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

MEMORANDUM IN OPPOSITION TO DEFENDANTS' EIGHTH MOTION TO COMPEL

SUMMARY

The documents sought by the Eighth Motion to Compel are privileged. They are not documents ordered by this court to be produced in any prior order. They stem from Defendants' false and now indisputably inaccurate description of Item 379 and the so-called Kasowitz Letter. Despite being ordered to produce the Kasowitz Letter, the designation of it as confidential is entirely appropriate. Defendants have been provided that letter and have described its contents in detail in unredacted pleadings provided to this court. There is no justification for removing the confidential designation except to enable Defendants to make that letter a centerpiece of their public relations campaign against Plaintiff.

THERE HAS BEEN NO COURT ORDER ORDERING PLAINTIFF TO PROVIDE THESE THREE PRIVILEGED DOCUMENTS

Not Responsive to 7th Motion to Compel:

Defendants spend the first six pages of their eighth motion to compel, Doc.

No. 512, giving the background of the seventh motion to compel in a blatant attempt to falsely imply that the three privileged documents they are now unjustly seeking were somehow responsive to the seventh motion to compel or that Plaintiff was somehow delinquent in producing the three privileged documents. The three privileged documents sought in this motion were not attached to Item 379, were not disclosed to any third party including Jason Holmberg and were never listed on a relevant materials log produced under this court's order, Doc. No. 85, and therefore remain privileged.

No Order Has Required Plaintiff to Produce These Three Privileged Documents:

The Defendants argue that these three privileged documents were ordered to be turned over by deceptively quoting portions of the Court's August 18, 2011 order.

> **The Court's August 18, 2011 Order directed Ceglia to identify and produce "all electronic copies or images of the purported contract," "all electronic versions or purported versions of any contract," and "all electronic versions of any emails or purported emails" among the relevant parties. See Doc. No. 117 ¶¶ 2-3.** Doc. No. 512 at 8**.**

Plaintiff has fully complied with the Court's August 18, 2011 order, which required Plaintiff to turn over "(C) all electronic versions of any emails or purported emails by and among Defendant Zuckerberg, Plaintiff and/or other persons associated with StreetFax ("Emails");", Doc. No. 117 at 2, and, of course, said nothing about turning over privileged documents or emails between Plaintiff's lawyers. Defendants are again misleading the court hoping their false description of what was ordered will be adopted by this court leading to more privileged documents being ordered produced.

The Three Privileged Documents Were Produced For Defendants Review:

The items sought in this motion to compel are to be found, if anywhere, on Plaintiff's electronic assets. Pursuant to this court's order, Doc. No. 85, Defendants' experts, Stroz Friedberg were entitled to make a complete copy of those electronic assets. Thereafter, Defendants' experts Stroz Friedberg were entitled to search those assets and any copies of items from those electronic assets for all items it deemed responsive to this court's expedited discovery order. If Stroz felt a located item was relevant, it was to place that item on a relevant materials log and present that log to plaintiff to enable him to designate appropriate items as privileged. Doc. No. 85. If Stroz did not feel a located item was relevant, it was not required to list that item on a relevant materials log. Pursuant to this court's order, Doc. No. 85, if an item was not listed on Stroz's relevant materials log, it is impossible that Plaintiff could have a. designated it as privileged or, b. failed to designate is a privileged.

REGULAR DISCOVERY HAS NOT BEGUN

The Court clarified in its January 10, 2012 Decision and Order that we are not in regular discovery where Rule 26 requirements apply to either party.

> **Here, the July 1, 2011 Order specifically limited discovery in this action to the categories listed therein, none of which are broad enough to include the five computers. Moreover, because no scheduling conference pursuant to Rule 16(b) has yet been scheduled, Defendants have also been exempted from participating in any discovery conference under Rule 16(f). Thus, even assuming Defendants could have been expected to reference the five**

computers in complying with Rule 26(a)(1)(A)(ii), including disclosure of 'electronically stored information,and tangible things' potentially supportive of the disclosing party's defense, such disclosure obligations have not yet attached to Defendants (or Plaintiff) in this case. Doc. No. 284 at 14.

Plaintiff has not yet been ordered in discovery to produce potentially relevant documents, other than those within the expedited discovery order, because of the unusual posture of this case, 27 months old at this point with regular discovery still aspirational.

PRIVILEGE HAS NOT BEEN WAIVED

The three documents sought in Defendants Eighth Motion to Compel are privileged. They have not been disclosed to any third parties, including Jason Holmberg. Holmberg confirmed in his declaration, Doc. No. 508 at 2, that he has not seen any Kasowitz correspondence after March 29, 2011. Plaintiff's expert Jerry Grant has clarified for the Court that neither the Kasowitz letter nor any of the three privileged documents described in the 8th motion to compel were ever attached to Item 379. Doc. No. 507 at 2.

SUBJECT MATTER WAIVER

Defendants argue that "there has been a general subject-matter waiver on the subject of the Kasowitz firm's withdrawal." Doc. No. 512 at 12. They argue that as a result of that subject-matter waiver, the three privileged documents in question should be produced to Defendants immediately.

This court has not ruled on whether a subject-matter waiver has occurred. Defendants argued as their last point in their sixth motion to compel, that "[t]hird,

even assuming that at some point the Kasowitz Letter was protected by the attorney-client privilege and the work product doctrine, the protection has been waived by the disclosure of the subject matter of the information to Holmberg, a third-party non-lawyer." Doc. No. 382 at 13. This quote deliberately repeats the lie that the Kasowitz Letter was disclosed to Holmberg. This simply ignores reality. No expert has made this claim for Defendants. In fact, Defendants' experts produced a relevant materials log that completely refutes this claim. Exhibit A. Jerry Grant, Plaintiff's expert, has produced a declaration completely refuting this claim. Finally, and most importantly, Jason Holmberg himself has produced a declaration completely refuting this claim. There is no support for Defendants' claim that the Kasowitz Letter was disclosed to Jason Holmberg. Any conclusion otherwise ignores reality.

More to the point, Jason Holmberg has declared under oath that at no time was he present for meetings at which the subject matter of the reason for Kasowitz declining to represent Plaintiff was discussed. Declaration of Jason Holmberg at ¶1-5. Therefore, his exclusion from the subject matter of the reasons for the Kasowitz law firm declining to represent Plaintiff is total. No correspondence on the topic of Kasowitz declining to represent Plaintiff was disclosed to him, which is undisputed. No meetings or conversations on that topic were had with him either. Id.

The Court stated in its June 28, 2012 Decision and Order, "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." Doc. No. 457 at 11. The court's conclusion noted above rests entirely on the now discredited claim of Defendants that the Kasowitz Letter was disclosed to Jason Holmberg. Therefore, the court's finding above, did not consider the remainder of Defendants' privilege waiving claims having stopped at the now factually inaccurate claim that the Kasowitz Letter was disclosed to Holmberg.

The District Court has not ruled on the matter of subject matter waiver, as Defendants imply. Doc. No. 512 at 12. Judge Arcara reviewed the specific question of whether "attorney-client privilege extends to Items 360 and 379 because Holmberg viewed the communications as Argentieri's agent, and not as an unrelated third party." Doc. No. 480 at 3. To this specific question, Judge Arcara affirms the April 19th, 2012 Decision and Order. Judge Arcara's adoption of the this court's order focused exclusively on reinforcing this court's conclusion that Holmberg was not an agent of Plaintiff's counsel to which privilege applied. However, Judge Arcara implicitly accepted this court's now inaccurate conclusion, adopted from Defendants' false description of Item 379, etc., that Item 379 was disclosed to Holmberg (indisputably false) and that the Kasowitz Letter was disclosed to Holmberg (indisputably false).

Defendants argument that "there has been a general subject-matter waiver on the subject of the Kasowitz firm's withdrawal," Doc. No. 512 at 12, conveniently overlooks the fact that the three privileged documents they seek do not discuss the

Kasowitz firm's withdrawal. Despite there being no subject matter waiver as noted herein, even if Defendants claim there is a subject matter waiver, that subject matter, as described by Defendants, is not the subject matter of the items sought by the Eighth Motion to Compel. There is no ethical way that Defendants could know the subject matter of these letters. None of these letters were listed on any relevant materials log provided by Defendants' experts pursuant to this court's order, Doc. No. 85. If the Defendants have been provided access to these letters already, then their assertion of knowing their subject matter makes sense. Otherwise, their claims in this regard are spurious and made in bad faith.

CONFIDENTIAL DESIGNATION OF KASOWITZ LETTER

Contrary to Defendants assertion that Plaintiff must cite a "clearly defined specific and serious injury." (Doc. No. 512 at 14), the Court correctly found in its August 12, 2011 Decision and Order "the [Joint Stipulated Protective] Order requires that the designation of confidentiality be based on a good faith belief that the designated material contains confidential information that is not publicly available "such as proprietary or confidential business, technical, sales, marketing, financial, commercial, private, or sensitive information, or information that is otherwise reasonably designable as confidential." Doc. No. 107 at 5. The Court held in its August 12, 2011 Decision and Order that Plaintiff could have held a good faith belief that certain electronic communications were covered by the Joint Stipulated Protective Order, without citing a clearly defined specific and serious injury.

The Kasowitz letter and the information contained therein is not publicly

available, contains sensitive information and was reasonably designated as confidential. For these reasons alone, the Court should uphold Plaintiff's designation as confidential. Defendants have no compelling need for full disclosure to the public of the Kasowitz letter. They have referenced the document in pleadings, including unredacted versions provided to the court. The only restriction Plaintiff's properly applied confidentiality designation places on Defendants is the inability to produce a pleading as a public relations press release detailing the contents of the letter itself.

Even if this Court rules that the Kasowitz Letter is not properly designated as confidential under this court's order, the designation should stay in place until the District Court has the opportunity to rule on Plaintiff's objection regarding the seventh motion to compel. Doc. No. 506. Without this cautious approach, the disclosure of documents now may be unrecoverable if the District Court reaches a different conclusion about whether the Kasowitz Letter was attached to Item 379 (which it indisputably was not), whether Item 379 was disclosed to Jason Holmberg (which it indisputably was not), whether the Kasowitz letter or email to which it was attached was disclosed to Jason Holmberg (which it indisputably was not) and finally, whether the subject matter of the decision of Kasowitz to decline to represent Plaintiff was disclosed to Holmberg (which it indisputably was not).

CONCLUSION

The origin of the entire conflict that the Fifth, Sixth, Seventh and Eighth motions to compel is the adoption of Defendants' now indisputably false description

of the items at issue, including Item 379 and the Kasowitz Letter as noted above and in Plaintiff's objection to this court's order on its seventh motion to compel. From the adoption of that false description the court was wilfully mislead to believe the opposite of the undisputed truth which is the following:

1. The single email that is Item 379 was not disclosed to Jason Holmberg or any third party; and
2. The Kasowitz Letter was not attached to Item 379; and
3. The email to which the Kasowitz Letter was attached was not disclosed to Jason Holmberg or any third party; and
4. The Kasowitz Letter, attached to an undisclosed and privileged email, was never disclosed to Jason Holmberg nor any third party.
5. Jason Holmberg never discussed with anyone the circumstances or reasons why the Kasowitz firm declined to represent Plaintiff therefore, there is no subject matter waiver of that issue supported by any facts in this case.

For the reasons contained in this response, Defendants' Eighth Motion to Compel should be denied.

Respectfully submitted,

/s/Dean Boland

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