UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

RESPONSE TO ATTORNEYS FEES DEMAND BY DEFENDANTS RELATED TO SEVENTH MOTION TO COMPEL

MEMORANDUM

Rule 37(a)(5)(A) governs the payment of costs and attorneys fees related to motions to compel and accompanying orders.

"But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust." Id.

Federal Civil Rule 37(B)(2)(c) reads as follows:

> **(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.** Emphasis added.

DEFENDANTS' FAILURE TO ENGAGE IN GOOD FAITH ATTEMPT TO RESOLVE THE MATTER WITHOUT OFFICIAL COURT ACTION

Following receipt and review of this court's order on Defendant's Sixth Motion to Compel, Plaintiff's counsel immediately sought to comply with that order. Declaration of Dean Boland at ¶2. To that end, Plaintiff's counsel reviewed the court's order, Doc. No. 457, to determine the precise document, which the court identified as the "Kasowitz Letter" that Plaintiff was being ordered to produce. Id. As is clear from the record, there is more than one letter on Kasowitz letterhead involved in this case as well as multiple emails sent to and received by lawyers form the Kasowitz firm. Id. at ¶3. This court has not ordered that **all** Kasowitz emails or letters be produced to Defendants. Therefore, the description of the "Kasowitz Letter" in the court's order was critical to determining which letter was to be produced to avoid inadvertently disclosing privileged material.

The Sixth Motion to Compel described the Kasowitz Letter as follows:

> **Defendants seek a court order compelling Plaintiff to produce a [1] 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"). [2] 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...."** Doc. No. 457 at 8.

Plaintiff reviewed this description and directed Stroz Friedberg, consistent with this court's order in Doc. No. 85, to produce to Defendants all attachments to

Item 379 to insure that the Kasowitz Letter, described above as "an attachment to an email, identified in Plaintiff's privilege log as Item 379…"[1] would be produced. That direction was communicated to Defendants' counsel. Exhibit A. Defense counsel responded that Plaintiff was not in compliance with the court's order and then selectively quoted only part of the above description, i.e. number 1 above. Following receipt of Defendants' counsel's snarling email, Plaintiff approached the court to efficiently and cost-effectively resolve the matter. Exhibit B. Defendants' counsel immediately rejected that efficient and cost-effective resolution, one that both parties had relied on successfully with this court in prior disagreements. Exhibit C. Before the court had the opportunity to schedule that phone conference, Defendants' quickly filed their Seventh Motion to Compel intentionally designed to divert the court from a phone conference. That email resulted in the court declining to have a phone conference on the matter at all. Exhibit D.

Plaintiff's attempt at a brief phone conference would have resulted in Plaintiff describing **an** April 13, 2011 email and attached letter to the court to insure the court intended Plaintiff to submit that specific letter to Defendants despite:

1. The email to which the April 13, 2011 letter was attached was not disclosed to

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[1] As a point of clarification, per this court's order in Doc. No. 85, Defendants's experts were ordered to search Plaintiff's electronic evidence, produce a log of presumed relevant materials and provide that log to Plaintiff. Plaintiff then had five days to designate any items on that log provided by Defendants' experts as privileged and communicate those designations to Defendants' experts and Defendants' counsel. See Doc. No. 85. Therefore, the numbering of this item as "Item 379" was applied by Defendants' experts, not Plaintiff. And, there was no "Plaintiff's privilege log" independent of a relevant materials log produced by Defendants' experts per Doc. No. 85.

Jason Holmberg or any third party; and

2. The April 13, 2011 letter itself was not disclosed to Jason Holmberg or any third party; and
3. The April 13, 2011 letter was not an attachment to Item 379; and
4. The April 13, 2011 letter never appeared on a relevant materials log from Stroz Friedberg enabling Plaintiff to designate it as privileged.

Had the court, during that phone conference, clarified its order and indicated the April 13, 2011 letter attached to an email that was not disclosed to Jason Holmberg and an email itself that never appeared on a relevant materials log from Stroz Friedberg produced pursuant to this court's order, Doc. No. 85, still must be produced, it would have been emailed to Defendants immediately following that phone conference.

Defendants rejection of a phone conference which would have easily resolved the entire matter which was the subject of their Seventh Motion to Compel is not operating in good faith. Federal Civil Rule 37(a)(5)(A)(i). That failure to operate in good faith negates Defendants' demand for costs and attorneys fees in connection with the Seventh Motion to Compel.

Plaintiff's attempted resolution via a brief phone conference and a motion to compel would have resolved the matter. Plaintiff sought the favored method of informal resolution while Defendants sought to generate needless attorneys fees and motion practice.

PLAINTIFF'S COUNSEL SEEKS TO PROTECT AGAINST INADVERTENT

PRIVILEGE WAIVER

Compounding the problem for Plaintiff's desire to protect any privilege that had not been deemed waived, the court's scheduling order following the Seventh Motion to Compel directed Plaintiff to attach the "Kasowitz Letter" to his response. Plaintiff's counsel and Plaintiff were still reasonably uncertain as to what letter the court was ordering be attached to his response. Id. at ¶8. Obviously, attaching the wrong document, albeit a privileged correspondence between lawyers, would result in Plaintiff's privilege being waived on another front.

Plaintiff's counsel then made the reasonable decision to submit to the court **an** April 13, 2011 letter from the Kasowitz law firm to insure the court's order was describing that letter and was ordering disclosure of **that letter**. From the court's perspective, attaching the Kasowitz Letter seemed not to risk inadvertent privilege waiver because it had already been ordered produced anyhow. The court then referred to the attachment of that letter as "beyond disrespect." However, from Plaintiff's perspective, as outlined above, precisely what was being ordered to be produced was uncertain leaving the attachment of just any document to his response perilous. The wisest course of action for Plaintiff at that juncture was to somehow obtain confirmation of just what the court intended by its description of the Kasowitz Letter in its order and whether that description fit with an April 13, 2011 letter Plaintiff was aware of. This, of course, was the point of the phone conference aborted by Defendants as a strategic maneuver.

PLAINTIFF'S RESPONSE WAS SUBSTANTIALLY JUSTIFIED

The disclosure to the court of what Plaintiff had, an April 13, 2011 letter from the Kasowitz law firm, was identical in substance to what would have occurred at the requested phone conference. At that phone conference, Plaintiff would have described the April 13, 2011 letter and confirmed whether this letter was the one the court meant in its Sixth Motion to Compel order. Merely attaching the April 13, 2011 letter, or any letter for that matter, when counsel and Plaintiff were unsure whether it was the letter the court's order required attached to Plaintiff's response, could have resulted in inadvertent privilege waiver as noted above. Had Plaintiff blindly followed that course and waived some previously protected privileged document, the court could likely have admonished Plaintiff to have approached the court before submitting the letter to Defendants if Plaintiff was unsure of how to comply with the court's order. This is precisely what Plaintiff did.

The court requested an affidavit regarding the proper allocation of the attorneys fees, if any are ordered, pursuant to the court's Seventh Motion to Compel Order. A declaration from Plaintiff's counsel is included with this response by Plaintiff.

If the court finds that Defendants did operate in good faith and Plaintiff's failure to comply with the court's order was not justified, any award of attorney fees should be stayed until the pending objection to this court's order on Defendants' Seventh Motion to Compel has been decided.

Respectfully submitted,

/s/Dean Boland

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