EXHIBIT A

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June 8, 2012

Alex Southwell
Gibson Dunn
200 Park Avenue
New York, NY 10166-0193

Re: Motion for Rule 11 Sanctions

Dear Mr. Southwell:

Enclosed please find a copy of a motion for Rule 11 sanctions prepared in this case. This correspondence is your service of this motion under the 21-day "safe harbor" provision of Rule 11. As you know, under Rule 5, the date of service of this motion is the date of mailing. FRCP 5(b)(2)(c). Therefore, the 21 day safe harbor provision began on June 8, 2012, the date of the mailing of this motion to you.

I am available to discuss this matter with you in the hope that it can be resolved without judicial intervention.

Have a nice week.

Sincerely,

Dean Boland

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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

MOTION FOR RULE 11 SANCTIONS

MEMORANDUM

Plaintiff respectfully requests this court sanction Defendants for their filing of the Motion to Dismiss for fraud on the court, Doc. No. 319, containing arguments not "warranted by existing law." FRCP 11(b).

Defendants' motion to dismiss for fraud on the court, Doc. No. 319, is not warranted by existing law. In fact, their motion to dismiss for fraud on the court and the remedy Defendants seek is specifically not authorized by New York law, the substantive state law this court must apply sitting in diversity.

THIS COURT IS SITTING IN DIVERSITY ON THIS CASE

This court is sitting "in diversity" as a result of a successful action to remove this case from New York State court to this court. Doc. No. 6. Doc. No. 36-1. The court's docket also reflects that the court is sitting in diversity on this case.

COURT SITTING IN DIVERSITY IS OBLIGATED TO APPLY SUBSTANTIVE STATE LAW

It is a long standing principle of jurisprudence that a federal court sitting in a diversity of citizenship case is obligated to adhere to state substantive law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Specifically in New York state, courts sitting in diversity must apply substantive New York law. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). A prior decision by this court in the Western District of New York confirms this view. It is, of course, incumbent upon Federal District Court sitting on a diversity action to apply substantive State law. *Rowe v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 265, 266 (W.D.N.Y. 1998).

Defendants acknowledge this point in that their motion to dismiss for statute of limitations violation. That motion cites exclusive to substantive New York state law regarding a variety of issues. Doc. No. 321.

NEW YORK SUBSTANTIVE LAW RECOGNIZES INTRINSIC AND EXTRINSIC FRAUD DISTINCTION

Under New York substantive law, there is a distinction between extrinsic and intrinsic evidence when a court is asked to consider a Fraud on the Court motion. This is because New York law permits collateral attacks on judgments obtained by extrinsic, but not intrinsic, fraud. *Altman v. Altman*, 150 A.D.2d 304, 542 N.Y.S.2d 7, 9 (N.Y.App.Div.1989)). Emphasis added.

Thus, extrinsic fraud "must be in some matter other than the issue in controversy in the action." *Chenu v. Board of Trustees*, 12 A.D.2d 422, 424, 212

N.Y.S.2d 818 [quoting *Crouse v. McVickar*, 207 N.Y. 213, 218, 100 N.E. 697], aff'd, 11 N.Y.2d 688, 225 N.Y.S.2d 760, 180 N.E.2d 913, remittitur amd., 11 N.Y.2d 765, 227 N.Y.S.2d 14, 181 N.E.2d 760, cert. denied, 370 U.S. 910, 82 S.Ct. 1256, 8 L.Ed. 2d 404.

Fraud is extrinsic when it is collateral to the matter decided by the court and deprives the opposing party of an opportunity adequately to present his claim or defense, as where a defendant is induced not to defend by a false promise to discontinue the action. *DiRusso v. DiRusso*, 55 Misc. 2d 839, 844, 287 N.Y.S.2d 171, 177-78 (Sup. Ct. 1968)

Fraud is intrinsic under New York state law when it relates to the very matter decided by the court, as when perjured testimony is produced. Id.

The distinction between extrinsic and intrinsic fraud was well expressed by Judge Phillips in Chisholm v. House, 160 F.2d 632, at p. 643 (10th Cir., 1947). He said:'* * * Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Where, however, the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts pertained to an issue involved in the original action and litigated therein, the fraud is regarded as intrinsic.'1011 The distinction between extrinsic and intrinsic fraud is important because New York allows collateral attack upon any judgment only when extrinsic fraud is established.

In *Crouse v. McVickar*, 207 N.Y. 213, 218, 100 N.E. 697, 45 L.R.A.N.S., 1159 (1912) the Court said 'fraud for which a judgment can be impeached must be in some matter other than the issue in controversy in the action.' Emphasis added. See *Jacobowitz v. Metselaar*, 268 N.Y. 130, 197 N.E. 169, 99 A.L.R. 1198 (1935); *Chenu v. Board of Trustees, Police Pension Fund*, 12 A.D.2d 422, 212 N.Y.S.2d 818 (1961); *Cohen v. Randall*, 137 F.2d 441 (2d Cir., 1943), cert. denied, 320 U.S. 796, 64 S.Ct. 263, 88 L.Ed. 480 (1943). Emphasis added.

Any fraud claimed must be extrinsic fraud on the court and relate to matters other than issues that could have been litigated. Emphasis added. *Diners Club, Inc. v. Makoujy*, 110 Misc. 2d 870, 871, 443 N.Y.S.2d 116, 117 (Civ. Ct. 1981). Emphasis added. (See also *Mtr. of Holden*, 271 N.Y. 212, 218, 2 N.E.2d 631, 633—634). *Overmyer v. Eliot Realty*, 83 Misc. 2d 694, 705, 371 N.Y.S.2d 246, 258 (Sup. Ct. 1975)).

SECONDARY SOURCES RECOGNIZE INSTRINSIC/EXTRINSIC FRAUD DISTINCTION

Restatement of Judgments § 126(2)(b): Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out. Emphasis added. In addition, the legal system contains other sanctions against perjury. See *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C.1969); *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952) (Brennan, J.). "Fraud on the court is therefore limited to the more egregious forms of subversion of the legal process already suggested, those that we cannot necessarily expect to be

exposed by the normal adversary process." Id.

SECOND CIRCUIT DEFINES FABRICATED EVIDENCE AND PERJURY CLAIMS AS INTRINSIC FRAUD CLAIMS

Perjury and fabricated evidence allegations are insufficient to obtain a Fraud on the Court dismissal. Courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as "fraud on the court." See, e.g., *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 193-95 (8th Cir. 1976), cert. denied, 429 U.S. 1040, 97 S.Ct. 738, 50 L.Ed.2d 751 (1977); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972) (Claims of perjury by a witness is recognized as intrinsic fraud); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D.Wisc.), aff'd without opinion, 588 F.2d 838 (7th Cir. 1978); *Koningsberg v. Security National Bank*, 66 F.R.D. 439, 442 (S.D.N.Y.1975); *Lockwood v. Bowles*, 46 F.R.D. 625, 630 (D.D.C.1969).

Perjury and fabricated evidence are evils that can and should be exposed at trial." In addition, the legal system contains other sanctions against perjury. See *Lockwood, Shammas.*

Fraud upon the court does not exist where a judgment has simply been "obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944).

In addition, fraud which involves "witness perjury or fabricated evidence that

does not involve officers of the court and that could and should have been discovered" during the previous litigation is insufficient to establish fraud on the court. *Barrett v. United States*, No. 06–CV–1324, 2006 WL 3248396, at * 7 (N.D.N.Y. Nov.7, 2006); see also *Gleason v. Jandrucko*, 860 F.2d 556 at 559 (2d Cir. 1988) (holding that the credibility and veracity of a witness at issue in an original proceeding cannot be later challenged by way of an independent action and that evidence of alleged perjury by a witness is simply not sufficient for a finding of "fraud upon the court"); *Trowbridge, et al v. Institute for Basic Research in Developmental Disabilities* 2003 WL 21143086, at * 4 (holding that fraud upon the court is not shown by presenting evidence attacking the veracity of a witness in the original proceeding).

Although fraud on the court motions citing intrinsic fraud are more often lodged post-judgment, the logic inherent in their application remains whether filed pre-judgment or post-judgment. In sum, "neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant," *Gleason*, 860 F.2d at 560, and thus, is insufficient to justify relief under the savings clause of Rule 60. See, e.g., *Tesser v. Board of Educ. of City of New York*, No. 97–CV–6719, 2005 WL 2977766, at * 5 (E.D.N.Y. Nov. 7, 2005) (holding that allegations of witness perjury and nondisclosure during pretrial discovery does not constitute grounds for an independent action under Rule 60).

It is important to note that the key substantive law here is the law of New York state. That state law, as noted above, clearly prohibits a motion for fraud on

the court citing intrinsic fraud at any point in litigation.

DEFENDANTS' FRAUD CLAIMS JUSTIFYING EXPEDITED DISCOVERY AND DELAY OR DEFERRAL OF DISCOVERY DOC. NO. 348 ARE INTRINSIC

Defendants have no claim that the type of fraud they are alleging is extrinsic. In fact, their own words in countless pleadings and oral argument repeatedly allege the precise language that defines intrinsic fraud.

1. "[T]he Amended Complaint...is based upon a doctored contract and **fabricated evidence**." Doc. No. 40 at 1. Emphasis added.
2. "Ceglia appears to have doctored the genuine contract...and then **fabricated emails**...." Doc. No. 45 at 2. Emphasis added.
3. "[Ceglia] has previously **fabricated documents**...." Doc. No. 72 at 9. Emphasis added.
4. "[S]moking gun documents...conclusively establish that he **fabricated the purported contract** and this entire lawsuit is a fraud and a **lie**." Doc. No. 99 at 4. Emphasis added.
5. "Defendants' papers stated that certain unidentified documents confirmed Defendants' longstanding public position that **Ceglia fabricated the purported contract**...." Doc. No. 110 at 11. Emphasis added.
6. "This case is based upon on a **fraudulent contract and fabricated emails**." Hearing Transcript, June 30, 2011 at 5. Emphasis added.
7. Defendants' counsel asserts the **email exchanges** between the parties offered by Plaintiff are "**made up**." Id. at 16.

8. "This is a case where plaintiff **fabricated a purchase agreement**." Id. at 37. Emphasis added.

9. The Facebook Contract is an "**amateurish forgery**." Id. at 112.

10. "Given that Ceglia has **fabricated emails** in this case...." Doc. No. 155 at 16. Emphasis added.

11. "Defendants have already gathered substantial proof that **Ceglia fabricated the emails**...just as he **doctored the contract**...." Doc. No. 224 at 21. Emphasis added.

12. "Ceglia's motion for sanctions based upon the purported 'spoliation' of the **fabricated contract**...should be denied...." Doc. No. 237 at 6. Emphasis added.

13. "This Court granted expedited discovery on July 1, 2011, based on **Defendants' showing that Ceglia had fabricated the [Facebook Contract]**." Id. at 6. Emphasis added.

14. "Evidence[s] demonstrat[es] that [Plaintiff] **fabricated the 'emails'** in his first Amended Complaint." Id. at 12. Emphasis added.

15. "The Purported Emails themselves, which Ceglia has proffered as authentic **communications with Mark Zuckerberg, are fabricated**." Doc. No. 324 at 6. Emphasis added.

16. "This lawsuit is a fraud. Ceglia...[has] **forged documents**, **fabricated emails**...." Doc. No. 319 at 9. Emphasis added.

17. "[T]his Court granted expedited discovery to allow Defendants to assemble evidence that **Ceglia is perpetrating a fraud on the court based on his**

forged contract...and the **fabricated emails**." Id. at 9. Emphasis added.

18. "[P]laintiff had **fabricated a document** submitted in support of its claim...." Id. at 31. Emphasis added.

19. "[H]e inserted into the **fabricated contract** a historical anomaly...." Id. at 50. Emphasis added.

20. "The Purported **'emails'** quoted in the Amended Complaint are **Fabricated**." Id. at 53.

21. "When he **fabricated the emails**...." Id. at 55. Emphasis added.

22. "[T]he **fabricated 'emails'** were typed in manually." Id. at 55. Emphasis added.

23. "According to the fictitious narrative reflected in the **fabricated 'emails'**...." Id. at 56. Emphasis added.

24. "[T]he lie to the fictional narrative in his **fabricated 'emails**.'" Id. at 57. Emphasis added.

25. "Defendants have established...that Ceglia is perpetrating a fraud on the court through the submission of a **forged Work for Hire document** and **fabricated emails**." Id. at 58. Emphasis added.

26. "Of course we were not there when **Mr. Ceglia...fabricated the document**." Hearing Transcript of April 4, 2012 at 9. Emphasis added.

27. "[H]e had the **first fabricated document**...." Id. at 12. Emphasis added.

28. "Your Honor, because, I would submit, he was **trying to create an electronic version of his fabricated contract** to further his fraud...." Id. at 62.

Emphasis added.

29. "The Purported Emails themselves which Mr. Ceglia has proffered as authentic **communications with Mr. Zuckerberg, are fabricated**." Doc. No. 325 at 7. Report of Stroz Friedberg. Emphasis added.

30. "[T]he text of the **Purported Emails** themselves demonstrates that they **are fabricated**." Id. at 28. Emphasis added.

31. "[T]he text of the **Purported Emails** themselves constitutes substantial evidence that they **are fabricated**." Id. at 31. Emphasis added.

32. "This **document was fabricated** on or after February 15, 2011." Id. at 44. Emphasis added.

33. "**Ceglia's sworn declaration** has now been revealed to be **false**." Doc. No. 295 at 9. Emphasis added.

34. "[T]he story he tells in his Amended Complaint is a **lie**." Doc. No. 45 at 11. Emphasis added.

35. "Nor should the Court be forced to devote judicial resources to supervising a concocted **lawsuit that rests on a lie**." Id. at 19. Emphasis added.

There are many more instances of Defendants asserting that the basis for their claimed fraud on the court using alternatives to the words perjury and fabrication. Defendants' fraud claims are intrinsic in total. Occasionally, Defendants even explicitly confirm their view that the basis for this Court's granting of the expedited discovery order was their supposed "showing" of perjury and fabricated documents by Plaintiff.

UNDER SUBSTANTIVE NEW YORK LAW, THERE IS NO REMEDY FOR DEFENDANTS' MOTION TO DISMISS FOR INTRINSIC FRAUD

The obvious distinction between intrinsic and extrinsic fraud is clear throughout state and federal case law. Defendants by the record noted above, have no argument that their fraud claims in this case are anything other than intrinsic. Defendants will have the opportunity to bring their fabricated documents and perjury claims before a jury. Nothing could be more intrinsic to the case than the Defendants' claims of fraud repeated throughout the record of this case.

New York law does not recognize a motion to dismiss for fraud on the court reliant on intrinsic fraud. In a pre-trial setting, fraud on the court motions reliant on intrinsic fraud are not recognized because, as noted above, the adversary system of justice is designed to handle precisely such allegations. Even post-judgment, a motion for Fraud on the Court reliant on intrinsic fraud is insufficient to reverse as New York state law regards a party's trial as their opportunity to expose alleged fabricated evidence and perjury.

SECOND CIRCUIT

FEDERAL COURT SITTING IN DIVERSITY SHOULD NOT GRANT RELIEF FOR CLAIM OF INTRINSIC FRAUD IF SUBSTANTIVE STATE LAW PROHIBITS IT

In 7 Moore, Federal Practice P60.37(3) (2d ed.), page 634, the author writes, "a federal court sitting in another state, which allows relief only where the fraud is extrinsic, should not grant relief from a judgment of that state on the basis of intrinsic fraud * * * Certainly the policy of *Erie-Tompkins* demands this where the

state court judgment was rendered in a case involving only non-federal matters; and, further, the policy is in accord with that underlying res judicata and full faith and credit." *Alleghany Corp. v. Kirby*, 218 F. Supp. 164, 183-84 (S.D.N.Y. 1963) aff'd, 333 F.2d 327 (2d Cir. 1964) on reh'g, 340 F.2d 311 (2d Cir. 1965).

"It is not a judgment which could be collaterally attacked in a New York court and therefore a collateral attack must fail in this Court as well." Id. Likewise, Defendants' pre-trial motion to dismiss for fraud, reliant on intrinsic fraud as it is, "must fail in this Court as well." Id.

CONCLUSION

For the reasons noted above, Plaintiff respectfully requests this court sanction Defendants for violation of Rule 11(b)(2). Their motion to dismiss for fraud reliant on intrinsic fraud is not "warranted by existing law."

Plaintiff respectfully requests this court award attorneys fees, expert fees, costs and any other relief it deems appropriate as a sanction for Defendants' violation of Rule 11.

Respectfully submitted,

/s/Dean Boland

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