

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and  
FACEBOOK, INC.,

Defendants.

x

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

x

**DEFENDANTS' MEMORANDUM IN SUPPORT  
OF THEIR MOTION FOR PRODUCTION**

Thomas H. Dupree, Jr.  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 955-8500

Orin Snyder  
Alexander H. Southwell  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue, 47th Floor  
New York, NY 10166-0193  
(212) 351-4000

Terrance P. Flynn  
HARRIS BEACH PLLC  
726 Exchange Street  
Suite 1000  
Buffalo, NY 14210  
(716) 200-5120

September 27, 2012

## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
FACTUAL BACKGROUND.....	3
1.    The Taking Of Samples During The Court-Authorized Hard-Copy Document Inspection.....	3
2.    June 4, 2012 Expert Reports of Ceglia's Experts, Walter Rantanen And Larry Stewart.....	6
3.    July 11, 2012 Deposition Of Larry Stewart.....	7
4.    Despite Defendants' Numerous Attempts To Meet-And-Confer, Ceglia Refused To Provide Requested Information About Stewart's Sampling.....	12
ARGUMENT .....	13
I.    This Court Should Order Ceglia And Stewart To Produce All Documents Reflecting Stewart's Paper Sampling From The Work For Hire And Specifications Documents.....	14
A.    The Evidence Establishes That The Vials 7 And 9 Samples Are From The Specifications Document, Not the Work For Hire Document.....	14
B.    Stewart Insists That The Vials 7 And 9 Samples Are From The Work For Hire Document Despite Evidence To The Contrary.....	18
II.    This Court Should Order Ceglia And Stewart To Produce All Documents Reflecting Stewart's Ink Sampling From The Work For Hire And Specifications Documents.....	20
CONCLUSION.....	22

## PRELIMINARY STATEMENT

During the course of expedited discovery, Defendants discovered that Plaintiff's document and ink expert, Larry Stewart, made a critical error—he had the wrong samples tested. And now Stewart and Ceglia appear to be lying and withholding documents in an attempt to cover up the mistake and the apparently false statements in Stewart's report. Defendants, by this motion, seek additional documents from Stewart's files—documents Ceglia has promised to provide, but has been hiding—so that the Court can properly consider Stewart's report and Ceglia's arguments in opposition to Defendants' Motion to Dismiss.

Stewart declared under oath in his expert report, and testified at his July 11, 2012 deposition, that he sent paper samples from each page of the Work for Hire Document—the forged contract on which Ceglia's claims rest—to Ceglia's paper expert for fiber testing. That expert, Walter Rantanen, concluded that the paper samples could have come from the same mill and production run, and Ceglia relies on that conclusion in arguing that the Work for Hire Document is authentic. However, all of the evidence that is currently available to Defendants contradicts Stewart's assertion that he sent Rantanen samples from the Work for Hire Document, and demonstrates instead that the samples Stewart sent to Rantanen came from a different document—a six-page, “StreetFax Back-End Technical Specification” document that the parties agree Ceglia and Defendant Mark Zuckerberg signed on April 28, 2003 (“Specifications Document”), and that does not mention Facebook. Because the authenticity of the Specifications Document is not in dispute, Rantanen's analysis of the Specifications Document is irrelevant in this case. Thus, Ceglia's reliance on Rantanen's conclusions in his response to Defendants' Motion to Dismiss is either mistaken or deliberately misleading.

This is not the only mistruth Defendants have discovered in Stewart’s deposition testimony. Stewart also testified in his deposition that he extracted samples from the handwritten ink on the Work for Hire Document and the Specifications Document (together, the “Hard-Copy Documents”), and that those ink samples are still in his possession. But Plaintiff’s other ink expert—who conspicuously did not file a report with the Court—testified that he took all of the ink samples available to Plaintiff during the examination of the Hard-Copy Documents, and that Stewart took none.<sup>1</sup> And again, all of the evidence currently available to Defendants—including documents, notes, testimony, and video—demonstrates that Stewart did not take ink samples from either of the Hard-Copy Documents. This evidence calls into serious question the veracity of Stewart’s report and testimony.

Defendants believe that Stewart has documents that will confirm that his statements regarding the paper samples he sent to Rantanen and his supposed ink sampling are false. Although Defendants have made numerous requests that Ceglia produce these documents pursuant to the parties’ agreement to a mutual exchange of expert documents, he has refused—even while also taking the absurd position that he has already produced them. Because these

---

<sup>1</sup> This is not the first time that Stewart has tried to take credit under oath for ink analysis actually performed by a colleague. For this same conduct, in 2004, Stewart was indicted by a grand jury and tried for perjury for his testimony in the criminal trial of *United States v. Martha Stewart and Peter Bacanovic*, 03 Cr. 717 (MGC) (S.D.N.Y. 2004). The first of the two counts with which Stewart was charged was for his false statements that he himself had personally performed thin-layer chromatography (TLC) analysis on a specific ink entry, when in fact his subordinate had. *See* Complaint, *United States v. Stewart*, No. 04 CR 554 (S.D.N.Y. May 21, 2004). While he was ultimately acquitted, interviews with jurors indicate that his acquittal was due in part to the jury’s skepticism of the testimony of Stewart’s subordinate, who had previously lodged a sexual harassment claim against him. *See* Colin Moynihan, Ink Expert in Stewart Trial Found Not Guilty of Perjury, N.Y. TIMES, Oct. 6, 2004 (noting jurors’ disbelief of Susan Fortunato’s testimony).

documents are critical to the Court's consideration of Stewart's and Rantanen's expert reports and testimony, Defendants respectfully request that the Court order Ceglia and Stewart to produce them. Specifically, Defendants request an order:

- (1) Directing Ceglia and Stewart to produce any and all documents reflecting Stewart's sampling of the Work for Hire Document and Specifications Document, including documents reflecting Stewart's ink sampling, if any, and the two pages of inventories (discussed in greater detail below) that Stewart used at the July 25, 2011 inspection to record the contents of his sampling vials; and
- (2) Directing Stewart to provide a sworn declaration (a) stating clearly whether the paper samples he sent to Rantanen were extracted from the Work for Hire Document or the Specifications Document, and citing any documentary support; (b) stating clearly whether he took ink samples from the Work for Hire Document and Specifications Document and, if so, how many he took, when, from where, and how many he has in his possession today; and (c) stating that he has produced directly to Defendants any and all inventories of all his vials of samples taken from the Work for Hire Document and Specifications Document, including the two pages of inventories that he used at the July 25, 2011 inspection to record the contents of his sampling vials.

## **FACTUAL BACKGROUND**

### **1. The Taking Of Samples During The Court-Authorized Hard-Copy Document Inspection.**

In June 2011, Defendants moved for expedited discovery that would include inspection and sampling of the purported "original" of Ceglia's Work for Hire Document. Doc. No. 45. Defendants explained that this inspection and sampling would allow them, among other things, to conduct chemical ink dating of the handwritten ink on the Work for Hire Document. *See, e.g.*, Doc. No. 53. Ceglia similarly expressed a desire to conduct chemical testing on physical samples of the Work for Hire Document in his Cross-Motion for Expedited Discovery. *See* Doc.

No. 58. In particular, Ceglia requested the creation of a “protocol for mutual destructive testing of original documents” so that both parties could conduct “destructive testing . . . to determine the age of the ink used” on the Work for Hire Document. Doc. No. 58 at 5; *see also* Osborn Decl. (Doc. No. 62) ¶ 11, Aginsky Decl. (Doc. No. 66) ¶¶ 11-14.

On July 1, 2011, this Court granted expedited discovery (Doc. No. 83) and adopted a Hard-Copy Inspection Protocol (Doc. No. 84) (“Hard-Copy Protocol”) the parties prepared governing the inspection of any hard-copy documents that Ceglia produced (the “Hard-Copy Inspection”). During the Hard-Copy Inspection, Defendants’ ink expert, Gerald LaPorte, took physical samples from the Work for Hire Document and later conducted ink dating analysis on those samples; his analysis determined that it was “virtually certain” that the ink used to make the handwritten interlineation on page 1 of the Work for Hire Document—purporting to date from April 2003—was less than two years old. *See* Doc. No. 326 at 2.<sup>2</sup> Despite Ceglia’s stated intention to the Court of performing ink dating, none of his experts that have filed reports with this Court have even attempted to conduct chemical ink dating analysis.

Because the parties’ experts needed to examine Ceglia’s Hard-Copy Documents before determining how many samples could be taken from those documents, neither the July 1 Order nor the Hard-Copy Protocol spelled out the number of physical samples of ink, toner, and paper that could be taken. The Hard-Copy Protocol simply required that the parties provide notice of such testing, and provided that any physical sampling must be done in the presence of both parties’ representatives. *See* Doc. No. 84 at ¶¶ 3-4. The precise number of samples that could be

---

<sup>2</sup> Defendants’ expert Dr. Lyter also took samples of the ink, but the ink dating methodologies he intended to perform were thwarted by “the physical condition of the Work for Hire document and the manner and degree of deterioration of the ink appearing on the document.” Doc. No. 328 at 8.

taken during the Hard-Copy Inspection was negotiated between the parties at the time of the inspection itself. *See* August 4, 2011 Southwell Decl. (Doc. No. 97) ¶¶ 30-38.

On July 16, 2011 (the first day of sampling), the parties agreed on the specific number and general locations of the ink, paper, and toner samples that each party would initially take from the Hard-Copy Documents.<sup>3</sup> *See* Doc. No. 97 ¶ 33, Doc. No. 97-8. The parties agreed that each party was initially authorized to take 20 paper samples from each page of the Work for Hire Document and the Specifications Document; 20 toner samples from each page of those documents; and 34 samples of handwritten ink from various locations on each of those documents. The ink sampling agreement was carefully negotiated due to the limited amount of handwritten ink on the documents, as well as its importance to the case. Specifically, the parties agreed that they each would take the following ink samples:

- 10 ink samples from the interlineation in each document, located on page 1 of the Work for Hire Document and page 4 of the Specifications Document;
- 2 ink samples from each letter of the purported “PC” initials next to the interlineation in each document;
- 2 ink samples from each letter of the purported “MZ” initials next to the interlineation in each document;
- 10 ink samples from the purported “Paul Ceglia” signature and date of each document; and

---

<sup>3</sup> The parties agreed that Defendants’ experts would take a certain number of samples, and that Ceglia’s experts would then extract the same number of samples. The parties further agreed that if, after both sides took the agreed number of ink samples, there was sufficient additional ink available, the parties would discuss taking additional ink samples. *See* Doc. No. 97 ¶¶ 32-38. Despite this agreement, and despite the fact that there was sufficient ink available, Ceglia’s counsel refused to allow Defendants’ experts to conduct additional ink sampling. *Id.* Defendants were forced to seek additional ink sampling in their August 4, 2011 Cross Motion to Compel. *See* Doc. Nos. 95. The Court granted that motion and permitted Defendants to take 30 additional ink samples from the Work for Hire and Specifications Documents. *See* Doc. No. 117 ¶ 6; *see also* Doc. No. 112 ¶ 8. Defendants’ experts took these samples on August 27, 2011 in the presence of Ceglia’s counsel. This Court has never authorized, nor have the parties ever agreed to, any additional paper or toner sampling.

- 10 ink samples from the purported “Mark Zuckerberg” signature and date of each document.

Each party was permitted to apportion the allotted samples among its own experts as it saw fit. At the Hard-Copy Inspection in Buffalo, Defendants’ experts, LaPorte and Lyter, took samples from the Hard-Copy Documents on July 16 and 19, 2011, respectively. *See* Doc. Nos. 326, 328. Ceglia’s experts, Stewart and Erich Speckin, took samples from the Hard-Copy Documents on July 25, 2011 in Chicago, Illinois. *See* Doc. No. 97 ¶ 35-36; *see also* Doc. No. 416. Images and photocopies taken after the experts conducted sampling provide a record of the sampling that occurred at each Hard-Copy Inspection. *See* Aycock Decl. ¶ 9. Speckin took Ceglia’s entire allotment of ink samples from both the Work for Hire and the Specifications Documents at the July 25, 2011 Hard-Copy Inspection, and Stewart took none. *See* Aycock Decl. ¶¶ 14-15. Speckin nevertheless has not submitted a report in this case, and did not even conduct any ink dating tests. Speckin tested some of the ink samples, and did not send any remaining samples that he took to Stewart. *See* Stewart Depo. Tr. (Southwell Decl. Ex. G) at 305:20-307:14; 56:25-57:3; Aycock Decl. ¶ 31. Ceglia has never notified Defendants that his experts would conduct any additional sampling from either document, which remain in Ceglia’s possession. *See* Southwell Decl. ¶ 51.

## **2. June 4, 2012 Expert Reports of Ceglia’s Experts, Walter Rantanen And Larry Stewart.**

On March 26, 2012, Defendants filed their Motion to Dismiss, which was supported by the reports of Defendants’ experts that documented the results of their ink dating and other forensic findings. *See* Doc. No. 319. Ceglia filed a number of reports from his experts on June 4, 2012, including the reports of his ink chemist, Stewart (Doc. No. 416 et seq.), and his paper analyst, Rantanen (Doc. No. 421), who conducted fiber identification analysis and other tests on paper samples that Stewart had sent him. As Rantanen’s report and associated documentation

make clear, these paper samples were contained in vials that Stewart had labeled “7” and “9” (the “Vials 7 and 9 Samples”). *See* Rantanen Report (Doc. No. 421) at 2; *see also* Southwell Decl. Exs. H (Stewart’s inventory of vials indicating Vials 7 and 9 were sent to Rantanen), NN (“Test Services Request Form” sent to Rantanen indicating same).

Stewart’s report states that the Vials 7 and 9 Samples that he sent to Rantanen were taken from the two pages of the Work for Hire Document. Stewart Report (Doc. No. 416-2) ¶¶ 304-308. Rantanen’s report concludes that the Vials 7 and 9 Samples were “consistent with coming from the same mill and production run.” Rantanen Report (Doc. No. 421) at 2. Ceglia and his experts rely on that conclusion to support the position that both pages of the Work for Hire Document were created at the same time. *See* Doc. No. 481 at 14, 19, 20, 27; *see also* Stewart Report (Doc. No. 416-2) ¶¶ 304-308; Blanco Report (Doc. No. 459) ¶¶ 164-165; Boland Decl. (Doc. No. 414) ¶¶ 3(b), (c)(v). As explained below, however, the evidence developed during Stewart’s deposition and the record of the sampling of the Hard-Copy Documents establish that the Vials 7 and 9 Samples were actually taken from the Specifications Document, not the Work for Hire Document—meaning that Stewart’s description of the samples is false, and Rantanen’s analysis is irrelevant to the authenticity of the Work for Hire Document.

### **3. July 11, 2012 Deposition Of Larry Stewart.**

Pursuant to the Court’s April 4, 2012 Order (Doc. No. 348), Defendants noticed the deposition of Ceglia’s expert, Stewart, for July 11, 2012. Southwell Decl. ¶ 5. To ensure the efficiency of expert depositions, the parties agreed to exchange expert materials in response to explicit requests, as appropriate, and to do so sufficiently far in advance of deposition for their effective use. *See* Southwell Decl. ¶¶ 4, 6-7; *see also* Doc. No. 457 at 21; *see also* Doc. No. 413 at 2. In a June 13 letter to Ceglia’s counsel, Dean Boland, Defendants requested that Ceglia produce, among other things, Stewart’s notes detailing the contents of his sampling vials, which

reflect how many samples each vial contained; documentation of the documents, pages, and locations from which the samples were taken; documentation of the sizes of the samples; and other identifying information. *See* Southwell Decl. ¶ 6, Ex. A. On June 22, Boland indicated in an email that he would provide everything Defendants had requested. Southwell Decl. ¶ 8, Ex. B.

On the evening of July 5, Boland produced dozens of digital photographs of portions of documents and other materials. Defendants reviewed these photographs and determined that they were insufficient. Many of the photographed materials were incomplete (such as a photograph of the top half of an inventory worksheet), or were useless or non-responsive (such as a photograph of the front of a leather-bound book bearing the title “Ledger”). *See* Southwell Decl. ¶¶ 11-12, Ex. F. On July 8, Defendants’ counsel promptly sent Boland an email highlighting the deficiencies in his production and seeking clarification as to what, exactly, had been produced. *See* Southwell Decl. Ex. F. Despite Defendants’ repeated requests, Boland did not respond to this email prior to Stewart’s July 11 deposition. *See* Southwell Decl. ¶ 13. Due to the complications with deposition scheduling and the number of depositions to be taken in a short period of time, Defendants decided to go forward with Stewart’s deposition despite the deficiencies in Ceglia’s production.

During his deposition, Stewart produced a critical document for the first time: a handwritten “TLC Worksheet Form,” dated July 25, 2011, that contemporaneously recorded the inventory of the contents of some of Stewart’s sampling vials (the “Inventory Worksheet”).<sup>4</sup> *See*

---

<sup>4</sup> The version of the Inventory Worksheet that Stewart produced at his deposition is incomplete—it is the first of at least two pages on which Stewart inventoried the contents of his vials on July 25, 2011. As can be seen in the video of the Hard-Copy Inspection, Stewart

[Footnote continued on next page]

Southwell Decl. ¶¶ 14-15, Ex. H. This Inventory Worksheet indicates that the Vials 7 and 9 Samples—which Stewart sent to Rantanen for paper analysis—were 20 paper “plugs” taken from pages 1 and 2, respectively, of “Q2.” *See* Southwell Decl. Ex. H. As discussed below, prior to his deposition, Stewart had consistently referred to the Specifications Document as “Q2” and the Work for Hire Document as “Q1.” Thus, the Inventory Worksheet suggests that the Vials 7 and 9 Samples were taken from the Specifications Document, not the Work for Hire Document—and that Stewart’s contrary representation to the Court is false.

When counsel asked Stewart about the belatedly produced Inventory Worksheet in his deposition, Stewart nevertheless continued to insist that the samples he sent to Rantanen were from the Work for Hire Document, not the Specifications Document. *See* Stewart Depo. Tr. at 362:17-20. In an attempt to explain why the Vials 7 and 9 Samples were labeled as coming from “Q2,” Stewart testified that the contents of Vials 7 and 9 came from “additional,” “doubled” sampling that Stewart asserted he had been “given authority to take.” *See* Stewart Depo. Tr. at 358:3-6 (“I just doubled my sampling [from the WFH] because at the time of the analysis we were asked -- we were allowed to do additional plugs and so I’m using the same name twice, it appears.”). And he stated that, after conducting this “additional” sampling, he “unfortunately” used the “same name” for the Work for Hire Document that he had previously used for the Specifications Document. Stewart Depo. Tr. at 359:23-360:4 (“I was given the authority to take additional plugs and I renamed [the WFH]. I unfortunately used the same name

---

[Footnote continued from previous page]  
recorded his sampling from pages 1 and 2 of the Work for Hire Document and from pages 1 and 2 of the Specifications Document on the first Inventory Worksheet page, and then used a second page to record his sampling from pages 3 through 6 of the Specifications Document. *See* Aycock Decl. ¶¶ 18-28.

there that I then used in the report [for the Specifications document], but you could see that those are both two-page documents and it's just a reiteration of the same analysis.”).

Stewart stated that, in conducting his “additional” sampling, he had taken a total of 36 paper samples from each page of the Work for Hire Document—even though the parties had agreed to take only 20 samples each from each page. *See Stewart Depo. Tr. at 345:4-12 (“Q. How many paper blanks did you take of the Work For Hire contract document? A. Looks like 16 from page 1 and then 16 from page 2 and then an additional 20 from page 1 and an additional 20 from page 2. Q. And what vials were those paper blanks in? A. That would be vial 1, vial 2, vial 7 and vial 9.”).* When asked, Stewart could not identify who had given him the “authority” to conduct “additional” sampling. *See Stewart Depo. Tr. at 359:23-360:4.*

In sum, when confronted with evidence that the Vials 7 and 9 Samples came from the Specifications Document, Stewart stated under oath that:

- The samples provided to Rantanen came from the Work for Hire Document, not the Specifications Document.
- The Vials 7 and 9 Samples were taken when he was given “authority” to conduct “additional” sampling from the Work for Hire Document, and he erroneously “renamed” the source of the “additional” samples as “Q2”—the name he consistently used elsewhere for the Specifications Document.
- He took “doubled [] sampling” that resulted in taking a total of 36 samples from each page of the Work for Hire Document.

Stewart also stated in his deposition that he took ink samples from the Work for Hire Document, and that those samples are still in his possession. But the Inventory Worksheet indicates that the only vials Stewart filled with samples from the Work for Hire Document contained paper and toner samples, and not ink samples. Moreover, as Defendants’ counsel Amanda Aycock observed at the July 25, 2011 inspection by Ceglia’s experts, Speckin took ink

samples, and Stewart took only paper and toner samples. *See* Aycock Decl. ¶ 14. This was confirmed by Speckin, who at his deposition testified that he took all of the ink samples allotted to Plaintiff, and Stewart took no ink samples. *See, e.g.*, Speckin Depo. Tr. (Aycock Decl. Ex. G) at 51:4-6, 73:2-11. During his deposition, however, Stewart repeatedly testified under oath that he took ink samples from the Hard-Copy Documents on July 25, 2011. *See* Stewart Depo. Tr. at 202:23-25 (“Q. You explain in the report that you took ink samples from the document, do you not? A. Yes, I do. I still have them.”); 201:24-202:5 (“Q. In fact, you conducted no ink testing in this case; correct? A. No. I did physical analysis on the ink and decided at that point to hold off doing any chemical analysis and I still have the ink samples today, I have not tested them.”).

When confronted with the Inventory Worksheet reflecting that he had not taken any ink samples, Stewart testified that he had prepared a different worksheet—which looked like the one provided to Defendants at the deposition—that recorded his ink sampling. *See* Stewart Depo. Tr. at 372:11-373:6 (“Q. [The Inventory Worksheet provided to Defendants] reflects that you did not take any ink samples; right? Or is there some other inventory sheet? A. There should be a different one that has ink on it. This one is just for toner and paper. Q. A different form, okay. I see. Another form that we don’t have. Does it look like this form, the worksheet form, but you’re saying it includes ink samples? A. Yes. It should -- Q. It should look the same? A. It should look the same, but it would indicate that there’s ink samples.”). Following Stewart’s deposition, Defendants repeatedly requested that Ceglia and Stewart produce this document. Ceglia and Stewart have not done so, even while they have simultaneously represented that they have produced “everything” documenting Stewart’s ink sampling. *See* Southwell Decl. ¶ 16-19. Thus, Ceglia has not produced any document that supports Stewart’s assertion that he took ink samples from the Hard-Copy Documents.

**4. Despite Defendants' Numerous Attempts To Meet-And-Confer, Ceglia Refused To Provide Requested Information About Stewart's Sampling.**

Ceglia's production of documents relating to Stewart's sampling remains woefully inadequate. Ceglia has withheld several critical documents on which Stewart repeatedly relied throughout his deposition, and which both Stewart and Boland represented on the record had already been produced. *See* Southwell Decl. ¶ 16-19. For example, Stewart claimed that his sampling inventory worksheets had been provided to Defendants (*see, e.g.*, Stewart Depo. Tr. at 346:5-6), and represented that these and other documents had been produced to Defendants in “a PDF that was sent with the file” that had “many pages” (Stewart Depo. Tr. at 368:8-9). At the time of Stewart’s deposition, however, Defendants had never received any PDF file from either Stewart or Boland that contained documents relating to Stewart’s sampling. *See* Southwell Decl. ¶ 17. Throughout Stewart’s deposition, Defendants repeatedly requested that Stewart produce the documents related to his sampling. Although Defendants obtained some of these documents during the deposition, it became clear that Ceglia had provided an incomplete set of documents related to Stewart’s removal of samples from the Hard-Copy Documents and the deposition was held open pending resolution of these issues.

Since Stewart’s deposition, Defendants have engaged in a months-long battle to obtain the documents that should have been produced prior to the deposition and that Defendants believe will confirm that Ceglia has misrepresented his experts’ findings and that Stewart lied under oath. Defendants made numerous requests for the missing materials, including Stewart’s inventory worksheets and other materials documenting his sampling, in no fewer than ten emails and letters. *See* Southwell Decl. ¶¶ 22-44, Exs. N, O, Q, S, T, X, Y, DD, FF, JJ. In particular, Defendants clearly and specifically requested the second page of Stewart’s Inventory Worksheet that he used at the July 25, 2011 inspection to record the contents of his vials—as can be seen in

the video of the inspection—and documentation of Stewart’s purported ink sampling. *See, e.g.*, Southwell Decl. Ex. X. Boland has either refused to respond or provided evasive and erroneous answers, repeatedly insisting that the materials Defendants seek have already been produced. *See* Southwell Decl. ¶¶ 23, 26, 28, 31, 35-37, 39, 41-43, 45-49. Although Ceglia has made two additional productions of materials since Stewart’s deposition—which include materials that had not previously been produced to Defendants—neither production contains the second page of the Inventory Worksheet, which records the contents of Vials 11-18 containing paper and toner samples from the Specifications Document, and neither production contains any documents reflecting any ink sampling conducted by Stewart. *See* Southwell Decl. ¶¶ 38, 44; Aycock Decl. ¶¶ 33-34. For months, Ceglia has tried to dodge this issue, necessitating the instant motion.<sup>5</sup> For the full detail of the exchanges between the parties, Defendants respectfully direct the Court to the Southwell Declaration submitted in support of this motion, paragraphs 4-49.

## ARGUMENT

Ceglia and Stewart should be ordered to produce any and all documents reflecting Stewart’s sampling of the Work for Hire and Specifications Documents, and to provide sworn declarations stating clearly that they have done so. The Court should order the production of these documents because they are likely to confirm that Stewart has made false statements under

---

<sup>5</sup> In a cryptic, unsigned statement, Stewart insists that “[t]here is nothing else [he] can provide” and “[t]here has been no purposeful destruction of materials or files.” *See* Southwell Decl. ¶ 49, Ex. LL (emphasis added). This is despite his clear statements during his deposition that he has ink samples and records of them, and despite clear video footage of him using two inventory worksheets while filling 18 vials with samples from the Hard-Copy Documents. For a fuller discussion of this slippery statement from Stewart, see the Southwell Declaration at paragraph 49. In such a serious context, Stewart should be required to clearly make such assertions in a sworn statement to the Court, and explain the absence of any documents that should otherwise exist or did previously exist.

oath and that Rantanen's paper analysis, on which Ceglia relies in opposing Defendants' Motion to Dismiss, was conducted using samples from the wrong document.

**I. This Court Should Order Ceglia And Stewart To Produce All Documents Reflecting Stewart's Paper Sampling From The Work For Hire And Specifications Documents.**

**A. The Evidence Establishes That The Vials 7 And 9 Samples Are From The Specifications Document, Not the Work For Hire Document.**

Ceglia and Stewart should be ordered to produce all documents reflecting Stewart's paper sampling from the Hard-Copy Documents. All of the evidence currently available to Defendants establishes that the Vials 7 and 9 Samples that Stewart sent to Rantanen were taken from the Specifications Document—not the Work for Hire Document, as Stewart has stated in his report and testified at his deposition. Defendants believe that any additional documentation of Stewart's paper sampling that Stewart produces will eliminate any potential doubt that Stewart has lied under oath. Because the truth of Stewart's assertions regarding the source of his paper samples bears on both the reliability of the remainder of Stewart's analysis and the probative value of Rantanen's analysis, the Court should require these documents to be produced.

The Inventory Worksheet that Ceglia belatedly produced demonstrates that the Vials 7 and 9 samples that Stewart sent to Rantanen were taken from the Specifications Document. The Inventory Worksheet identifies the contents of Vials 7 and 9 as paper samples from pages 1 and 2 of "Q2." *See* Southwell Decl. Ex. H. All of the documents produced in this case indicate that "Q2" is Stewart's shorthand for the Specifications Document, whereas he consistently refers to the Work for Hire Document as "Q1." A portion of this worksheet, Exhibit H to the Southwell Declaration, is captured in the screenshot below:

7	Q2 Pg 1 Paper 20 PWS		SENT FOR TESTING TO FPS ON 10/3/11
8	Q2 Pg 1 Toner 20 PWS		
9	Q2 Pg 2 <del>Fluor B</del> Paper 20 PL		SENT FOR TESTING TO IPS ON 10/30/11
10	Q2 Pg 2 Toner 20 PWS		

In addition, Stewart's handwritten examination notes from July 25, 2011—the same day that he sampled the Hard-Copy Documents and completed his Inventory Worksheet—define “Q1” as “One 2 PG document beginning ‘WORK FOR HIRE,’” and define “Q2” as “One six PG document titled ‘StreetFax Back-End.’” See Southwell Decl. Ex. I. An excerpt of these notes, Exhibit I to the Southwell Declaration is captured in the screenshot below:

Q2	One six pg document titled "StreetFax Back-End." Margins stated here somewhat obscured due to Page taking. Each pg has approx same yellowing (very sl) Bends similar thru page on corners. Fold across all pages approx 1 1/2" down from top left to 2 1/2" down from top RGT. 8 1/2" X 11" fcs
----	--

Further, in Stewart's report submitted to the Court on June 4, 2011, he explicitly defines “Q1” as “One, two-page original document bearing the title, “‘WORK FOR HIRE’”

CONTRACT,”” and “Q2” as “One, six-page document bearing a FAX header and the title, “StreetFax Back-End Technical Specification.” Doc. No. 416 at 12.<sup>6</sup>

The video of the inspection on July 25, 2011, moreover, shows that Stewart was taking samples from the Specifications Document when he filled his seventh and ninth vials. *See* Aycock Decl. ¶¶ 24-25. The video further shows Stewart writing in rows 7-10 on his Inventory Worksheet when taking samples from pages 1 and 2 of the Specifications Document.<sup>7</sup> *See id.* And when Stewart begins to take samples from page 3 of the Specifications Document, he starts a second page of the Inventory Worksheet—one that has not been produced to Defendants. *See* Aycock Decl. ¶¶ 26-28.

Finally, the results that Rantanen reported demonstrate that the Vials 7 and 9 Samples were from the Specifications Document, not the Work for Hire Document. As noted by both parties’ experts, at the time of the Hard-Copy Inspection, the paper of the Work for Hire Document was yellowed on the front side, but not on the reverse. *See, e.g.*, Stewart Report (Doc. No. 416 et seq.) ¶¶ 39, 57; Blanco Report (Doc. No. 459) ¶ 180; Tytell Report (Doc. No. 330) at 1; LaPorte Report (Doc. No. 326) at 8.<sup>8</sup> The yellowed front sides of the Work for Hire Document also fluoresced dully when illuminated with ultraviolet light, while the reverse of the

---

<sup>6</sup> There are numerous other instances in his notes and productions in which Stewart explicitly or implicitly refers to the Specifications Document as “Q2,” including a “TLC Worksheet Form” and Stewart’s notes about his toner analysis. These examples are explained in detail in the Southwell Declaration at paragraph 50.

<sup>7</sup> When taking paper and toner samples from pages 1 and 2 of the Work for Hire Document, Stewart writes in rows 1-6 (all labeled “Q1”). *See* Aycock Decl. at ¶¶ 18-23.

<sup>8</sup> Although the anomalous white tab areas at the top of each page of the Work for Hire Document were not yellowed on the front side, Stewart took only two samples from those tab areas, and those samples were placed in Vial 1, which was not sent to Rantanen for paper testing. *See* Southwell Decl. Ex. H.

pages exhibited a normal, bright fluorescence. *See, e.g.*, LaPorte Report (Doc. No. 326) at 11; Lyter Report (Doc. No. 328) at 4; Tytell Report (Doc. No. 330) at 6. The pages of the Specifications Document, in contrast, did not exhibit any yellowing on the front of the paper or anomalies when viewed with ultraviolet light. *See, e.g.*, Unredacted LaPorte Report at 12.

The characteristics of the paper samples that Rantanen examined are consistent with the Specifications Document, not the Work for Hire Document. Those samples were not yellowed on one side, and they did not exhibit anomalous ultraviolet characteristics. At his deposition, Rantanen confirmed that he did not detect any difference in the ultraviolet characteristics of the paper samples, front to back or from one to the other. *See* Rantanen Depo. Tr. 237:14-19. Rantanen also confirmed at his deposition that he observed even coloration across the paper samples he examined and on the fronts and backs of the samples. *See* Rantanen Depo. Tr. 105:21-106:10 (“Q. And your report doesn’t indicate that the samples were anything other than plain white paper; right? Q. You have no reason to think that there were any inconsistencies or anomalies regarding the color of the samples; right? A. No. Q. So the color was consistent on both sides of the paper samples; right? A. From what I could see with the very small piece . . .”), 106:14-17 (“Q. . . . [T]here was consistent coloration on the front and backs of the samples; right? A. From what I could tell, yes.”). In his deposition, Stewart himself acknowledged that samples from the Work for Hire Document would be yellowed on one side, while samples from the Specifications Document would not. *See* Stewart Depo. Tr. at 360:20-22.

All of this evidence currently available to Defendants seems to make clear that the Vials 7 and 9 Samples that Stewart sent to Rantanen were taken from the Specifications Document. If true, Stewart’s contrary statements that the samples were taken from the Work for Hire Document are false.

**B. Stewart Insists That The Vials 7 And 9 Samples Are From The Work For Hire Document Despite Evidence To The Contrary.**

When confronted at his deposition with evidence that the Vials 7 and 9 Samples were taken from the Specifications Document, Stewart nevertheless insisted, on the record, that the samples he provided to Rantanen were from the Work for Hire Document. *See* Stewart Depo. Tr. at 362:17-20. But his attempt to explain away the evidence described above is not remotely plausible. Stewart stated that he was authorized to take “additional” paper samples, and that he “renamed” the Work for Hire Document as “Q2” for that purpose. *See* Stewart Depo. Tr. at 359:23-360:4. As an initial matter, it strains credulity to believe that Stewart would ignore his consistent practice in this case and suddenly begin referring to the Work for Hire Document as “Q2” at any time. Even putting that aside, Stewart’s story regarding his “additional” sampling is either obviously false or violated the Court’s orders. The Court never authorized such “additional” paper sampling. Moreover, the Court’s Hard-Copy Protocol dictates that all sampling must occur in the presence of representatives from both parties and Defendants were never notified of or present for “additional” sampling of the Work for Hire Document. *See* Doc. No. 84 ¶ 4. At no time did the parties even discuss the possibility of Stewart conducting an “additional” round of sampling. *See* Southwell Decl. ¶ 51.

Stewart’s explanation is further belied by his assertion that, after this “additional” sampling, he had taken a total of 36 paper samples from each page of the Work for Hire Document during the inspection. *See* Stewart Depo. Tr. at 345:4-12. A simple review of the Work for Hire Document after sampling confirms that only 42 paper samples have been taken

from page 1 and 40 from page 2.<sup>9</sup> Defendants' experts (LaPorte and Dr. Lyter) took a total of twenty paper samples from each page of the Work for Hire Document. *See* Aycock Decl. ¶ 32. It is therefore impossible for Stewart to have taken 36 paper samples from each page of the Work for Hire Document. Indeed, the video of the Hard-Copy Inspection and post-sampling images of the Work for Hire Document confirm that Stewart's explanation is false because he, in fact, took only 18 paper samples from page 1 and 16 paper samples from page 2, which he placed in Vials 1, 2 (page 1) and 5 (page 2).<sup>10</sup> *See* Aycock Decl. ¶¶ 18-19, 22.

Even if Stewart's sworn explanation of the Inventory Worksheet is correct, he has admitted under oath that Ceglia violated this Court's orders in conducting unauthorized sampling of the Hard-Copy Documents. In any event, the much more likely conclusion is that Stewart's sworn explanation is false, that Stewart perjured himself in testifying that the Vials 7 and 9

---

<sup>9</sup> Photocopies of the sampled Work for Hire and Specifications Documents were taken subsequent to each parties' experts' sampling, and provided to both parties at the time of the Inspection. *See* Aycock Decl. ¶ 9.

<sup>10</sup> When reviewed by someone familiar with the documents, familiar with the process for taking samples from a document, and who was present at the Hard-Copy Inspection, the Video of the Hard-Copy Inspection confirms these numbers. From approximately 11:10 a.m. to 11:15 a.m. on the Video Stewart removes 18 samples of paper from page 1 of the Work for Hire Document, placing the first two samples (from the white tab areas at the top of page 1) in his Vial 1 and the remaining 16 samples (from various locations on the discolored part of the document) in his Vial 2. *See* Aycock Decl. ¶¶ 18-19. Note that Stewart indicated on the first page of his Inventory Worksheet that Vial 1 contained 2 paper samples and Vail 2 contained only 14 paper samples. *See* Southwell Decl. Ex. H. On the Video, Stewart appears to have lost count of the number of paper samples he took for Vial 2—he pauses and appears to try to mentally recount the number of samples he took. Speckin will minutes later take 4 paper samples from page 1 of the Work for Hire, which is how many Plaintiff's experts had apparently agreed he would take from each page from which he sampled. However, this brought the total number of paper samples taken by Plaintiff's experts to 22—two over the amount authorized for each party in the agreement between the parties. *See* Doc. No. 97-8. From approximately 11:24 to 11:26 a.m., Stewart takes 16 paper samples from page 2 of the Work for Hire Document. *See* Aycock Decl. ¶ 22.

Samples he sent to Rantanen were taken from the Work for Hire Document, and that Ceglia has submitted expert reports to this Court that falsely represent both the source of the paper samples and the significance of Rantanen’s findings.

At the very least, Stewart’s highly dubious explanation of his paper sampling provides good cause for this Court to order the production of all documents reflecting Stewart’s paper sampling from the Work for Hire and Specifications Documents and a sworn explanation of the situation, which will enable the Court and Defendants to confirm that—as the currently available evidence so strongly suggests—Stewart’s account is false.

**II. This Court Should Order Ceglia And Stewart To Produce All Documents Reflecting Stewart’s Ink Sampling From The Work For Hire And Specifications Documents.**

The Court should also order the production of all documents relating to Stewart’s purported taking of ink samples from the Hard-Copy Documents. All of the currently available evidence establishes that Stewart did not take any ink samples from those documents, and that Stewart’s contrary statements are false. Stewart claimed at his deposition that he had documents demonstrating that he conducted ink sampling—but he has never shared any such documents with Defendants. To confirm whether Stewart has perjured himself with respect to his supposed ink sampling as well, Ceglia and Stewart should be ordered to produce any such documents.

The available evidence demonstrates that Stewart did not take any ink samples from the Work for Hire Document. The belatedly produced Inventory Worksheet, on which Stewart recorded his sampling of the Work for Hire Document, shows that Stewart’s vials contain only paper and toner samples. It reflects no ink sampling. Indeed, there is no record of any ink sampling by Stewart in any of the documents or notes he has produced to Defendants—all of

which record or refer to only paper and/or toner samples.<sup>11</sup> *See, e.g.*, Southwell Decl. Exs. H (showing that Stewart only conducted TLC on toner, not on ink), L (discussing only toner analysis); Stewart Report (Doc. No. 416 et seq.) (not discussing any ink sampling or chemical ink analysis performed by Stewart whatsoever).

Moreover, Defendants' counsel attended the July 25, 2011 inspection and observed that Speckin took all of Ceglia's allotted ink samples from each Hard-Copy Document, and that Stewart took none. This observation is confirmed both by Speckin's own testimony at his deposition and by the video of the inspection. *See* Aycock Decl. ¶ 17; Speckin Depo. Tr. at 51:4-6, 73:2-11.

Stewart nevertheless testified at his deposition that he took ink samples on July 25, 2011, and repeatedly insisted that those samples are still in his possession. *See* Stewart Depo. Tr. at 202:23-25; 201:24-202:5. Stewart has also testified about the existence of other purported inventory worksheets similar to the one provided to Defendants (which documents no ink sampling) that supposedly document his ink samples. *See* Stewart Depo. Tr. at 372:11-373:6. Defendants have not been provided with any such worksheet that reflects any ink sampling performed by Stewart. Since Stewart's deposition, Defendants have repeatedly requested that Ceglia produce this purported document, or any other evidence of Stewart's supposed sampling of the ink from the Hard-Copy Documents. In response, Ceglia has not produced a single document supporting Stewart's claim.

---

<sup>11</sup> In his September 6, 2012 "response" to Defendants' document requests, Stewart completely ignores the issue of whether he took ink samples, and from where. He simply repeats his contention that his photocopies of the Work for Hire Document show the "locations of areas where I removed samples"—but none of these images shows any ink sampling. *See* Southwell Decl. ¶ 49(c).

The direct conflict between the available evidence and Stewart's assertion that he conducted ink sampling bears directly on Stewart's credibility in this Court. To confirm whether Stewart's assertion is true, this Court should order the production of all documents reflecting all of Stewart's ink sampling from the Work for Hire and Specifications Documents and a sworn explanation of this issue.

## **CONCLUSION**

For the foregoing reasons, this Court should enter an order (1) directing Ceglia and Stewart to produce any and all documents reflecting Stewart's sampling of the Work for Hire Document and Specifications Document, including documents reflecting Stewart's ink sampling, if any, and the two pages of inventories that Stewart used at the July 25, 2011 inspection to record the contents of his sampling vials; and (2) directing Stewart to provide a sworn declaration (a) stating clearly whether the paper samples he sent to Rantanen were extracted from the Work for Hire Document or the Specifications Document, and citing any documentary support; (b) stating clearly whether he took ink samples from the Work for Hire Document and Specifications Document and, if so, how many he took, when, from where, and how many he has in his possession today; and (c) stating that he has produced directly to Defendants any and all inventories of all his vials of samples taken from the Work for Hire Document and Specifications Document, including the two pages of inventories that he used at the July 25, 2011 inspection to record the contents of his sampling vials. Defendants further request that Ceglia be ordered to comply with that order within a week and that the Court award Defendants their attorneys' fees and costs, and all other relief to which they may be entitled.

Dated: New York, New York  
September 27, 2012

Respectfully submitted,

Thomas H. Dupree, Jr.  
Erik R. Zimmerman  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 955-8500

Terrance P. Flynn  
HARRIS BEACH PLLC  
726 Exchange Street  
Suite 1000  
Buffalo, NY 14210  
(716) 200-5120

/s/ Orin Snyder  
Orin Snyder  
Alexander H. Southwell  
Matthew J. Benjamin  
Amanda M. Aycock  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue, 47th Floor  
New York, NY 10166-0193  
(212) 351-4000

*Attorneys for Defendants Mark Zuckerberg and Facebook, Inc.*