

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 1:10-cv-00569-
	:	RJA
MARK ELLIOT ZUCKERBERG and	:	
FACEBOOK, INC.,	:	
	:	
Defendants.	:	
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**DEFENDANTS’ REPLY MEMORANDUM OF LAW  
IN SUPPORT OF THEIR SEVENTH MOTION TO COMPEL**

Ceglia’s outrageous, bad faith defiance of this Court’s orders has reached a new extreme. Ceglia is now in contempt of *two* direct orders from this Court (Doc. Nos. 457, 464) to produce a document that goes to the core of this case and confirms that Ceglia’s claims are fraudulent: the Kasowitz Letter, *i.e.*, “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.” Doc. No. 457 at 8. This Court should impose severe sanctions on Ceglia and his counsel for their inexcusable refusal to comply with this Court’s direct, explicit, and repeated orders to produce the Kasowitz Letter. Indeed, Ceglia and his counsel have made clear that such sanctions are the only viable means of protecting this Court and its processes from further abuse.

On June 28, 2012, the Court granted Defendants’ Sixth Motion to Compel and explicitly directed that “Plaintiff is ORDERED to produce the Kasowitz Letter **within ten (10) days** of this Decision and Order.” Doc. No. 457 at 43. Ceglia refused. He deliberately defied this Court’s Order by taking the preposterous position that this Court had not ordered him to produce the

Kasowitz Letter. Defendants therefore filed their Seventh Motion to Compel (Doc. No. 461), seeking yet another order requiring Ceglia to produce the Kasowitz Letter, as well as imposing sanctions to compel Ceglia's compliance. On July 11, this Court ordered Ceglia to respond to Defendants' motion by July 20, and clearly and expressly ordered Ceglia to include the Kasowitz Letter as an exhibit to his response:

Plaintiff's response to the motion shall be filed not later than July 20, 2012, and shall include as an exhibit a copy of Privilege Log Item 379 and all attachments that Plaintiff was ordered to produce to Defendants, *including, as referenced on page 12 of Item 379, as an attachment to an April 13, 2011 email from Aaron Marks of the law firm of Kasowitz, Benson, Torres & Friedman LLP to Plaintiff's attorneys, "a letter responding to Mr. Vacco's communication of last evening and certain documents that are referenced in the letter," and all attachment[s] to such letter, i.e., the "certain documents that are referenced in the letter."*

Doc. No. 464 (emphasis added).

Ceglia has again refused to comply. His response to Defendants' motion does *not* include the Kasowitz Letter or its attachments as an exhibit. Ceglia has thumbed his nose at this Court by filing the same version of Item 379 that he has already produced—the version that omits the Kasowitz Letter and its attachments, and that this Court has already ruled is inadequate. There is no conceivable good faith argument that this response satisfies the Court's July 11 Order. Indeed, Ceglia offers nothing approaching a valid excuse for his refusal to satisfy his unambiguous obligation, under two orders of this Court, to produce the Kasowitz Letter and all attachments. He simply proceeds as if this Court's orders do not exist, and indefensibly attempts to reargue the merits of Defendants' Sixth Motion to Compel by claiming that the Kasowitz Letter is privileged—a claim that this Court already considered and rejected in

granting Defendants' motion. *See* Doc. No. 457 at 11 (finding it “clear that Plaintiff has failed to preserve any privilege that attached to the Kasowitz Letter”).

There is no reason whatsoever for this Court to revisit that decision and entertain what is, in substance, a baseless motion for reconsideration from Ceglia. This Court has already made clear in this same context—when denying Ceglia’s attempt to seek reconsideration of the Court’s denial of his frivolous privilege claim with respect to Item 379—that “[t]he standard for granting a motion for reconsideration . . . is strict,” and that the Court should not afford “a ‘second bite at the apple’ for a party dissatisfied with the court’s ruling by ‘relitigating old issues, presenting the case under new theories, [or] securing a rehearing on the merits . . . .’” Doc. No. 361 at 2-3 (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)). That is exactly what Ceglia seeks to do here. He argues that the Kasowitz Letter is privileged because it was not disclosed to Jason Holmberg, a non-attorney, and that even if the Kasowitz Letter was disclosed to Holmberg, that was insufficient to waive the privilege. Doc. No. 466 at 5-6; *see also* Doc. No. 432 at 2-3. But this Court has already rejected those arguments and ruled that disclosure to Holmberg of the *subject matter* of Item 379 was sufficient to waive any claim of privilege, and that this waiver applied to Item 379 *in its entirety*. That is why the Court required Ceglia to produce all emails in Item 379 and the Kasowitz Letter—regardless whether they were sent to Holmberg. *See* Doc. No. 361 at 4-5; Doc. No. 457 at 10-11. Ceglia offers no justification for reconsidering that ruling, and instead merely repeats the arguments that this Court has already denied.

Ceglia also argues that he has not waived his privilege claim with respect to the Kasowitz Letter because he was not required to include it on any privilege log. Doc. No. 466 at 4-5. Again, this Court rejected that argument in its June 28 Order when it ruled that Ceglia *was* required to include the Kasowitz Letter in his privilege log, and that he therefore waived his

privilege claim by attempting to conceal the letter and excluding it from his log. *See* Doc. No. 457 at 10-11. That ruling was plainly correct: As the Court recognized, Ceglia “does not dispute that the Kasowitz Letter contains relevant information.” *Id.* at 11. Indeed, Defendants explained in their Sixth Motion to Compel that the Kasowitz Letter was responsive to this Court’s expedited discovery orders because it contained responsive materials including, as attachments, copies of emails that this Court ordered Ceglia to produce in its August 18, 2011 Order. *See* Doc. No. 382 at 5-8. Moreover, in February 2012, Ceglia himself acknowledged that the Kasowitz Letter was responsive to this Court’s expedited discovery orders when his former counsel at Lake APC produced, in response to those orders, emails that were attached to the Kasowitz Letter and that contained handwritten notations, presumably from a Kasowitz attorney, calling attention to evidence of Ceglia’s fraud. *See id.* at 5-6. Thus, Ceglia was also required either to produce the responsive Kasowitz Letter itself or include it on his privilege log. Because he did neither, he waived any privilege claim with respect to the letter. *See id.* at 9-10.

Ceglia nevertheless argues that he was not required to include the Kasowitz Letter on his privilege log because he was obligated only to log documents that Stroz Friedberg discovered on Ceglia’s electronic media and advised Ceglia that it intended to produce. Doc. No. 466 at 4-5. That argument is ridiculous. Under this Court’s expedited discovery orders (Doc. Nos. 83, 117), Ceglia had an independent obligation to produce or log responsive hard-copy and electronic documents, regardless of what Stroz Friedberg located or identified as presumptively relevant under the Court’s Electronic Assets Inspection Protocol (Doc. No. 85). Ceglia’s contrary argument amounts to a claim that, so long as he concealed a responsive document from Defendants *and* Stroz Friedberg, Ceglia was entitled to omit that document from his privilege log without waiving his privilege claim. Of course, Ceglia cites *nothing* in support of this argument, which is so absurd that it could not conceivably have been made in good faith. This

argument is also directly rebutted by Ceglia's own August 29, 2011 production, in which Ceglia produced electronic documents and a privilege log, even though the documents produced and included in the log had not been identified as responsive by Stroz Friedberg. *See* Doc. No. 156-2. Because neither his August 29 privilege log nor any other privilege log included the Kasowitz Letter, the Court correctly concluded that Ceglia had waived any claim of privilege with respect to that document. And because Ceglia himself recognized, in creating that August 29 log, that he had an independent obligation to produce or log responsive documents, he cannot credibly argue now that he was only required to log documents identified by Stroz Friedberg. Indeed, the fact that Ceglia makes that argument at all raises a serious question as to whether additional responsive documents exist that he has omitted from his privilege log.

In any event, even putting aside Ceglia's specious argument regarding his privilege log, Ceglia fails to recognize that this Court has ruled that he has also waived his privilege claim on additional grounds—including his assertion in his response to Defendants' Sixth Motion to Compel that he had already made the Kasowitz Letter available to Defendants and their experts. *See* Doc. No. 457 at 11. As Defendants explained, and this Court accepted, Ceglia has no legitimate objection to producing a letter that he claims he already made available to Defendants. *See id.*; Doc. No. 434 at 3. Because this Court has already ruled that Ceglia has waived his privilege claim on numerous grounds, Ceglia has no good faith basis for continuing to claim that the Kasowitz Letter is privileged and refusing to produce it.

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Ceglia's blatant defiance of two explicit orders from this Court to produce the Kasowitz Letter is reprehensible—particularly because the Court has already ordered Ceglia and his counsel to show cause why they should not be sanctioned for filing a series of bad faith motions that were intended to harass Defendants and disrupt the expert discovery process ordered by the

Court. *See* Doc. No. 457 at 42-43. Ceglia and his counsel plainly have not learned their lesson, and their ongoing display of contempt for this Court's orders establishes that they have no intention of abandoning their campaign of bad faith delay and obstruction absent intervention by the Court. This Court must impose severe sanctions to bring them in line.

### CONCLUSION

This Court should direct Ceglia to produce the Kasowitz Letter immediately, and should summarily impose sanctions on Ceglia and his attorneys for their bad faith defiance of two clear orders of this Court.

Dated: New York, New York  
July 24, 2012

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