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' REDACTED REPLY MEMORANDUM IN SUPPORT OF THEIR EIGHTH MOTION TO COMPEL

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INTRODUCTION

Plaintiff Paul Ceglia continues to suppress responsive communications regarding the Kasowitz firm's withdrawal by maintaining baseless privilege and confidentiality designations. In order to do so, Ceglia mischaracterizes those communications and contradicts his prior sworn account of Jason Holmberg's involvement in this case. Because Ceglia waived any applicable privilege that would have attached to the three withheld communications and has failed to justify his improper confidentiality designation of the April 13 Kasowitz Letter, Defendants' Eighth Motion to Compel should be granted in its entirety.

I. This Court Should Order Ceglia To Produce The Three Withheld Communications.

A. The Three Withheld Communications Are Responsive To This Court's Expedited Discovery Orders.

Ceglia's long-standing obligations under this Court's expedited discovery orders are clear. This 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. Moreover, in its August 15, 2012 Order granting Defendants' Seventh Motion to Compel, this Court held that because the April 13 Kasowitz Letter "is relevant to the genuineness of the dispute[d] contract," it "should have been produced to Defendants" or claimed as privileged. Doc. No. 478 at 4.

The context surrounding Item 379 and the April 13 Kasowitz Letter, as well as the content of the letter itself, demonstrate that the three withheld communications contain or attach responsive documents, are "relevant to the genuineness of the dispute[d] contract," and thus should have been produced to Defendants months ago. First, REDACTED

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so far as Defendants can discern, makes this plain:

- On March 30, REDACTED
- Later that evening, REDACTED
- On April 11, DLA Piper and Lippes Mathias replaced Mr. Connors, noticed their appearances in this case, and filed the First Amended Complaint.
- One day later, on April 12, REDACTED
- Later that evening, REDACTED
- The next day, on April 13, REDACTED

  This is the April 13 Kasowitz Letter, which Ceglia recently produced after refusing to do so for months, in defiance of two separate standing orders from this Court.

See also Unredacted Memorandum ISO Defendants' Eighth Motion to Compel at 7-9.

In the face of this precise chronology of REDACTED Ceglia implausibly asserts that the three withheld communications "do not discuss the Kasowitz firm's withdrawal." Doc. No. 540 at 6-7. This assertion defies both common sense and the documented timeline

detailed above. Again, REDACTED

Notwithstanding Ceglia's dubious characterization, it is highly likely that the three withheld communications are "relevant to the genuineness of the dispute[d] contract," contain images of the authentic StreetFax Contract and emails between the parties, and are responsive to this Court's orders. As such, Ceglia should have produced those documents to Defendants, or logged them on the grounds of privilege, more than a year ago.

B. Ceglia Waived Privilege Over The Three Withheld Communications In Two Ways.

In opposition, Ceglia maintains that all three withheld communications are privileged. Doc. No. 540 at 4-7. That is incorrect. As this Court has already determined, Ceglia waived the protection of the attorney-client privilege and work-product doctrine over the withheld communications in two ways: by failing to include them in a proper privilege log and by disclosing the subject matter of the information discussed in those withheld communications to Jason Holmberg, a third-party non-lawyer.

1. Ceglia's Failure To Include Any Of The Three Communications On Any Privilege Log.

Ceglia asserts that it was "impossible" for him to have designated the three withheld communications as privileged because those communications were not specifically identified by Stroz Friedberg in its inspection of Ceglia's electronic assets. Doc. No. 540 at 3. This assertion—which mirrors Ceglia's Rule 72 Objections to Judge Arcara, in which he seeks to overturn this Court's orders compelling disclosure of the April 13 Kasowitz Letter, *see* Doc. No.

506—is absurd. There are at least two standing orders in this case requiring Ceglia to produce documents, independent of Stroz Friedberg's inspection: (1) the July 1, 2011 Order granting Defendants' motion for expedited discovery and requiring Ceglia to produce "the original, native electronic files consisting of or containing the purported emails described in the Amended Complaint and all electronic copies of the purported emails" (Doc. No. 83 at 2) and (2) the August 18, 2011 Order explicitly ordering Ceglia to produce his electronic assets "pursuant to the Electronic Asset Inspection Protocol . . . except that . . . Plaintiff shall produce directly to Defendants all electronic copies or images of any Contract in the possession, custody, or control of Plaintiff's attorneys or other agents" (Doc. No. 117, ¶ 3). Both Orders unambiguously required Ceglia to produce the three withheld communications directly to Defendants. In the event Ceglia chose to withhold documents on the basis of a purported privilege, he was required to identify those documents on a privilege log to be timely delivered to Defendants. *See* Fed. R. Civ. P. 26(b)(5)(A); W.D.N.Y. Local R. Civ. P. 26(e)(2).

Ceglia cannot now claim to have just become aware of this obligation. He has prepared and provided multiple privilege logs to Defendants during this litigation. For example, eleven days after the Court's August 18, 2011 Order, Ceglia provided Defendants with a privilege log of 55 documents. To be clear, Ceglia prepared that log in full; it is not based on any inspection or identification of responsive documents by Stroz Friedberg. That log—like all of the others that Ceglia has prepared and proved in this case—does not include any of the three withheld communications. *See* Doc. No. 529 at 16.

These facts are indisputable—and indeed, Ceglia makes no attempt to dispute them. He continues to mischaracterize the expedited discovery ordered by this Court, going so far as to claim that it would have been "impossible" to log the three withheld communications. This

assertion is self-serving and demonstrably false. As this Court has repeatedly found, *see* Doc. Nos. 357 at 10-11, 361 at 4-5, Ceglia's failure to include the three withheld communications in a proper privilege log waived the protection of the attorney-client privilege and work-product doctrine. *See also United States v. Construction Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (failure to provide adequately detailed court-ordered privilege log waives privilege).

2. Ceglia's Disclosure To Holmberg, A Third-Party Non-Lawyer

This Court properly found that because Ceglia disclosed the information contained in Item 379 to Holmberg, Ceglia waived privilege over all information to which Holmberg was "privy," even when Holmberg was not a "direct []or indirect recipient of any specific email." Doc. No. 361 at 4; *see also Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 95-96 (W.D.N.Y. 2011). Ceglia challenged this Court's finding of subject-matter waiver by filing Rule 72 Objections to this Court's April 19 Decision and Order granting Defendants' Fifth Motion to Compel (Doc. No. 357). *See* Doc. No. 367. District Judge Arcara affirmed this Court's April 19 Decision and Order "in its entirety." Doc. No. 480 at 5 (affirming that "Judge Foschio correctly concluded that absent information indicating Argentieri employed Holmberg consistently as a legal assistant or secretary, or that Argentieri sought Holmberg's secretarial assistance with respect to Items 360 and 379, the attorney-client privilege does not apply"); *see also Bowne of New York City, Inc. v. Ambase Corp.*, 150 F.R.D. 465, 478–95.[1]

More than five months after this Court's initial finding of subject-matter waiver, and with a fresh declaration from Holmberg in hand, Ceglia now asserts that Holmberg was not privy to any information concerning Kasowitz's withdrawal. Ceglia's belated attempt to unwind his privilege waiver must be rejected. Indeed, Ceglia's latest account of Holmberg's shifting role in

[1] Ceglia alleges that Defendants pursued "the now discredited claim . . . that the Kasowitz Letter was disclosed to Holmberg." Doc. No. 540 at 6. That is false. Defendants at no point alleged that the Kasowitz Letter was disclosed to Holmberg—only that the *subject matter* of Kasowitz's retention and withdrawal was disclosed to Holmberg. *See, e.g.*, Doc. No. 512 at 10.

this litigation is belied by the extensive evidence that Defendants and this Court have already amassed.

To begin, before submitting the Holmberg declaration in opposition to Defendants' Eighth Motion to Compel (Doc. No. 541), Ceglia surrendered multiple opportunities to explain to this Court exactly what Holmberg knew about the Kasowitz withdrawal. In fact, Ceglia failed to submit a declaration from Holmberg on four separate occasions: in support of his motion for clarification of this Court's April 19 Order, his Rule 72 Objections to this Court's April 19 Order, his opposition to Defendants' Sixth Motion to Compel, and his opposition to Defendants' Seventh Motion to Compel. *See* Doc. Nos. 358, 367, 432, 466. And when Ceglia finally first submitted a declaration from Holmberg regarding the Kasowitz withdrawal—in support of his Rule 72 Objections to this Court's August 15, 2012 Order—Holmberg merely attested to what was obvious from Item 379 itself: that he had not directly received the April 13 Kasowitz Letter. *See* Doc. No. 508. But as Defendants noted in their opposition to Ceglia's Rule 72 Objections, Holmberg's first declaration was inapposite, since "it did not dispute a key factual finding made by Judge Foschio in ruling that Ceglia waived any privilege over the April 13 Kasowitz Letter: that 'Holmberg had access to the majority of the emails contained within [Item 379] . . . . [and] was privy to the information contained therein.'" Doc. No. 529 at 15-16 (quoting Doc. No. 371 at 4). In other words, in that first declaration, Holmberg never contested that he had access to the information contained within Item 379 pertaining to the subject matter of Kasowitz's withdrawal—which was the basis for Judge Foschio's ruling of subject-matter waiver.

Now, having repeatedly relinquished opportunities to submit relevant testimony from Holmberg, Ceglia has filed a declaration in which Holmberg attests that he "never discussed the subject matter of the Kasowitz lawyers declining to represent Paul Ceglia with any person."

Doc. No. 541, ¶ 4.[2] But this declaration was signed by Holmberg only after Defendants explicitly alerted Ceglia to the deficiencies in Holmberg's prior declaration. It should therefore be rejected as untimely.

Moreover, even if this Court were to consider Holmberg's untimely declaration, the facts to which Holmberg now swears contrast sharply with the record evidence and Ceglia's own prior statements. Holmberg, a wood-pellets salesman who is not a lawyer, was heavily involved in Ceglia's recruitment and retention of Kasowitz. On March 6, 2011, Holmberg emailed Paul Argentieri the so-called "Lawsuit Overview" document, a "dossier [Holmberg] put together to present the case to law firms." *See* Doc. No. 331. Two days later, on March 8, REDACTED

See Doc. No. 383-1 at 4–5. REDACTED

Id. at 52–53. On March 18, REDACTED

Id. at 89. On March 21 and 22, REDACTED

Id. at 41–42. Finally, on March 28, REDACTED

Id. at 22–23.

[2] As this Court well knows, the Kasowitz firm did not "declin[e] to represent Paul Ceglia," as Holmberg attests. *See* Doc. No. 541, ¶ 4; *see also* Doc. No. 540 at 5 (referring to "the subject matter of the reasons for the Kasowitz law firm declining to represent Plaintiff"). Rather, the Kasowitz firm REDACTED *See* Doc. No. 513-1.

Two days later, on March 30, REDACTED

And yet Holmberg—

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—now claims that he "never discussed" the Kasowitz firm's withdrawal. Indeed, Holmberg goes so far as to assert that he was not aware, until recently, that the Kasowitz firm discovered the authentic StreetFax Contract or even that the Contract existed. This is simply not credible.

Furthermore, Ceglia's own prior sworn account of Holmberg's involvement in this case conflicts with his current story. Less than seven months ago, Ceglia claimed privilege over the "Lawsuit Overview" document and Item 379, documents involving detailed discussion about the retention of outside law firms. *See* Doc. No. 310. In support of that privilege claim, Ceglia told this Court that Holmberg was Argentieri's "consultant and agent on matters pertaining to this litigation." Doc. No. 310 at 6-7. Under oath, Holmberg described his role as a retained consultant retained "to assist [Argentieri] in prosecuting Paul Ceglia's lawsuit." Doc. No. 341, ¶ 2. This Court rejected Ceglia's privilege claims, despite Ceglia's characterization of Holmberg's broad agency, finding that Ceglia had failed to submit relevant evidence of Holmberg's retention as an agent for *Kovel* purposes. Doc. No. 357 at 9-11. In denying Ceglia's Rule 72 Objections, Judge Arcara affirmed that finding "in its entirety." Doc. No. 480 at 5.

Now that it is convenient to jettison Holmberg from his core legal team, Ceglia claims that the very same lawyers Holmberg had recruited and helped to retain withdrew without Holmberg ever knowing about it. Doc. No. 540 at 5. This is absurd. Holmberg appears to shift

from privileged agent to neglected bystander, depending on the documents Ceglia seeks to suppress.

This Court's well-supported factual finding remains undisturbed: Holmberg is a third-party non-lawyer who was privy to the subject matter of the Kasowitz firm's retention and withdrawal, such that Ceglia has waived any privilege that may have otherwise applied.

II. This Court Should Overrule Ceglia's Improper Designation Of The April 13 Kasowitz Letter As Confidential.

A party who designates a document as confidential bears the burden of justifying that designation. *See Koch v. Greenberg*, 2012 U.S. Dist. LEXIS 58608, at *5 (S.D.N.Y. Apr. 13, 2012). As this Court explained in overruling most of Ceglia's initial confidential designations, that burden must be discharged with evidence of a "clearly defined specific and serious injury" resulting from disclosure. Doc. No. 107 at 4 (citing *In re September 11 Litigation*, 262 F.R.D. 274, 277 (S.D.N.Y. 2009) (internal quotation marks and citation omitted).

Ceglia does not even attempt to meet his burden. Instead, he simply asserts that "[t]he [April 13] Kasowitz letter and the information contained therein is not publicly available, contains sensitive information and was reasonably designated as confidential." Doc. No. 540 at 7–8. But Ceglia fails to identify with specificity any "sensitive" information contained in the April 13 Kasowitz Letter, or any harm that will result from that letter's disclosure. Needless to say, the desire to avoid "adverse publicity" or to conceal evidence of one's criminal misconduct is not "sufficient to justify judicial protection from disclosure." *Koch*, 2012 U.S. Dist. LEXIS 58608, at *6 (citation omitted).[3] Otherwise, a litigant would be able to cloak himself in protection of a protective order to conceal evidence of his fraud—an allowance which would engender truly perverse incentives.

[3] *See also In re Pasquale J. Vatsala Vescio*, 220 B.R. 195, 201 (Bankr. D. Vt. 1998) (providing access to documents that allegedly demonstrated fraud committed on sister federal court, and refusing "to permit any order of ours to shield a party from accountability to the Court of which we are a unit").

Failing to articulate any legitimate basis for maintaining his confidentiality designation, Ceglia is left to accuse Defendants of seeking to manufacture "a public relations press release detailing the contents" of the April 13 Kasowitz Letter. Doc. No. 540 at 8. Ceglia's claim that Defendants supposedly intend to issue a press release is not only misplaced but hypocritical, given that Ceglia currently appears to be advertising for "a seasoned writer" to draft a press release about "the effect a coming decision is going to have on [Facebook's] stock price." *See* Supplemental Declaration of Alexander H. Southwell, Ex. A; *see also* Ex. B. These tactics are consistent with Ceglia's long-standing objective—reflected in the "Lawsuit Overview" document—to extort a settlement from Defendants. This Court should overrule Ceglia's improper confidentiality designations of the April 13 Kasowitz Letter.

CONCLUSION

For the reasons set forth herein, and in Defendants' Eighth Motion to Compel and For Other Relief (Doc. No. 512), Defendants respectfully request that this Court order Ceglia to immediately produce to Defendants, along with all attachments and/or embedded images:

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In addition, Defendants request that the Court overrule Ceglia's improper designation of the April 13 Kasowitz Letter as confidential, and award Defendants their attorneys' fees and costs related to their Eighth Motion to Compel. In the alternative, the Court should inspect

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in camera to assess Ceglia's privilege claims.

Dated: New York, New York
September 20, 2012

Respectfully submitted,

/s/ Orin Snyder

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