

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,	:	
	:	
Plaintiff,	:	Civil Action No. 1:10-cv-00569-RJA
	:	
v.	:	DECLARATION OF
	:	ALEXANDER H. SOUTHWELL
MARK ELLIOT ZUCKERBERG and	:	
FACEBOOK, INC.,	:	
	:	
Defendants.	:	
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I, ALEXANDER H. SOUTHWELL, hereby declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in the State of New York and admitted to practice before this Court. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP, counsel of record for Mark Elliot Zuckerberg and Facebook, Inc. in the above-captioned matter. I make this declaration, based on personal knowledge, in support of Defendants’ Motion for Production.

2. This declaration describes Defendants’ good-faith efforts to resolve disputes regarding Plaintiff’s refusal to produce documents related to Plaintiff’s expert Larry Stewart before filing Defendants’ Motion for Production, in compliance with Western District of New York Local Rule 7(d)(4).

3. Because of the extensive back-and-forth between the parties, this declaration proceeds in five parts. First, it describes the correspondence between Defendants’ counsel, Plaintiff’s counsel, and Stewart on the relevant issues prior to Stewart’s deposition. Second, this declaration provides information about Stewart’s deposition and authenticates excerpts of the deposition transcript and some of the exhibits to the deposition. Third, this declaration describes

the correspondence between Defendants' counsel, Plaintiff's counsel, and Stewart following Stewart's deposition. Fourth, this declaration sets forth the numerous misrepresentations and falsehoods contained in Plaintiff's correspondence with Defendants. Fifth and finally, this declaration describes other information and evidence in support of Defendants' Motion for Production.

I. Correspondence Before Stewart's Deposition

4. On June 4, 2012, Defendants indicated in a filing before this Court that they were prepared at the outset of the expert deposition period to meet and confer with Plaintiff to determine whether there should be a mutual exchange of expert-related documents between the parties in preparation for expert depositions. *See* Doc. No. 413 at 2.

5. On June 5, 2012, after the submission of Plaintiff's expert reports on June 4, 2012, pursuant to the Court's April 4, 2012 Order (Doc. No. 348), Defendants noticed the depositions of Plaintiff's experts, including the deposition of Larry Stewart for July 11, 2012.

6. In a June 13, 2012 letter to Boland, Defendants confirmed their willingness to mutually exchange relevant expert documents. In that same letter, Defendants also made a series of document requests related to Plaintiff's experts. With regard to Stewart, Defendants requested, *inter alia*, detailed information regarding the contents of the vials Stewart provided to Plaintiff's paper analyst Walter Rantanen. A true and accurate copy of the letter sent from Defendants to Boland on June 13, 2012 is attached hereto as **Exhibit A**.

7. On June 21, 2012, during a phone call with Boland, the parties agreed to exchange expert materials in response to explicit requests, as appropriate, and to do so sufficiently far in advance of each deposition for their effective use.

8. On June 22, 2012, Boland sent me an email stating that Plaintiff would “provide everything on the list [in the June 13, 2012 letter] except for his library of standards information.” A true and correct copy of that email is attached hereto as **Exhibit B**.

9. On July 3, 2012, I sent Boland an email reminding him to provide the documents he indicated he would provide related to the Stewart deposition, and reserving all rights with respect to Plaintiff’s failure to produce these documents sufficiently in advance of Plaintiff’s experts’ depositions, including continuing the deposition after full production of the relevant documents and moving for appropriate sanctions. A true and correct copy of that email is attached hereto as **Exhibit C**.

10. On July 5, 2012, at approximately 9:20 p.m., after receiving no response to their July 3 email, I again sent Boland an email requesting he respond concerning the documents related to the Stewart deposition. A true and correct copy of that email is attached hereto as **Exhibit D**.

11. On July 5, 2012, at approximately 9:57 p.m., Boland sent Defendants a production of a number of documents in an electronic file downloadable from a website called WeTransfer. A true and correct copy of the email providing the link to this file is attached hereto as **Exhibit E**.

12. On July 8, 2012, after Defendants had reviewed the items produced by Plaintiff, I promptly sent Boland an email detailing the deficiencies of that production. For example, as noted in the email, Plaintiff had provided a series of partial digital photographs of only portions of documents. A true and correct copy of that email is attached hereto as **Exhibit F**.

II. The July 11, 2012 Deposition of Larry Stewart

13. Given the need to proceed with the scheduled deposition, and despite Plaintiff's failure to respond to my July 8, 2012 email detailing the deficiencies of his production related to Stewart, Defendants conducted the deposition of Stewart on July 11, 2012. A true and accurate copy of excerpts of the transcript of Stewart's deposition is attached hereto as **Exhibit G**.

14. As an initial matter, as became apparent over the course of Stewart's deposition and from a review of documents produced, Stewart uses a form titled "TLC Worksheet Form" with his company name and logo at the top right-hand corner for at least two purposes.

- a. First, he uses such forms as inventory worksheets to record the contents of the vials he fills with tiny samples of ink, paper, and/or toner at a document examination. When used as an inventory worksheet, the column titled "Lane" represents the vial number, and the "Description" column describes the location from which the samples in that vial were taken, the type of sample (i.e., paper, ink, toner), and the number of samples (or "plugs") contained in that vial. *See, e.g., Exhibit H, infra.*
- b. Second, Stewart uses the "TLC Worksheet Form" for the purpose for which it was apparently intended: in order to record the samples tested in each lane of a thin-layer chromatography (TLC) plate.¹ When used as a TLC worksheet, the column titled "Lane" represents the lane number on the TLC plate, and the "Description" column describes the location and vial from which the sample tested in that lane was taken. *See, e.g., Exhibit K, infra.*

¹ For a general description of TLC analysis and an illustration of a typical TLC plate, see Doc. No. 328 at 6.

15. During this deposition, several documents were produced that called into question Stewart's purported paper and ink sampling of the Hard-Copy Documents (as defined in Defendants' Motion for Production). Those documents, some of which were authenticated and introduced as exhibits at Stewart's deposition, included:

- a. Defendants' Exhibit 26, a "TLC Worksheet Form" dated "7/25/11" that Stewart filled out at the Hard-Copy Inspection in Chicago, Illinois on July 25, 2011, documenting the contents of his sampling of vials 1-10. This document was used by Stewart to record the contents of the vials and referred to as the "Inventory Worksheet" in Defendants' Motion for Production. A true and accurate copy of Defendants' Exhibit 26 is attached hereto as **Exhibit H**.
- b. Defendants' Exhibit 27 is Stewart's contemporaneous, handwritten notes from the Hard-Copy Inspection in Chicago, Illinois on July 25, 2011, which document his observations of the Hard-Copy Documents. A true and accurate copy of Defendants' Exhibit 27 is attached hereto as **Exhibit I**.
- c. Defendants' Exhibit 28 is a photograph of Stewart's thin-layer chromatography (TLC) Plate #1, dated "7/29/11," which Stewart used in order to conduct his analysis of the toner of the Hard-Copy Documents. A true and accurate copy of Defendants' Exhibit 28 is attached hereto as **Exhibit J**.
- d. A "TLC Worksheet Form" dated "7/29/11" describes the samples tested in each lane of Stewart's TLC "Plate #1," which consist of toner samples

taken from the Work for Hire and Specifications documents, plus a paper blank (“PB”). A true and accurate copy of this document is attached hereto as **Exhibit K**.

- e. Defendants’ Exhibit 29 is handwritten notes regarding Stewart’s toner analysis that he conducted on July 29, 2011. A true and accurate copy of Defendants’ Exhibit 29 is attached hereto as **Exhibit L**.

16. Despite the fact that Defendants had not received many of the documents produced at any time prior to Stewart’s deposition, Stewart repeatedly represented on the record that “everything” had already been produced to Defendants prior to the deposition, allegedly in PDF format. *See, e.g.*, Stewart Depo. Tr. at 346:5-6, 352:24-353:9, 368:7-9. Stewart also represented in his Report to this Court that he turned over “case file notes” in discovery. *See* Doc. No. 416 ¶ 195.

17. To be clear, at no time prior to Stewart’s deposition were Defendants’ provided a PDF document containing any of Stewart’s worksheets or handwritten notes, nor any information regarding Stewart’s sampling of the ink of the Hard-Copy Documents.

18. Boland also represented on the record during the course of the deposition that “all of the documents” had been provided to Defendants. Stewart Depo. Tr. at 378:10; *see also* Stewart Depo. Tr. at 371:24-372:2 (“MR. BOLAND: I’m not agreeing that we haven’t provided them, but I understand your position is that we haven’t.”).

19. For a detailed inventory of what had been produced to Defendants at the time of Stewart’s deposition, Defendants respectfully refer the Court to Exhibit DD, which is Defendants’ August 27, 2012 letter to Boland.

III. Correspondence After Stewart's Deposition

20. The evidence currently available to Defendants strongly suggests that, despite Stewart's sworn testimony to the contrary, Stewart provided the paper samples from the wrong document to Walter Rantanen for paper analysis and did not conduct any ink sampling. Since Stewart's deposition, Defendants have repeatedly attempted to obtain documents pertaining to these serious questions that have arisen since the deposition regarding Stewart's paper and ink sampling.

21. On July 15, 2012, the day before the deposition of Walter Rantanen, Boland sent me an email that said: "Mr. Rantanen was not told, purposefully, where the samples in the two vials were taken from. Larry Stewart did not want to unintentionally influence his results. Therefore, Mr. Stewart will compile the answers to your questions about where the samples came from in each vial and provide that to you as soon as possible." A true and accurate copy of this email is attached hereto as **Exhibit M**. Stewart never did provide any "answers to [Defendants'] questions about where the samples came from in each vial."

22. On July 16, 2012, Defendants sent a letter to Plaintiff outlining deficiencies in Plaintiff's July 5, 2012 production of materials related to Stewart's deposition (the "July 16 Letter"). In that letter, in attempt to avoid confusion as to what was actually provided, Defendants attached the entire July 5 production received from Boland. Defendants specifically noted that Plaintiff had not provided an inventory of all samples Stewart took from the Hard-Copy documents, and other documents Defendants had requested. Given Boland's and Stewart's continued misrepresentations about what had been provided to Defendants in response to Defendants' repeated requests, in an attempt to avoid ambiguity, Defendants requested a copy of Stewart's entire file. A true and accurate copy of that letter is attached hereto as **Exhibit N**.

23. On July 18, 2012, after receiving no response to Defendants' July 16 Letter, I sent Boland an email asking again that he provide the materials requested in the July 16 Letter. A true and accurate copy of that email is attached hereto as **Exhibit O**.

24. On July 20, 2012, Boland sent me an email, stating that he was reviewing the items Defendants indicated they had not received. A true and accurate copy of that email is attached hereto as **Exhibit P**.

25. On July 20, 2012, I reiterated in an email the request contained within the July 16 Letter, specifically for the "entire file that Stewart had with him at his deposition on July 11, 2012, including all inventories of samples." A true and accurate copy of that email is attached hereto as **Exhibit Q**.

26. On July 23, 2012, Boland responded regarding the materials related to Stewart, but did not address Defendants' specific requests made in the July 16 Letter, stating that Defendants "had the opportunity to efficiently seek them through deposition." A true and accurate copy of that email is attached hereto as **Exhibit R**.

27. On July 24, 2012, I responded via email to Boland's July 23 email. In this email, I stated, "In sum, Mr. Stewart believed his file had been provided to Defendants, you represented on the record that it had been provided to Defendants, and yet it is abundantly clear that 'all of the documents' have not been provided to Defendants. Along with our July 16, 2012 letter to you, we produced back to you a copy of what you produced to us on July 5, 2012, so there can be no ambiguity as to what you actually provided, which, as outlined above, was insufficient and incomplete." As a specific example of what had not been provided, Defendants noted, "Mr. Stewart represented in his deposition that there were additional inventory worksheets, including a worksheet documenting ink samples. *See, e.g.,* Stewart Depo. Tr. 372:19-373:6. Only one

sample inventory worksheet has been provided, Defendants' Exhibit 26, and it was not provided until very late in Mr. Stewart's deposition. Defendants' Exhibit 26 does not include any information about ink sampling." A true and accurate copy of that email is attached hereto as **Exhibit S**.

28. On July 30, 2012, having received no response to my July 24 email, I sent Boland an email reiterating the requests made in the July 16 Letter, "specifically including the entire file that Mr. Stewart had with him at his deposition on July 11, 2012 (including all inventories of samples)." A true and accurate copy of that email is attached hereto as **Exhibit T**.

29. On July 31, 2012, Boland sent me an email stating, "I will get you these materials today via email after I confirm with Mr. Stewart that he can provide what you are requesting if he has not already." This email in no way responded to Defendants' July 24 email. A true and accurate copy of that email is attached hereto as **Exhibit U**.

30. On August 1, 2012, having heard nothing further from Boland on July 31, I reiterated in an email that Defendants had not received anything from Boland or Stewart. Boland responded later that day, noting that he was "[w]orking on this information regarding the inventory worksheet now." A true and accurate copy of this email exchange is attached hereto as **Exhibit V**.

31. On August 1, 2012, following the previous email exchange, Boland sent me an email purporting to provide responses to my July 8, 2012 email from before Stewart's deposition (the July 8 email had outlined the deficiencies specific to the July 5, 2012 production). This evasive and belated response did not address the "inventory worksheet" he said he was "working on" earlier that day, did not respond to Defendants' July 24 email, and did not address

Defendants' requests contained within the July 16 Letter. A true and accurate copy of that email (with Boland's in-line responses in red, many of them false) is attached hereto as **Exhibit W**.

32. On August 10, 2012, I sent Boland an email, clearly reiterating the requests made in Defendants' July 16 Letter and further detailed in Defendants' July 24 email (to which Boland never responded). This August 10 email attached both the July 16 Letter and the July 24 email. In this email, I specifically and clearly requested, in furtherance of Defendants' earlier requests in attempt to avoid any ambiguity: (1) the second inventory worksheet Stewart used at the July 25, 2011 inspection to record his sampling of the Hard-Copy Documents, and (2) an inventory of Stewart's ink sampling, which he represented existed at his deposition. A true and accurate copy of this email is attached hereto as **Exhibit X**.

33. On August 22, 2012, having received no response to Defendants' August 10, 2012 email, I sent Boland a letter again requesting critical documents related to Stewart's sampling of the Hard-Copy Documents, noting that this letter constituted a final attempt to meet-and-confer on the issue. A true and accurate copy of this letter is attached hereto as **Exhibit Y**.

34. On August 23, 2012, at approximately 11:41 a.m., Boland sent me an email notifying me that he intended to respond to Defendants later that day.² A true and accurate copy of this email is attached hereto as **Exhibit Z**.

² In a clear attempt to continue to muddy the record regarding productions related to Stewart, Boland referred to Defendants' letter as "your letter regarding items you cannot locate that we provided to you from Mr. Stewart." This mischaracterization of Defendants' letter is false. First, Defendants have clear records of each of Plaintiff's productions and have not "misplaced" anything; in every subsequent production Plaintiff has made to Defendants regarding Stewart, Plaintiff has produced additional items he had not previously produced. Second, to this day, Defendants have not been provided with the second inventory worksheet that Stewart used on July 25, 2011 to record the contents of his sampling vials or any documents showing any evidence of ink sampling by Mr. Stewart.

35. On August 23, 2012, at approximately 1:43 p.m., Boland sent me an email purporting to respond to Defendants' August 22 letter. As further detailed below, this email was riddled with misrepresentations and outright falsehoods. A true and accurate copy of this email is attached hereto as **Exhibit AA**.

36. On August 23, 2012, at approximately 2:23 p.m., Boland sent me another email indicating that a link to a production from Stewart was forthcoming. This email falsely asserted that all of the documents that were to be provided had already been provided. A true and accurate copy of this email is attached hereto as **Exhibit BB**.

37. On August 23, 2012, a few moments later, Boland sent Defendants a production of a number of documents in an electronic file downloadable from a website called WeTransfer. The email providing the link to this file represented, "These are the materials from Larry Stewart previously provided to you on at least two prior occasions." This is false: this production contained materials that had not been previously provided to Defendants. In any event, the production did not include the second inventory worksheet that Stewart used on July 25, 2011 to record the contents of his vials, nor did it include any record of any ink sampling conducted by Stewart. A true and accurate copy of the email providing the link to the WeTransfer file is attached hereto as **Exhibit CC**.

38. On August 27, 2012, given Boland's continued misrepresentations, on the record and in communication with counsel, that Plaintiff had produced all the materials Defendants had requested, Defendants sent Boland a detailed, eleven-page letter to try to clarify the status of the productions and resolve the matter without court intervention. This letter described: the specific contents of each of Boland and/or Stewart's productions to Defendants, listing filenames and providing screenshots of exactly what had been produced; the specific documents that Plaintiff

produced on August 23 but had not provided previously; and the specific documents that Plaintiff still had not produced. This letter specifically described how documents produced did not provide the information Boland represented to Defendants they did. A true and accurate copy of this letter and its exhibits (A-C) is attached hereto as **Exhibit DD**.

39. On August 28, 2012, despite the painstaking detail with which Defendants had outlined precisely what had and what had not been previously produced and what remained to be produced, Boland sent me yet another email that bewilderingly asserted that Defendants “have been provided on more than one occasion, all the documents you are still seeking today.” This is false. Notably, Boland makes the unambiguous representation that Stewart “took samples of ink that remain untested in vials in his lab.” The evidence set forth in Defendants’ Motion for Production and supporting Aycock Declaration strongly suggests that this is false. *See* Aycock Decl. ¶¶ 12-31, 34. This email contains numerous other misrepresentations and falsehoods, which are discussed below. A true and accurate copy of this email is attached hereto as **Exhibit EE**.

40. On August 30, 2012, at 10:53 a.m., I sent Boland an email, describing why the representations made by Boland in his August 28 email were demonstrably false. The demonstrably false representations noted in the letter included that: (1) Stewart took ink samples from the Work for Hire Document and/or Specifications Document on July 25, 2011; (2) Stewart has provided a copy of all of the TLC Worksheets that he has in this case; and (3) Stewart sent Defendants paper copies of printed notes in his October 25, 2011 production via FedEx to Defendants. A true and accurate copy of this email is attached hereto as **Exhibit FF**.

41. On August 30, 2012, at approximately 2:36 p.m., Boland sent me an email, continuing to assert that the first two representations—that Stewart in fact took ink samples and

that he had provided all worksheets—were true. As explained in the Memorandum in Support of Defendants’ Motion for Production and accompanying Declaration of Amanda Aycock they are not true. *See, e.g.*, Aycock Decl. ¶¶ 27-31, 33-34. As to the third representation, regarding paper copies of notes purportedly provided to Defendants, Boland stated, “If this is incorrect, it is moot as he provided you at the deposition and again afterward a copy of all of his notes. I will confer with him again today about whether he has uncovered any other notes and respond accordingly by tomorrow.” The first sentence of this statement is false: Defendants have not received a copy of all of Stewart’s notes, which is what necessitated the instant motion. As for the second sentence, to date, Boland has not responded regarding the representation that paper copies of notes were provided in October 2011. A true and accurate copy of this email is attached hereto as **Exhibit GG**.

42. On August 30, 2012, a few hours later at approximately 4:28 p.m., Boland sent me another email, purporting to explain Stewart’s worksheets and the documents supposedly demonstrating Stewart’s sampling of the Hard-Copy Documents. To be clear, it is Defendants’ position that there exist at least three documents titled “TLC Worksheet Form”—two dated July 25, 2011 and used to inventory the contents of Stewart’s vials 1-18 on that day, and one dated July 29, 2011 and used to describe the TLC analysis that Stewart performed on that day. It is the second inventory worksheet dated July 25, 2011, documenting the contents of vials 11-18, that Plaintiff and Stewart have refused to produce. In this email, Boland attempts to conflate the various worksheets, insisting that he is “providing the two TLC worksheets again.” What he ignores is that Defendants were not requesting Plaintiff to produce the already-provided first July 25 inventory worksheet and July 29 TLC worksheet again, but that he produce the second inventory worksheet used on July 25. Notably, Boland does not mention ink sampling

specifically in this communication, vaguely referring to “sampling areas” and stating that Stewart “is still maintaining the untested samples” without mentioning ink samples specifically. Boland again asserts, “This all has been previously provided,” but then indicates that he will make an additional production that day. A true and accurate copy of this email is attached hereto as **Exhibit HH**.

43. On August 30, 2012, shortly after 4:30 p.m., Boland sent me a series of emails containing links to three files on a website called “YouSendIt,” the first of which contained images (approx. 705MB), the second of which contained PDF files (approx. 38MB), and the third of which contained file folders (approx. 579MB). This production contained dozens of items that had never before been produced to Defendants. It did not include the second inventory worksheet that Stewart used on July 25, 2011 to record the contents of his vials, nor did it include any record of any ink sampling conducted by Stewart. True and accurate copies of the emails providing links to the YouSendIt files are attached hereto as **Exhibit II**.

44. On August 31, 2012, I sent Boland an email detailing the documents that—despite Boland’s continued representations that he had earlier provided “everything”—had never before been produced to Defendants, and describing the persisting deficiencies in the production. Like Defendants’ August 27 letter, this email specifically named files that Defendants had never before been provided and attached screenshots of the production. A true and accurate copy of this email and its attachments are attached hereto as **Exhibit JJ**.

45. On September 6, 2012, Boland sent me an email providing a purported ten-page response from Larry Stewart regarding Defendants’ document requests. As explained in greater detail below, this statement is evasive and contains misrepresentations undoubtedly intended to confuse the record on the issues of Stewart’s second inventory worksheet used on July 25, 2011

and of Stewart's ink sampling or lack thereof. It continues to falsely represent that documents that were provided to Defendants for the first time on August 30, 2012 were previously provided. A true and accurate copy of the email transmitting Stewart's statement is attached hereto as **Exhibit KK**. A true and accurate copy of Stewart's statement is attached hereto as **Exhibit LL**.

IV. Plaintiff's Misrepresentations and Falsehoods

46. All of Plaintiff's responses to Defendants regarding Defendants' production of documents reflecting Stewart's sampling of the Hard-Copy Documents have been evasive at best, and misleading and outright false at worst. In this section I describe some of the most egregious examples in order to clarify the record.

47. In his August 1, 2012 email (Exhibit W) to Defendants, which purports to belatedly respond to Defendants' July 8, 2012 email, Boland makes numerous false statements, including:

- a. Boland asserts, "Mr. Stewart has no additional records of where on the document these samples were taken." As Plaintiff's own subsequent productions prove, this is false. Plaintiff produced additional previously-undisclosed records of the general locations from which Stewart took paper and toner samples from the Hard-Copy Documents in both his August 23 and 30, 2012 productions. *See* ¶¶ 37-38, *supra*; ¶ 49(c)(2), *infra*. Moreover, the second inventory worksheet Stewart used on July 25, 2011, which he has not yet produced, will show samples labeled "Q2" were taken from a six-page document, *i.e.*, the Specifications document. This will provide additional records regarding where the paper samples are from because it will demonstrate that the vials provided to Walter

Rantanen for testing (vials 7 and 9), labeled “Q2,” actually contained samples from the Specifications document.

- b. Boland also asserts that Defendants were provided Stewart’s “handwritten notes” and images of TLC plates in 2011. As demonstrated in Defendants’ August 27, 2012 letter, this is false—Defendants were provided no such notes at that time. *See Exhibit DD, supra.*

48. In his August 23, 2012 email (Exhibit AA) to me, apparently provoked by Defendants’ August 22 letter stating an intention to bring these issues before the Court, Boland makes numerous false statements, including the following:

- a. Boland asserts, “Specific scans [produced to Defendants in October 2011] were made in order to document where [Stewart] had taken the plugs of ink, toner and paper. In those images, you can see small holes that correspond to where he took the plugs.” This is false: these scans do not document Stewart’s sampling in any way. Stewart took these scans before conducting any sampling of the Work for Hire document. *See Aycock Decl.* ¶ 18. The sample holes represented in these scans was done by Defendants’ experts LaPorte and Lyter on July 16 and July 19, 2011, respectively.
- b. Boland also misleadingly asserts, “In addition, after he completed taking samples opposing counsel immediately received a photocopy of the front and back side of each of the 2 pages of the FB contract, again depicting where he had taken his samples. Defendants’ counsel were provided those photocopies on-site in Chicago at the end of his examination on 7/25/11.”

But these photocopies were taken after both of Plaintiff's experts had sampled the Hard-Copy-Documents, so they represent the sampling of both Stewart and Speckin. As explained in the Declaration of Amanda Aycock and as Speckin testified to, Speckin took ink samples, while Stewart took only paper and toner samples. *See* Aycock Decl. ¶¶ 14-15.

- c. Additionally, as clearly outlined in Defendants' August 27, 2012 letter (Exhibit DD, *supra*), Boland made false assertions about what had been produced previously to Defendants.

49. Finally, Stewart's evasive so-called "detailed, ten page response" on September 6, 2012 does nothing more than attempt to muddy the record, and it is rife with misrepresentations and falsehoods.

- a. The majority of this "detailed, ten page response" consists of lengthy quotations from Defendants' correspondence to Boland.
- b. Stewart spends the first seven-and-a-half pages repeatedly asserting that Defendants' insistence that they have not been provided certain materials previously is "demonstrably wrong," and attempting to demonstrate as much. Stewart fails to do so. Defendants simply did not receive the materials Stewart cites when Stewart says he provided them. As Stewart himself acknowledged in his deposition, he did not produce directly to Defendants (*see* Stewart Depo. Tr. at 353:10-13). He first produced to Plaintiff's counsel, who in turn produced to Defendants. So Stewart's assertions about when *he* produced given materials are completely irrelevant—simply because he produced something to Plaintiff's counsel

does not mean that Plaintiff's counsel produced it to Defendants. But more importantly, this entire discussion is beside the point: at no time has Stewart or Plaintiff produced any evidence documenting any ink sampling that Stewart took on July 25, 2011, and at no time has Stewart or Plaintiff produced the second "TLC Worksheet Form" that Stewart used on July 25, 2011 to inventory vials 11-18, which contained paper and toner samples from the Specifications document.

- c. In response to Defendants' observation that Stewart and Plaintiff have produced no evidence that he sampled the ink from the Hard-Copy Documents, Stewart evasively states: "I have provided (on multiple occasions) all TLC worksheets, handwritten notes, along with scans and photocopies of the Work for Hire Contract showing locations of areas where I removed samples. There is nothing else I can provide." Exhibit LL, *supra*, at 9. Stewart also states, cryptically, that "[t]here has been no purposeful destruction of materials or files." Exhibit LL, *supra*, at 10 (emphasis added). Stewart later asserts, "Pgs 21-42 of the same file show 'before and after' sampling pictures as well as locations of sampling areas. I am still maintaining the untested samples in case they are needed." Exhibit LL, *supra*, at 9. He then concludes, "In fact, the untested material awaits. That way, if additional tests become necessary to answer questions regarding the ink, paper or toner from the Work for Hire Contract, we are prepared to provide them." Exhibit LL, *supra*, at 10

(emphasis added). These statements are false and/or misleading for multiple reasons as explained below.

1. Stewart does not so much as mention the word “ink” in his response stating the evidence of sampling he has provided.
2. None of the documents that Stewart and/or Plaintiff have actually provided show any ink sampling from the Work for Hire or Specifications document.
 - i. The two “TLC Worksheet Forms” that Stewart has provided—one dated July 25, 2011 and used as an inventory worksheet for vials 1-10, the other dated July 29, 2011 and used as a TLC worksheet for TLC “Plate #1”—only document paper and toner samples. *See Exhibits H, K, supra.*
 - ii. The handwritten notes Stewart has provided say nothing about his sampling of the ink. *See Exhibits I, L, supra.*
 - iii. The photocopies of the Hard-Copy Documents that Stewart provides showing “where he removed samples” only show locations from which he removed paper and toner samples, not ink samples. Moreover, Stewart’s assertion that these photocopies show “before and after” images of the sampling Hard-Copy Documents is misleading and wrong, for two main reasons: First, the first eight pages, on which there is a handwritten note saying “set of copies made 7/25 before Plaintiff’s testing (destructive) began,” are photocopies of the

version of the Work for Hire document attached to the Amended Complaint and a faxed version of the Specifications document. Both of these copies were made prior to any sampling whatsoever of any document—there is no sampling visible on the copies at all. By the time the Hard-Copy Documents were examined by Stewart on July 25, they had already been sampled by Defendants’ experts on July 16 and 19, 2011, so any photocopies he took on July 25 “before” his sampling would necessarily show sampling from Defendants’ experts only. Second, the purported “after” photocopies explicitly reflect only paper and toner sampling, not ink sampling. These photocopies are attached hereto as **Exhibit MM**.

3. Obviously, despite his statement to the contrary, there is other information Stewart can provide, such as sworn declaration clearly stating whether he took ink samples, and if so, how many he took, how many he maintains, and from which document(s) they were taken. As of now, Boland has repeatedly asserted that Stewart took samples of ink (*see, e.g.*, Exhibits EE (August 28, 2012 email), GG (August 30, 2012 email)), but since his deposition Stewart has not clearly stated that he in fact took ink samples or produced evidence that he did. Moreover, Stewart could explain his cryptic statement that there has been no “purposeful”

destruction of files—Stewart can and should provide more information if there has been any destruction whether purposeful or not.

4. Stewart repeatedly claims that he maintains the “untested samples,” but does not state—in this document—that the samples that he himself possesses are actually ink samples. In fact, the only time he mentions ink in relation to sampling or testing, Stewart says that “we are prepared to provide them.” Exhibit LL, *supra*, at 10. The antecedent to “them” in this sentence is incredibly vague—it could refer to “untested material” or “additional tests” or “answer[s] to questions regarding the ink, paper or toner.” In any event, Stewart in no way provides a statement that he took or is in possession of ink samples.

d. In response to Defendants’ observation that Stewart has not produced the second worksheet he used on July 25, 2011 to inventory the samples contained in vials 11-18, Stewart conflates the July 29, 2011 TLC worksheet with the second July 25, 2011 inventory worksheet and insists that he has already provided two worksheets. Exhibit LL, *supra*, at 9-10.

1. To be clear, it is Defendants position that there exists three distinct documents recorded on Stewart’s form titled “TLC Worksheet Form”:

i. A “TLC Worksheet Form” dated July 25, 2011, used as an inventory worksheet to record the contents of Stewart’s vials 1-

10, which contain paper and toner samples from the Work for Hire and first two pages of the Specifications documents. This document has been produced.

ii. A “TLC Worksheet Form” dated July 25, 2011, used as an inventory worksheet to record the contents of Stewart’s vials 11-18, which contain paper and toner samples from pages three through six of the Specifications document. Defendants respectfully refer the Court to the Declaration of Amanda Aycock, at paragraphs 26 to 28 for the evidence that this document exists. This document has not been produced.

iii. A “TLC Worksheet Form” dated July 29, 2011, used as a TLC worksheet to record lanes tested on Stewart’s TLC Plate #1. Stewart tested the samples that he took on July 25 on TLC Plate #1, but he did not conduct this TLC analysis until July 29, 2011. This document has been produced.

2. Stewart insists that because the July 29, 2011 “TLC Worksheet Form” has two dates written on it, and the “second date is ‘7/25/11’,” it must be the worksheet Defendants are seeking. This “explanation” defies common sense. First, it is clear that the document itself is dated “7/29/11” and that the notation including the earlier date is simply meant to identify the date the samples used were extracted, not to indicate the date the document was created. Second, Stewart did not conduct any TLC analysis using

TLC plates at the inspection on July 25, 2011, so it would not make sense for him to have recorded the lanes of a TLC plate at that time. Third, the July 29, 2011 form itself shows that Stewart tested toner samples from vials 12, 14, 16, and 18, which as noted on that very worksheet contained toner samples from pages three through six of “Q2”. Stewart recorded the contents of these vials on the second inventory worksheet he used on July 25, 2011 that he now refuses to produce.

3. Stewart states: “As Mr. Southwell insists that I created two worksheets on 7/25/11, and I have 2 worksheets with a date of 7/25/11, I can only assume that the 2 worksheets provided to Mr. Southwell represent the 2 worksheets he is speaking of. There is no additional or 3rd worksheet outlining an inventory of the contents of vials 11 through 18.” Exhibit LL, *supra*, at 10. This is false. As can clearly be seen on the video of the inspection, Stewart created a third worksheet on July 25, 2011 to inventory the contents of vials 11-18. *See* Aycock Decl. ¶¶ 26-28. If Stewart has destroyed, discarded, or otherwise disposed of this worksheet, then he should be required to explain what he did with it in a sworn declaration.

V. Evidence and Information in Support of Defendants’ Motion

50. In addition to the evidence discussed in Defendants’ Memorandum in Support of Their Motion for Production, which includes his Report (Doc. No. 416 et seq.) and handwritten

notes from July 25, 2011, there are numerous other instances in his notes and productions in which Stewart explicitly or implicitly refers to the six-page Specifications Document as “Q2.”

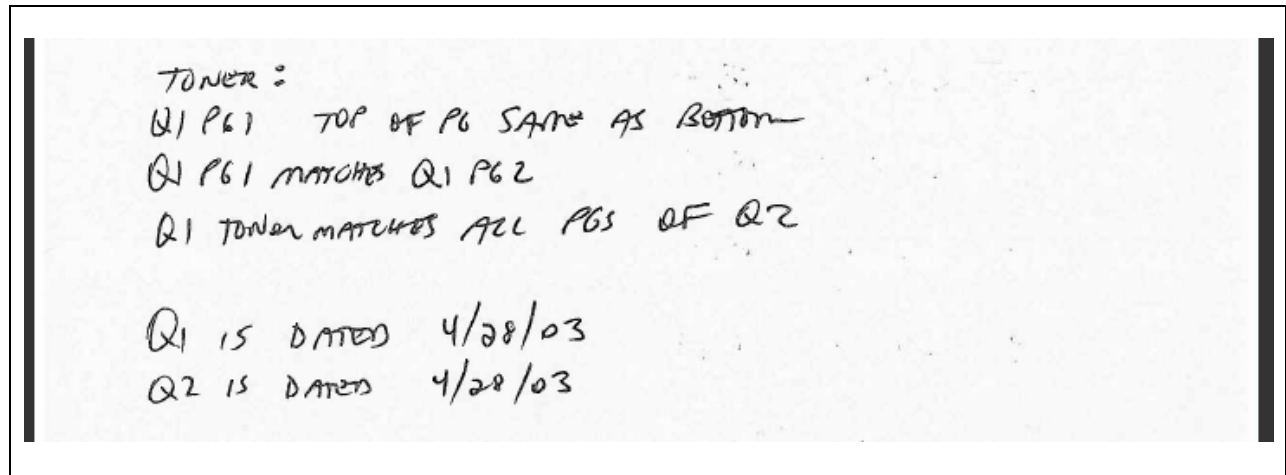
These examples include, but are not limited to:

- a. Exhibit J, *supra*, which as noted above is a “TLC Worksheet Form” dated “7/29/11” and labeled “Plate #1,” which lists document “Q1” as having 2 pages and document “Q2” as having 6 pages. This “TLC Worksheet Form” provides information about the ten rows of Stewart’s TLC plate used during his TLC analysis of the toner.

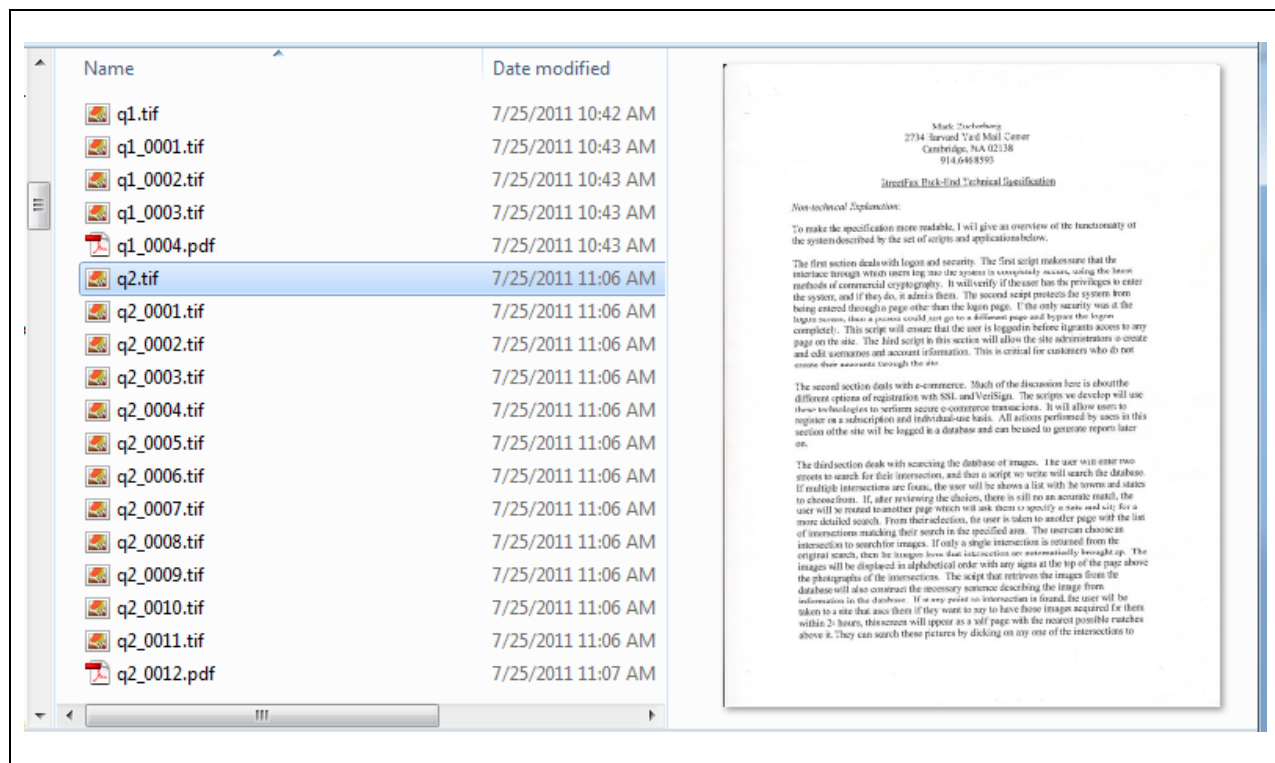
- 1. The “TLC Worksheet Form” also shows that Stewart tested toner samples from vials 12, 14, 16, and 18, which as noted on that very worksheet contained toner samples from pages three through six of “Q2”. Exhibit J, *supra*. A true and accurate screenshot of this worksheet is reproduced below.

4	Q2 Pg 1 #8			A
5	Q2 Pg 2 #10			A
6	Q2 Pg 3 #12			A
7	Q2 Pg 4 #14			A
8	Q2 Pg 5 #16			A
9	Q2 Pg 6 #18			A

- b. Exhibit L, *supra*, which, as noted above, are Stewart's handwritten notes regarding his toner analysis. These notes identify "Q1" and "Q2" as two distinct documents, each having a date of "4/28/03," with "Q1" having 2 pages and "Q2" having multiple pages. A true and accurate screenshot of these notes is reproduced below.



- c. In Stewart's October 2011 production to Defendants pursuant to the Court's expedited discovery orders, Stewart labeled his images of the Work for Hire Document taken on July 25, 2011 with "q1" in the filename, and labeled images of the Specifications Document with "q2" in the filename. A true and accurate screenshot of a portion of Stewart's October 25, 2011 production, showing the Specifications document with a filename including "q2," is reproduced below.



51. Stewart testified at his deposition that he was authorized to conduct “additional” sampling of the Work for Hire document. *See* Stewart Depo. Tr. at 359:23-360:4. However, this Court has never authorized any “additional” sampling by Plaintiff’s experts, nor has Plaintiff ever notified Defendants that his experts would be conducting any additional sampling of either the Work for Hire Document or Specifications document, which both remain in Plaintiff’s possession. In fact, the parties have never even discussed the possibility of Stewart conducting such an “additional” round of sampling. Thus any alleged “additional” sampling Stewart conducted was in clear violation of the Court’s Hard-Copy Protocol dictating that all sampling occur in the presence of representatives from both parties. *See* Doc. No. 84 ¶ 4.

52. A true and accurate copy of the “Test Services Request Form” produced by Stewart, photographs of which were entered onto the record during the deposition of Walter Rantanen as Defendants’ Exhibit 32, is attached hereto as Exhibit NN.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this
26th day of September, 2012 at New York, New York.



Alexander H. Southwell