

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

Defendants.

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

**DEFENDANTS’ MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF’S
MOTION TO STRIKE NEW EXPERT REPORTS AND FOR ORDER PROHIBITING
THE FILING OF NEW EXPERT REPORTS IN SUPPORT OF DEFENDANTS’
MOTION TO DISMISS FOR FRAUD ON THE COURT**

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MEMORANDUM OF LAW

On August 9, 2012, Defendants provided to the Court the supplemental report of Gus R. Lesnevich (the “Supplemental Lesnevich Report”), in which Mr. Lesnevich identified 12 significant differences between purported copies of the second page of the Work for Hire document. This supplemental report reinforces the conclusion set forth in Mr. Lesnevich’s initial report—that Ceglia has proffered two different physical documents as the fraudulent Work for Hire document on which he is suing. Mr. Lesnevich also described in this supplemental report the overwhelming evidence that Mr. Zuckerberg’s signature and initials on the version of the Work for Hire document that Ceglia proffered for examination in 2011 are forged.

Ceglia seeks to bar the Court from considering this additional evidence of fraud and has moved to strike the Supplemental Lesnevich Report as untimely. But Ceglia has identified no support for this drastic remedy, and in fact, the authority Ceglia vaguely references is facially inapplicable. This Court has directed Defendants to produce “all reports” documenting their experts’ findings from the expedited discovery inspections. Doc. No. 83 at 3. That is an ongoing obligation, and Defendants’ submission of the Supplemental Lesnevich Report is accordingly squarely within the Court’s order. Ceglia’s attack is meritless.

BACKGROUND

Gus Lesnevich is a Forensic Document Examiner with more than 40 years of experience in his field. *See* Doc. No. 329, Ex. E at 1. Among his many qualifications is an eight-year term with the United States Secret Service. *See id.* He has testified as an expert in over 500 cases, both civil and criminal. *See id.*

On July 1, 2011, this Court granted Defendants’ Motion for Expedited Discovery and directed Ceglia to produce both hard-copy and electronic documents for Defendants’ examination. Doc. No. 83. The Court also ordered Defendants to “provide to the Court and

Plaintiff all reports documenting the findings of that examination.” *Id.* at 3.¹ On July 14-16, 2011, Ceglia presented a hard-copy Work for Hire document to Defendants’ forensic document examiners, including Mr. Lesnevich. Subsequently, Ceglia also produced various electronic images of what purported to be the same Work for Hire document, which images were created at different times by Ceglia’s attorneys and experts.

On March 26, 2012, Defendants filed their Motions to Dismiss and for Judgment on the Pleadings. *See* Doc. Nos. 318, 319, 320, 321. In support of their Motion to Dismiss for Fraud, Defendants filed numerous expert reports, including Mr. Lesnevich’s initial report. Doc. No. 329. In that report, Mr. Lesnevich concluded, beyond a reasonable doubt, that Ceglia had proffered at least two different versions of the Work for Hire document during this litigation: one that he attached to his Complaint in 2010 and a different version that he produced to Defendants’ experts for examination in 2011. To reach that conclusion, Mr. Lesnevich analyzed four different electronic images of the Work for Hire document;² Mr. Lesnevich focused exclusively on the first page of that document, since it contains all of the fraudulent references to “The Face Book” or “The Page Book.” In his initial report, Mr. Lesnevich identified at least 20 significant dissimilarities among the four different images of page 1 of the Work for Hire document, leading

¹ The Court’s August 18, 2011 Order (Doc. No. 117) effectively reiterated that directive. *See* Doc. No. 117, ¶ 9.

² Specifically, Mr. Lesnevich analyzed an image of the Work for Hire document in TIF file format sent by Ceglia to his attorney Paul Argentieri on June 27, 2010 (Q-1); an image of the Work for Hire document attached to Ceglia’s Complaint, filed June 30, 2010 (Q-2); an image of the Work for Hire document taken by Ceglia’s expert Valery Aginsky during his January 13, 2011 examination of the Work for Hire document (Q-3); and an image of the Work for Hire document taken by Defendants’ expert Peter V. Tytell during Defendants’ July 14, 2011 examination of the Work for Hire document presented by Plaintiff’s counsel Paul Argentieri (Q-4). *See* Doc. No. 329 at 2.

him to conclude that Ceglia had proffered at least two different versions of the Work for Hire document.³

Defendants concurrently moved to stay discovery pending resolution of their dispositive motions. *See* Doc. Nos. 322, 323. In its April 4, 2012 Order, this Court granted that motion in part and amended the expedited discovery timetable. Doc. No. 348. Specifically, the Court stayed “general discovery,” instituted a “limited period of expert discovery,” and required Ceglia to file his expert reports opposing Defendants’ Motion to Dismiss within 60 days. The Court also provided for expert depositions and established deadlines for Ceglia’s opposition to Defendants’ Motions to Dismiss and for Judgment on the Pleadings.

Nothing in this Court’s April 4 Order terminated or even modified Defendants’ continuing obligation to produce “all reports” documenting their experts’ findings from the Court-ordered examinations. And nothing in the April 4 Order set a deadline by which expert examination must be completed. Ceglia concedes as much, noting that the April 4 Order was silent as to what he describes as “new” and “surrebuttal” reports. Doc. No. 500 at 2.

Throughout the spring and summer of 2012, Mr. Lesnevich continued his examination of those same images of the Work for Hire document, focusing on the second page. During his examination, Mr. Lesnevich identified at least 12 significant dissimilarities among the different images of page 2 of the Work for Hire document. These findings confirmed Mr. Lesnevich’s initial conclusion: Ceglia had proffered at least two different versions of the Work for Hire document during this litigation. In addition, Mr. Lesnevich examined the handwriting on the version of the Work for Hire document that Ceglia proffered for examination in 2011 and

³ In his Motion to Strike, Ceglia repeatedly crows that he has “discredited” what he terms “Defendants’ key theory, the ‘page one substitution theory.’” *See* Doc. No. 500 at 4-6. This argument is a strawman: none of Defendants’ experts, including Mr. Lesnevich, has ever espoused a purported “page one substitution theory” or attested that the second page of the Work for Hire document is authentic.

determined that Mr. Zuckerberg's purported signature and initials are traced forgeries. *See* Doc. No. 472-1.

During this same period, the parties noticed and conducted expert depositions. Defendants noticed and conducted eight depositions of all of Ceglia's experts. Ceglia, on the other hand, noticed eleven depositions of Defendants' experts and conducted only five of them—he cancelled the other six depositions, all with less than 48 hours' notice.⁴

Mr. Lesnevich was one of the experts whose deposition Ceglia cancelled. The parties had scheduled Mr. Lesnevich's deposition on the mutually agreed-upon date of August 8, 2012. But, less than 48 hours before Mr. Lesnevich's deposition was scheduled to begin, Ceglia cancelled the deposition via email, deeming it "unnecessary." Doc. No. 500 at 5. Defendants notified Ceglia that it had been their intention to provide supplemental findings from Mr. Lesnevich, which would now have to be provided in written form. *See* Aycock Dec., Ex. A. Defendants then filed the Supplemental Lesnevich Report on August 9, five days before the scheduled close of expert depositions and more than two months before the scheduled deadline for Ceglia's opposition to Defendants' dispositive motions. *See* Doc. No. 472-1.

At no point did Ceglia attempt to reschedule Mr. Lesnevich's deposition or request more time to study Mr. Lesnevich's supplemental findings before waiving his right to take Mr. Lesnevich's deposition—requests which Defendants certainly would have accommodated. Instead, Ceglia allowed the opportunity to conduct expert depositions to pass, filed his opposition to Defendants' Motion to Dismiss for Fraud nearly two months before the Court's scheduled deadline, and filed the instant Motion to Strike.

⁴ Defendants have moved for reimbursement of the reasonable fees and costs incurred as a result of Ceglia's repeated failure to provide adequate notice of cancellation. *See* Doc. No. 518.

ARGUMENT

There is no valid basis for striking the Supplemental Lesnevich Report. Defendants' submission of the Supplemental Lesnevich Report complies with their ongoing obligation to disclose "all reports" of their expedited discovery examination. Moreover, Ceglia has identified no authority that compels this Court to deny itself a complete record from the expedited discovery period on the "primary authenticity issue" in this litigation—and there is none. Accordingly, Ceglia's Motion to Strike should be denied.

I. Defendants Carry an Ongoing Obligation to Disclose Expert Reports.

Mr. Lesnevich's supplemental report is proper—indeed, mandatory—because it complies with the Court's long-standing directive to "provide to the Court and Plaintiff all reports documenting the findings of" Defendants' examination. Doc. No. 83. Notably, this Court did not set a deadline for the submission of Defendants' expert reports. And at no point has the Court amended or superseded Defendants' continuing obligation.

Moreover, this Court has repeatedly emphasized its preference for a complete record from the expedited discovery period. Most recently, in its September 14, 2012 Order granting Defendants' motion for extension, the Court noted the "strong imperative that all relevant facts be presented to the court without compromising fairness to the parties, in order that justice be obtained." Doc. No. 542 at 3. That interest is particularly compelling since Plaintiff "seeks extraordinary damages" and his claim implicates "significant economic interests." *Id.* at 1-3. In his supplemental report, Mr. Lesnevich offers this Court substantial evidence that reinforces his initial conclusion: that Ceglia created multiple versions of his fraudulent Work for Hire document. Defendants' submission of that supplemental report satisfies the Court's desire for a complete record from the expedited discovery period on the "primary authenticity issue" in this litigation. *Id.* at 3.

II. Ceglia Has Identified No Authority That Warrants His Desired Remedy— And There Is None.

The only authority that Ceglia identifies in support of his motion to strike is facially inapplicable, and his motion should be denied for that reason alone. Specifically, Ceglia suggests—wrongly—that this Court should strike the Supplemental Lesnevich Report under Federal Rules of Civil Procedure 26 and 37. *See* Doc. No. 500 at 9-10.

Rule 37 authorizes preclusion of discovery information in narrowly defined circumstances that do not exist here. A court may preclude the submission of supplemental information under Rule 37 only (1) where a party has failed to provide that information “as required by Rule 26(a) or (e),” and (2) such failure was not “substantially justified or harmless.” Fed. R. Civ. P. 37(c)(1); *see also Lore v. City of Syracuse*, No. 5:00-CV-1833, 2005 U.S. Dist. LEXIS 30328, at *8 (N.D.N.Y. Nov. 17, 2005) (holding that “[t]here must be a violation of Fed.R.Civ.P. 26(a) or 26(e)(1) in order for there to be a preclusion sanction [under Rule 37]”). Both parties agree that Rule 26 has not and does not govern the Court-ordered expedited discovery, including the parties’ submission of expert reports. As Ceglia recently observed, “we are not in regular discovery where Rule 26 requirements apply to either party.” Doc. No. 540 at 3. Thus, preclusion under Rule 37 is improper, and Ceglia’s motion to strike should be denied as baseless for this reason alone.⁵

⁵ The two out-of-circuit cases that Ceglia offers this Court in support of his drastic remedy are inapposite. Citing to *Keener v. United States*, Ceglia suggests that under no circumstances may supplemental reports do more than merely “correct[] inaccuracies” in an initial report. *See* Doc. No. 500 at 2 (*citing Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998)). This is incorrect. *Keener*, a Montana case cited repeatedly by Ceglia, held that a second report which “provides opinions that go to the heart of [a] case” cannot be considered either a rebuttal or a supplement to an initial report that is “tantamount to a non-opinion.” That is, where a second report “is so substantially different from the first report,” the second report cannot be said to reasonably provide either supplemental or rebuttal findings. *Id.* at 642. This unsurprising holding is not implicated here: Mr. Lesnevich’s supplemental findings directly reinforce his initial conclusion that Ceglia proffered to Defendants and this Court multiple versions of the Work for Hire document that were forged.

Nor does *Coles v. Perry* compel this Court to strike the Supplemental Lesnevich Report. That case merely reiterates the principle that a party cannot “supplement[] her report by addressing a new matter after discovery

Moreover, even if Rule 26 (and Rule 37) were applicable, Defendants' purported "failure" to include Mr. Lesnevich's supplemental findings in his initial report was both substantially justified and harmless. In his initial report, Mr. Lesnevich reasonably focused his analysis on the different images of page 1 of the Work for Hire document, which contains all of the fraudulent references to "The Face Book" and "The Page Book" and purports to provide Ceglia with his (non-existent) ownership interest. By identifying numerous dissimilarities among those different images of the Work for Hire document, Mr. Lesnevich established, beyond a reasonable doubt, that Ceglia has created multiple forgeries. Mr. Lesnevich has now identified numerous dissimilarities on the second page of those same images—a finding that simply reinforces his initial conclusion.

Nor has Ceglia identified any harm resulting from Defendants' filing of the Supplemental Lesnevich Report. Desperate to avoid the corroborative evidence of fraud detailed by Mr. Lesnevich, Ceglia asserts that "[t]o allow an additional report in at this late hour, after depositions, costing over \$100,000 have been conducted, is unfair, unbalanced, and prejudices Plaintiff." Doc. No. 500 at 3. But Ceglia's allegation of prejudice is both misplaced and hypocritical.

Defendants filed the Supplemental Lesnevich Report—which further supports the conclusion in his initial report—before the scheduled close of expert depositions and long before the scheduled deadline for Ceglia's opposition to Defendants' Motions to Dismiss. Defendants notified Ceglia of their intention to provide supplemental findings and made Mr. Lesnevich available to be deposed regarding those findings. Ceglia cancelled Mr. Lesnevich's deposition with less than 48 hours' notice; he has made no effort to reschedule it. In sum, Ceglia has

has ended." *See* 217 F.R.D. 1, 43 (D.D.C. 2003). Defendants filed the Supplemental Lesnevich Report before the close of expert depositions and more than two months before the deadline for Ceglia's opposition to Defendants' Motions to Dismiss.

voluntarily relinquished the opportunity to test Mr. Lesnevich's supplemental findings during deposition; he cannot now be heard to complain about this self-inflicted "prejudice" that he has taken no action to remedy.⁶

Finally, courts within the Second Circuit have made clear that the sanction of exclusion is a "drastic remedy [that] should be exercised with discretion and caution." *Morgenstern v. County of Nassau*, No. 04-CV-0058 (JS) (ARL), 2008 U.S. Dist. LEXIS 91746, at *1 (E.D.N.Y. Sept. 29, 2008) (refusing to strike two of three witness affidavits despite submitting party's failure to adequately disclose under Rule 26(a)). Indeed, even when a supplementing party has violated Rule 26 in a way that is neither substantially justified nor harmless, preclusion remains a discretionary (and severe) remedy. *See Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006); *Lore*, 2005 U.S. Dist. LEXIS 30328, at *9 (finding that "[e]ven in the face of missed deadlines, excluding expert testimony can frustrate the Federal Rules' overarching objective of doing substantial justice to litigants.") (internal citations omitted). Even if it were authorized (which it is not), imposition of such a sanction under Rule 37 would be completely unwarranted and would contradict this Court's oft-stated preference for a full and complete record.

CONCLUSION

Ceglia's efforts to bar this Court from considering additional substantial evidence of his fraud, as well as his request to prohibit Defendants from submitting any additional reports, should be rejected as meritless. For the foregoing reasons, Defendants respectfully request that this Court deny Ceglia's Motion to Strike.

⁶ Ceglia suggests that Defendants' concerns with prejudice resulting from scheduling depositions prior to Ceglia's submission of expert reports is equally applicable here. Doc. No. 500 at 8-9. That is false. This Court, at Defendants' urging, scheduled depositions of experts to take place after those experts' reports were filed, consistent with typical practice. *See* Doc. No. 350 at 184. Ceglia ignores that he would have had the opportunity to do the same in this case: Defendants filed the Supplemental Lesnevich Report before the scheduled close of expert depositions. After reviewing the Supplemental Report, Ceglia could have tested Mr. Lesnevich's supplemental findings during deposition, but he chose not to do so. Thus, Defendants' filing of the Supplemental Lesnevich Report before the scheduled close of expert depositions is entirely consistent with this Court's April 4, 2012 Order.

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