercising this inherent power, courts "have attempted to balance 'a client's right to freely choose his counsel' against the 'need to maintain the highest standards of the profession.'" *Id.* (quoting *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (2d Cir. 1978)). "[M]otions to disqualify opposing counsel are disfavored in [the Second] Circuit because they are often

interposed for tactical reasons and result in unnecessary delay.” *Capponi v. Murray*, 772 F.Supp.2d 457, 471 (S.D.N.Y. 2009).

An established ground for disqualification is concurrent representation in which an attorney simultaneously represents one existing client in a matter that is adverse to another existing client. *GSI Commerce Solutions*, 618 F.3d at 209. “In cases of concurrent representation, [the Second Circuit] has ruled it is ‘prima facie improper’ for an attorney to simultaneously represent a client and another party with interests directly adverse to that client.” *Hempstead Video*, 409 F.3d at 133 (citing *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976)). In such circumstances, “[t]he attorney ‘must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.’” *Id.* (quoting *Cinema 5, Ltd.*, 528 F.2d at 1387). Nevertheless, absent a claim that joint representation will taint the trial, “appearance of impropriety is too slender a reed on which to rest a disqualification order except in the rarest cases. This is particularly true where . . . the appearance of impropriety is not very clear.” *Nyquist*, 590 F.2d at 1247.

In the instant case, disqualification is unnecessary because there is no evidence that the interests of Zuckerberg and Facebook are adverse to each other, and Defendants’ counsel have demonstrated the vigor of their representation of both client will not be diminished by loyalty to one over the other. In particular, as Defendants maintain, Defendants’ Response - Motion to Disqualify at 7, the potential conflict between Zuckerberg and Facebook which Plaintiff maintains exists because Facebook will want to analyze the handwriting on the Contract, but Zuckerberg will not, Plaintiff’s Memorandum - Motion to Disqualify at 8-9, is only conclusory and speculative and, by

assuming the Contract's authenticity, thus insufficient to warrant disqualification. Defendants further assure that Zuckerberg and Facebook share a "complete unity of interest" in ensuring that Plaintiff's claims are dismissed as fraudulent. Defendants' Response - Motion to Disqualify at 7-8. Nor does this action involve the assertion of any claim by one Defendant against the other. *Id.* at 8. That the interests of Zuckerberg and Facebook in this litigation are not divergent is further established by the fact that even after the issuance of Facebook's IPO, Zuckerberg retains majority control over the company. See June 20, 2012 Decision and Order (Doc. No. 451), at 7.

Plaintiff asserts in further support of the Motion to Disqualify the fact that Defendants' counsel's requirement that both clients sign informed consents operates as an admission of a potential conflict precluding joint representation. Plaintiff's Reply - Motion to Disqualify at 4. In support of this argument, Plaintiff relies on an agreement between Zuckerberg and Facebook, redacted, pertaining to the corporate structure of Facebook, to establish an actual conflict exists between Zuckerberg and Facebook. *Id.* Plaintiff further maintains such conflict cannot be waived because it is only if the Contract is found inauthentic that the absence of any conflict will be established, *id.* at 5, and it is unlikely that the Contract will be found not to be authentic because Plaintiff's expert witnesses have provided "overwhelming and largely undisputed conclusions" that the Contract is authentic. *Id.* at 5 and Exh. B (chart listing items reviewed by Plaintiff's experts with whose conclusions Defendants' experts either agree or disagree). Such assertions, however, fail to establish even the potential for a conflict between Zuckerberg and Facebook support disqualification.

Although not argued by Defendants, it has not escaped the court's attention that

Facebook is only a nominal party to this action, named only because Facebook is the depository for the assets which Plaintiff maintains Zuckerberg has misappropriated from the general partnership allegedly created by the Contract, including the business interests, opportunities and assets. Significantly, the Amended Complaint is devoid of any factual allegations that Facebook breached the Contract or engaged in any misconduct to deprive Plaintiff of the benefit of the bargain purportedly created by the Contract; rather, of the seven claims set forth in the Amended Complaint, only one, the Fifth Claim for Relief seeking a declaration of Plaintiff's ownership rights as to Facebook, is asserted against Facebook, as well as Zuckerberg. Plaintiff's Fifth Claim specifically alleges that "Zuckerberg contributed the misappropriated assets of the General Partnership to Facebook, Inc. and took the General Partnership's opportunity for himself." Amended Complaint ¶ 88(b). Plaintiff further alleges that "[b]y virtue of his 50% ownership interest in the General Partnership, Ceglia is entitled to receive 50% of the total equity interest in Facebook, Inc. received by, and promised to Zuckerberg, including, but not limited to, stock, stock options and restricted stock units." *Id.* ¶ 88(e).

Further underscoring that Plaintiff's claims against Zuckerberg cannot be diverse from Plaintiff's claims against Facebook is that Facebook did not even exist as of April 28, 2003, the date the putative Contract was signed, thus creating the alleged general partnership, nor did Facebook exist when the Contract allegedly was breached. Indeed, Plaintiff has not alleged Facebook was a party to the Contract, nor could it have been insofar as it is alleged the corporation came into existence 15 months after the Contract was executed. Amended Complaint ¶ 7 ("Facebook, Inc. was incorporated on July 29, 2004 . . ."). Nor does Plaintiff allege that, in breaching the Contract in

derogation of Plaintiff's rights under the Contract, that Zuckerberg acted as Facebook's agent thus creating vicarious liability to Facebook based on Zuckerberg's conduct. As such, assuming, *arguendo*, that Zuckerberg executed and then breached the Contract, such actions could not have created a conflict with the then non-existent Facebook.

Moreover, Plaintiff's arguments in support of the Motion to Disqualify are quixotic attempts to create issues where none exist. For example, Plaintiff asserts the failure of Lisa Simpson, Esq. and the Orrick Law Firm to sign Defendants' Response - Plaintiff's Motion to Disqualify, establishes that not all of Defendants' counsel are opposed to Plaintiff's Motion to Disqualify. Plaintiff's Memorandum - Motion to Disqualify at 9. The patent fallacy of such argument is made manifest by the fact that most of the papers filed on Plaintiff's behalf in this action are not signed by Paul A. Argentieri, Esq., who not only is Plaintiff's lead counsel, but who is the only attorney whose representation has been continuous since the action was filed in New York Supreme Court, Allegany County, on June 30, 2010. To suggest, as Plaintiff does, that the failure of one attorney of record to sign a particular document filed by another attorney for a party somehow implies the existence of a disagreement is a bald non-sequitur and specious.

Nor is there any persuasiveness to Plaintiff's assertion that the document, Plaintiff's Reply - Motion to Disqualify, Exh. A, a standard corporate indemnification agreement, creates a potential conflict between Zuckerberg and Facebook. By its terms, Zuckerberg, along with other Facebook executives covered by the agreement, is entitled to protection against claims by reason of the officers' actions on behalf of Facebook. As discussed, Discussion, *supra*, at 38-39, on July 29, 2004, when Zuckerberg breached the Contract as Plaintiff alleges, he did not act on behalf of

Facebook as Facebook was merely the entity into which Plaintiff's alleged interests created by the Contract were passed by Zuckerberg's breach. As such, Plaintiff's reliance on the indemnification agreement to create the appearance of an actual conflict is baseless.

Accordingly, Plaintiff's Motion to Disqualify is without merit and is DENIED.

## 7. **Sanctions**

Defendants have requested the court sanction under 28 U.S.C. § 1927 Plaintiff in connection with the filing of Plaintiff's Motions to Vacate and to Disqualify Counsel. Defendants' Response - Motion to Vacate at 4-5; Defendants' Response - Motion to Disqualify at 9-10. The district court has "inherent power' to award attorneys' fees against the offending party and his attorney when it is determined a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,'" *Agee v. Paramount Communications Inc.*, 114 F.3d 395, 398 (2d Cir. 1997) (quoting *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985)), as well as, under 28 U.S.C. § 1927 ("§ 1927"), against an attorney "who so multiplies the proceedings in any case unreasonably or vexatiously . . . ." A sanctions award under either basis of judicial authority requires "clear evidence" that the offending party's conduct was without merit and was taken for improper purposes. *Sierra Club*, 776 F.2d at 390 (inherent power); *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (§ 1927). "Like an award made pursuant to the court's inherent power, an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Oliveri*,



803 F.2d at 1273. Nor does § 1927 “distinguish between winners and losers, or between plaintiffs and defendants” such that a sanction award need not await the final outcome of litigation. *Id.* (quoting *Roadway Express v. Piper*, 447 U.S. 752, 762 (1980)). Rather, § 1927 “is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned with only limiting the abuse of court processes.” *Id.* Further, the presentation of factual misstatements in support of a motion can support an award of sanctions under § 1927. *Johnson v. University of Rochester Medical Center*, 715 F.Supp.2d 427, 429-30 (W.D.N.Y. 2010) (imposing sanctions against plaintiff’s attorney under § 1927 where evidence established the attorney pursued claims in a False Claims Act case attorney knew had no basis in law or fact, to wit, allegations that the defendant had made an unsolicited, libelous statement about the plaintiff when, in fact, the plaintiff’s attorney had requested and authorized the release of the allegedly libelous statement), *aff’d*, 642 F.3d 121 (2d Cir. 2011).

Moreover, Fed.R.Civ.P. 11(b) provides that

By presenting to the court a pleading, written motion, or other paper - - whether by signing, filing, submitting, or later advocating it - - an attorney or unrepresented party certifies to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed.R.Civ.P. 11(b).

Further, “[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

Fed.R.Civ.P. 11(d)(3). Moreover, although 28 U.S.C. § 1927 provides only for counsel’s liability for the excessive costs incurred by reason of an attorney’s unnecessarily, unreasonably, and vexatiously multiplying the costs of litigation, appropriate sanctions that may be awarded for a violation of Rule 11 include monetary sanctions, striking the complaint and dismissal of the action. *See Jimenez v. Madison Area Technical College*, 321 F.3d 652, 656-57 (7<sup>th</sup> Cir. 2003) (affirming district court’s “harsh sanction” of dismissal of action under Rule 11 where willful and malicious nature of the plaintiff’s flagrant Rule 11 violations, including use and filing of fraudulent letters and emails in support of fictitious allegations of racial discrimination against defendant former employer, was not abuse of discretion); *Abdelhamid v. Altria Group, Inc.*, 515 F.Supp.2d 384, 392 & n. 39 (S.D.N.Y. 2007) (dismissing amended complaint as sanction under Rule 11 where plaintiff’s counsel was aware of evidence directly contradicting many of the allegations); *Murray v. Dominick Corp. of Canada, Ltd.*, 117 F.R.D. 512, 515-16 (S.D.N.Y. 1987) (dismissing investor’s federal securities action under Rule 11 as sanction where, during presentation of defendants’ case at trial, the falsity of the plaintiff’s claims was established).

Here, the complete dearth of any evidence supporting Plaintiff’s Motion to Strike, First Motion to Compel, Motion for Discovery, Motion to Vacate, and Motion to Disqualify Counsel, as well as the fact that Plaintiff’s Motions to Vacate and to Disqualify are accompanied by requests to stay discovery pending resolution of such

motions,<sup>11</sup> gives rise to more than suspicion that such motions were filed solely to unreasonably and vexatiously multiply the proceedings, and especially to derail the schedule for the limited discovery of experts set forth in the April 4, 2012 Order. As such an award of sanctions appears warranted and Plaintiff is ORDERED TO SHOW CAUSE within ten (10) days why sanctions should not be assessed.

### CONCLUSION

Based on the foregoing, Defendants' Sixth Motion to Compel (Doc. No. 381) is GRANTED; Plaintiff's Motion to Strike (Doc. No. 385) is DENIED; Plaintiff's First Motion to Compel (Doc. No. 389) is DENIED; Plaintiff's Motion for Discovery (Doc. No. 396) is DENIED; Plaintiff's Motion to Vacate (Doc. No. 426) is DENIED; and Plaintiff's Motion to Disqualify Counsel (Doc. No. 437) is DENIED.

Plaintiff is ORDERED to produce the Kasowitz Letter **within ten (10) days** of this Decision and Order.

Plaintiff is further ORDERED to show cause, **within ten (10) days** of this Decision and Order, why he should not be sanctioned for filing the Motion to Strike (Doc. No. 385), First Motion to Compel (Doc. No. 389), Motion for Discovery (Doc. No. 396), Motion to Vacate (Doc. No. 426), and Motion to Disqualify Counsel (Doc. No. 437).

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

DATED: June 28, 2012  
Buffalo, New York

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<sup>11</sup> In a Decision and Order filed June 20, 2012 (Doc. No. 451), the undersigned denied Plaintiffs' Motions to Vacate and to Disqualify insofar as such motions sought to stay discovery.