UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' NOTICE OF MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EXTENSION OF TIME

PLEASE TAKE NOTICE that upon the annexed Declaration of Alexander H. Southwell, Esq., Defendants hereby move this Court for an Order modifying the currently-scheduled deadline to file Defendants' Reply Brief in Support of their Motion to Dismiss. Specifically, Defendants request a short extension of the currently-scheduled deadline for filing a Reply set forth in the Court's Order (Doc. No. 348), as amended by the Court's Text Order (Doc. No. 471). Good cause exists for the requested extension due, in part, to the pendency of outstanding discovery obligations from Ceglia, the fact that the deposition of one of Ceglia's experts is not scheduled until later this month, and the fact that the volume of material that must be reviewed in order to clearly present the issues to the Court demands a reasonable timeframe that exceeds the five weeks thrust upon Defendants by Ceglia's premature filing of his Opposition. Defendants respectfully request an extension from September 20, 2012 to the later of October 18, 2012, or two weeks after Plaintiff's full compliance with the outstanding discovery disputes described herein.

Additionally, Defendants respectfully move for an expedited briefing schedule and hearing on this narrow request given the current upcoming deadline for Defendants to file their Reply of September 20, 2012. Defendants respectfully propose the following expedited briefing schedule: Ceglia should file any opposition brief on or before Wednesday, September 12, 2012, and Defendants should file any reply brief on or before Thursday, September 13, 2012. That schedule allows the parties to fully present their views in time for the Court to address the extension request sufficiently in advance of the deadline.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Civil Rule of Procedure 7 of this Court, Defendants state their intention to file and serve reply papers if needed, and hereby request oral argument on this motion.

BACKGROUND

On April 4, 2012, this Court entered a calibrated scheduling order setting forth deadlines for the completion of (i) limited expert discovery, and (ii) all remaining briefing related to Defendants' pending motion to dismiss ("the April 4 Order"). *See* Doc. No. 348. The April 4 Order was the culmination of briefing and a status conference at which all parties were given the opportunity to state, on the record, the amount of time they required for completing expert discovery and the outstanding briefs. The Court heard extensive arguments from both sides, and determined that Plaintiff Paul Ceglia would have two months within which to file his expert reports in response to the motion, after which both parties would get two months to depose each other's experts. *Id.*; *see also* Doc. No. 350 at 198:25-201:5 (Transcript of Apr. 4, 2012 hearing). The Court added that "plaintiff shall file his opposition to defendants' motion to dismiss" "[t]wo months after the close of expert depositions." Doc. No. 350 at 200:23-201:1. Defendants were ordered to "file a reply within 30 days thereafter." *Id.* at 201:1-2. Thus, it was within the

contemplation of the parties—and the Court was willing to accept—that briefing on the motion to dismiss would close on November 4, 2012.

Ceglia used his entire two-month window and produced expert reports on the last day they were due: June 4, 2012.[1] Declaration of Alexander H. Southwell, Esq. ("Southwell Decl."), ¶ 2. Because the schedule set forth in the April 4 Order was calibrated, in the first instance, to Ceglia's submission of those reports, the upshot was that not a single expert deposition could begin before June 5, 2012. Over the next two months, depositions of the parties' experts took place. A total of 25 depositions were noticed, 16 of which were sought by Ceglia. To accommodate the sheer quantity of depositions and ensuing scheduling conflicts—and in apparent recognition of the compressed schedule—the Court, on a joint request from the parties, granted a brief 10-day extension of the discovery deadline (and corresponding briefing deadlines) on August 6, 2012. *See* Doc. No. 471. Under the modified schedule, discovery was extended to August 14, and the Court was prepared for all briefing on the motion to dismiss to be complete on November 14, 2012. *See id.*

Even with the extended deadline, Ceglia was unable to make one of his experts, Erich Speckin, available for a deposition within the mandated discovery period—notwithstanding that Defendants had noticed Mr. Speckin's deposition for a date prior to the original close of discovery. Southwell Decl., ¶ 9. Plaintiff's counsel refused to accept a notice of deposition for his expert, which delayed Defendants' efforts to schedule the deposition until a period when Mr. Speckin was traveling outside the contiguous United States. *Id.* Because Mr. Speckin does not

[1] Despite having acquiesced to a two-month window for filing his expert reports in setting the schedule, Ceglia moved at the last minute, on May 29, 2012, to extend the Court's June 3 deadline and seek an additional 30 days for submitting his expert reports. *See* Doc. No. 392. The Court denied that extension, finding "no grounds to warrant any modification of the scheduled due date" because Ceglia had "had ample time to comply." *See* Doc. No. 408.

return from his travels until approximately mid-September 2012, Defendants agreed, as an accommodation to his schedule, to conduct his deposition once he becomes available. *Id.* Mr. Speckin's deposition is currently scheduled for September 24, 2012, the first date his counsel indicated he was available. *Id.*

By contrast, Defendants made available all of the 16 deponents who Ceglia noticed on dates certain before the close of discovery. Southwell Decl., ¶ 7. But Ceglia elected to follow through with only five of those 16 deposition notices. As for the remaining 11 scheduled depositions—which Defendants had been diligently preparing for and stood ready to defend—Ceglia abruptly canceled them late in the game, many on less than 48 hours' notice. *Id.*[2] All told, of the 13 depositions that actually took place during the discovery period, eight were of Ceglia's experts. *Id.*, ¶¶ 7-8.

The four-month period of limited discovery produced a large quantity of expert opinions and information. Indeed, over 6,000 pages of testimony and opinions were generated, many of which consist of technical and scientific analysis. Southwell Decl., ¶ 10. The obvious intention of the April 4 Order was to give the parties sufficient time to digest and parse this material and then present it in a clear fashion to the Court.

But on August 21, 2012, a mere week after expert depositions were completed, Ceglia jumped the gun and filed his Opposition to the motion to dismiss—seven weeks before the Court's contemplated timeframe. *See* Doc. No. 481. Ceglia raced to the docket despite (or perhaps because of) (1) numerous ongoing discovery disputes related to his repeated failure to disclose material he is obligated to produce and to the uncompleted deposition of one of Ceglia's

[2] Defendants are currently seeking costs for the untimely cancellation of those depositions. *See* Doc. No. 518.

key experts, Larry Stewart; and (2) the fact that one of his experts remains unavailable for a deposition until September 24, 2012.

Under the calibrated schedule of the April 4 Order, Defendants' Reply is now due on September 20, 2012: almost two months before the contemplated end of the briefing schedule.

ARGUMENT

Ceglia's filing of his Opposition seven weeks earlier than the Court's anticipated deadline is obviously premature and smacks of his abusive litigation *modus operandi*. It also undermines the satisfactory resolution of this case. The 60- and 30-day timeframes ordered by the Court for the submission of the Opposition and Reply briefs, respectively, reflect a recognition that the volume of information generated during the period of expert discovery would require adequate time to synthesize and present cogently to the Court. A sufficient opportunity to respond is all the more important given that Defendants' pending motion would dispose of this entire action. Although Ceglia's early filing might be technically in compliance with the terms of the April 4 Order, it flouts the spirit of the briefing schedule: to allow full and studied presentations to the Court on this critical dispositive motion.

Defendants' request for a short enlargement of the time within which to file their Reply is reasonable. It is a limited, discrete extension that would keep this case substantially on track in terms of the Court's schedule. Indeed, Defendants' proposed deadline for filing the Reply will, assuming Ceglia's timely compliance with his discovery obligations, be a date before the ultimate deadline for the close of all briefing originally contemplated by the April 4 Order.[3] Any

[3] Thus, this motion is fundamentally different from Ceglia's motion to extend the time for filing his expert reports, which Defendants opposed. Unlike Ceglia's eleventh-hour motion to extend the deadline there—which was made at the tail-end of a 60-day period he, himself, requested from the Court—Defendants make this motion ten days before the scheduled Reply

delay beyond that will be entirely attributable to Ceglia's persistent obstructionism. Ceglia cannot plausibly argue that the extension will prejudice his case in any way, particularly as his attorneys first suggested the 60-day timeframe to the Court.

A. Good Cause Exists to Extend the Reply Deadline.

In these present circumstances, there is ample good cause to extend the deadline for filing Defendants' Reply. Generally, a "district court has wide discretion to grant an enlargement of time . . . if the request is made within the expiration period or as extended by previous order." *Choi v. Chem. Bank*, 939 F. Supp. 304, 309 (S.D.N.Y. 1996). That discretion is grounded in Federal Rule of Civil Procedure 6(b)(1)(A), which "provides that the Court may, for good cause shown, extend the time in which an act may or must be done where a party's request is made before the original time or any previously granted extension expires." *Cold Spring Const. Co. v. Spikes*, No. 11-CV-700S, 2012 WL 41967, at *1 (W.D.N.Y. Jan. 9, 2012); *see also Ramashwar v. City of New York*, 231 F. App'x 26, 27-28 (2d Cir. 2007) ("Federal Rule of Civil Procedure '6(b)(1) gives the court wide discretion to grant a request for additional time . . . .'" (quoting 4B Wright & Miller, Federal Practice and Procedure: Civil 3d § 1165 (2002))). "[A]n application for the enlargement of time under Rule 6(b)(1) normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." *Kernisant v. City of New York*, 225 F.R.D. 422, 431 (E.D.N.Y. 2005) (internal quotation marks omitted). In this context, the "good cause" showing requires only that the requesting "party demonstrate some justification for the issuance of the enlargement order." *Id.*[4]

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deadline, and more than seven weeks before the contemplated deadline for the close of all briefing.

[4] This motion is governed by the standard set forth in Federal Rule of Civil Procedure 6(b)(1). Although the April 4 status conference was captioned a "Rule 16(b) conference" on the

At least five reasons provide ample justification for a short extension of time within which to file Defendants' Reply.

First, there remain at least two live disputes over documents that are responsive to the Court's expedited discovery orders and that Ceglia has repeatedly refused to produce. Most, if not all, of these materials should have been disclosed months ago. The missing documents—and Ceglia's recalcitrance—are detailed in Defendants' separate motions before the Court, and are summarized below:

(1) Communications described in the April 13 Kasowitz Letter. The April 13 Kasowitz Letter, itself damning evidence of Ceglia's fraud, reveals the existence of at least three other communications that fall squarely within the scope of this Court's discovery orders and are subject to production. *See* Doc. No. 512 at 6-7. Yet Ceglia has not produced any of those documents to Defendants, forcing Defendants to file an eighth motion to compel, which is pending before the Court. *See generally, id.*

(2) Hard-copy documents described in Paul Argentieri's Declaration. Less than three weeks ago, in an August 21, 2012 declaration submitted to the Court with Plaintiff's Opposition brief, Ceglia's attorney Paul Argentieri swore to the existence of at least four hard-copies of the Work for Hire document that were created on or before June 30, 2010. *See* Doc. No. 484; Doc. No. 522 at 2. Those documents are covered by the Court's directive, issued more than fourteen months ago, that Ceglia produce "all copies of the

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docket, the Court made clear that it did not view it as such. *See* Doc. No. 350 at 80:6-81:4. As the Court explained, the only reason the hearing was labeled a "Rule 16(b) conference" is because that was the most judicious and fair way to bring the parties together for purposes of setting a briefing schedule on the motion to dismiss. *Id.* Thus, the April 4 Order was not a Rule 16(b) Scheduling Order. In any event, the standard for modifying a Rule 16(b) Scheduling Order tracks the standard applicable under Rule 6(b) in that both require "good cause" for an extension. *See Blasi v. N.Y. City Bd. of Educ.*, No. CV 00-5320, 2008 WL 2705373, at *1 (E.D.N.Y. July 3, 2008).

purported contract in hard-copy form, created on or before June 30, 2010." *See* Doc. No. 83 at 1. But the hard-copies described in Argentieri's declaration have never been produced to Defendants; indeed, the first time Defendants heard about these four hard-copies of the Work for Hire document was on August 21, 2012, when Ceglia filed the Argentieri declaration. *See* Doc. No. 522 at 3. These documents are the subject of Defendants' ninth motion to compel, which is pending before the Court. *See generally*, *id.*[5]

It would be premature to require Defendants to file their Reply without resolving these discovery issues. All of the missing materials described above go to the heart of what is at issue in Defendants' motion to dismiss: whether the Work for Hire document on which this lawsuit is based is a forgery and, consequently, whether this entire case is a fraud on the Court. The documents most critical to that determination—the communications revealed in the April 13 Kasowitz Letter and the additional hard-copies of the Work for Hire document—are the subjects of Defendants' eighth and ninth motions to compel. *See* Doc. Nos. 512, 522. It would be unfair to require Defendants to file their Reply without those materials, which Ceglia continues to improperly withhold. Nor would the Court have a complete record on which to base its ruling. The existence of these documents, standing alone, justifies an extension because that extra time will give Defendants an opportunity to inspect the missing materials (assuming their motions to

[5] There also exists a third dispute over missing documents related to Plaintiff's expert Mr. Larry Stewart, who was deposed on July 12, 2012. Southwell Decl., ¶ 11. During that deposition, Mr. Stewart repeatedly referred to documents that Defendants had not been previously provided, in violation of the parties' mutual agreement that all documents underlying his testimony would be produced prior to his deposition. *Id.* Defendants have engaged in substantial back-and-forth discussions with Ceglia's counsel regarding the documents that Mr. Stewart should have produced, but has wrongly withheld. *Id.* Defendants explicitly kept Mr. Stewart's deposition open pending production of these missing documents, *id.*, and may be compelled to seek judicial intervention in this matter too.

compel are granted) and present a full record to the Court. *Cf. Brick v. CSX Transp., Inc.*, No. 06CV622, 2007 WL 2580483, at *5 (W.D.N.Y. Sept. 4, 2007) (granting extension of time because party's ability to render complete expert reports was "dependent upon" his obtaining additional facts after the previously scheduled deadline).

Second, notwithstanding that the deadline for expert discovery was extended to August 14, 2012, Plaintiff's expert, Erich Speckin, remains to be deposed and will not be available until late-September. The reason for Mr. Speckin's out-of-time deposition—authorized by the Court's August 6, 2012 Order granting the parties' joint request for an extension, *see* Doc. Nos. 469, 471—is that he is traveling out of the contiguous United States until mid-September 2012.[6] As an accommodation to Mr. Speckin, Defendants agreed to postpone his deposition until he was available, and have now scheduled that deposition for September 24, 2012, the earliest date his counsel proposed. Southwell Decl., ¶ 9. Mr. Speckin is a potentially important expert witness because he participated in the Court-ordered Hard-Copy Document Inspection and extracted ink samples from the Hard-Copy Documents (although he did not submit an expert report for Plaintiff). Just as with the pending discovery disputes, *supra* p. 7-8, it would be premature to require the Defendants to submit their Reply without giving Defendants an opportunity to depose Mr. Speckin and analyze his testimony, particularly as the point of the limited discovery is to fully air expert opinions about the authenticity of the Work for Hire document.

Third, the Court-sanctioned expert discovery generated a significant amount of information that must be processed and analyzed for purposes of the Reply. Over 6,000 pages of

[6] Ceglia's counsel precipitated this delay by refusing to accept service of a deposition notice for Mr. Speckin—notwithstanding that Mr. Speckin is one of Ceglia's expert witnesses—and declining to consent to his deposition. Southwell Decl., ¶ 9. Thus, Defendants were forced to subpoena Mr. Speckin and, by that time, he was no longer available because he was already traveling outside the contiguous United States. *Id.*

deposition testimony and expert opinion were produced in four months. Southwell Decl., ¶ 10. The sheer volume of material that must be reviewed for purposes of drafting the Reply demands a reasonable timeframe that exceeds the five weeks thrust upon Defendants by Ceglia's premature filing of his Opposition. Furthermore, the quantity of information generated by the period of limited expert discovery was not only immense, but also complicated. To be clear, the information is not complicated in that it suggests factual disputes (of which there remain none of any consequence) or in any way undercuts the conclusion that Ceglia is attempting to perpetrate a fraud; rather, the technical details and facts testified to were complex and require careful, measured attention (and, hence, additional time) in order to clearly present the issues to the Court.[7]

It is no answer that Ceglia was faced with the same volume of information upon which to base his Opposition. Ceglia's strategy for processing and analyzing a vast quantity of information is apparently to ignore much of it or distort it beyond recognition: his brief is rife with misrepresentations, half-truths, and outright lies, not to mention recycled arguments that have already been rejected by the Court. Such departures from reality do not demand much in the way of time to draft, although they do require time to respond to.

It also bears mentioning that Ceglia, without notice or explanation, abruptly canceled 11 depositions of Defendants' witnesses that had been scheduled to take place before August 14, 2012. Southwell Decl., ¶ 7. Defendants expended a great deal of time preparing for those depositions, and stood ready to defend them until they were canceled at the eleventh-hour. *Id.*

[7] Confirming that point, page limits for the Motion to Dismiss and Opposition were, by leave of Court, increased nearly threefold: from 25 pages to 65 pages. Doc. Nos. 337, 510. That substantially increased length reflects a recognition of the complexity of the arguments and sheer volume of detail necessary to resolve these claims.

Defendants' wasted preparation for those depositions significantly cut into the time that could have been devoted to analyzing the new expert discovery.

Fourth, the briefing schedule at issue here is for a case-ending dispositive motion. Given that Defendants' arguments—if accepted— would result in a complete dismissal of this lawsuit, the Court deserves the fullest possible record on which to base its determination. As it stands, the record is incomplete because of numerous pending discovery disputes and the remaining deposition of Ceglia's expert. *See supra* pp. 7-9. Defendants should be granted the opportunity to conclude their briefing based on the full record—which will require the short extension of time requested herein—because that will give the Court the chance to bring to an end the fraud that is this entire case.

Fifth, Defendants' lead counsel, Orin Snyder, is also lead counsel in a significant case in New York Supreme Court that is scheduled to begin trial on September 19, 2012: *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, Index No. 600292/08 (Hon. Richard B. Lowe III). The trial is expected to last at least four weeks. Mr. Snyder will be involved with substantial trial preparation for that other matter up until the date the Reply is currently due, which will greatly hamper his ability to read the deposition transcripts and new discovery, and contribute to the drafting of the Reply.

B. Defendants Have Acted in Good Faith and Ceglia Will Not Be Prejudiced By An Extension of the Reply Deadline.

It being apparent that ample cause exists for extending the Reply deadline, the only remaining inquiries are whether (i) Defendants have acted in bad faith, and (ii) whether Ceglia will be prejudiced by the extension. *See Kernisant*, 225 F.R.D. at 431. Both can be disposed of summarily.

As for whether Defendants have acted in bad faith by requesting an extension, nothing could be further from the truth. Throughout this case, Defendants have litigated swiftly and in full compliance with the Federal Rules and the Court's direction. There can be no serious argument that Defendants have not pursued their defenses diligently and in prompt fashion (despite umpteen spurious filings by Plaintiff, each of which has required a written response). In terms of expert discovery, in particular, Defendants scheduled all 16 of their expert witnesses before the Court's deadline for the close of discovery, and worked hard to ensure that they stood ready to defend each of those depositions. *See* Southwell Decl., ¶ 7.

Moreover, Ceglia cannot plausibly argue that he would be prejudiced by the short extension sought here. At the April 4 scheduling conference, it was the settled expectation of all parties that briefing on the Motion to Dismiss could extend as far as November 4, 2012. *See supra* pp. 2-3. Indeed, the Court selected the two-month window for Plaintiff's Opposition (after the close of expert discovery) based upon a representation from Ceglia's counsel that a 60-day timeframe was necessary. *See* Doc. No. 350 at 183:21-184:3, 200:7-16. Unless he was always planning to file his Opposition early, and his 60-day representation to the Court was a lie, Ceglia cannot profess to be harmed by the possibility that briefing will extend into October.

CONCLUSION

For the foregoing reasons, Defendants respectfully request a short extension of time within which to file their Reply brief, until the later of October 18, 2012, or two weeks after Plaintiff's full compliance with the outstanding discovery disputes described herein. Defendants also respectfully request that this motion be heard on an expedited basis, with Ceglia ordered to file any brief opposing this motion on or before September 12, 2012 and Defendants ordered to file any reply brief on or before September 13, 2012.

Dated: New York, New York
September 10, 2012

Respectfully submitted,

/s/ Orin Snyder

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