UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR RECOVERY OF EXPENSES

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INTRODUCTION

By the end of the court-ordered period for expert depositions, Plaintiff Paul Ceglia noticed ten depositions and cancelled seven of them—three with less than 48 hours' notice and four with less than 24 hours' notice. Ceglia offers neither justification nor apology for his behavior. He has provided no remotely credible argument why these cancellations were timely, nor any federal rule or case law suggesting that Defendants' application for recovery of costs is unreasonable. Instead, he relies only on unsupported self-serving assertions about the applicability of Rule 30(g) and the reasonableness of Defendants' requests. Defendants' application for recovery of expenses should be granted in full.

ARGUMENT

Defendants' request for reimbursement of expenses incurred as a result of Ceglia's last-minute cancellation of seven of ten scheduled depositions is well-supported. As Defendants explained in their opening papers, *see* Doc. No. 518 at 7, Federal Rule of Civil Procedure 30(g) authorizes recovery of costs and fees associated with preparation for untimely cancelled depositions. Indeed, courts in the Second Circuit and in this very District have routinely awarded such recovery, particularly in the case of depositions cancelled with less than 48 hours' notice. *See* Doc. No. 518 at 7–8 (collecting cases).[1] Here, Defendants' experts reviewed their reports, reviewed the reports of Plaintiffs' experts, conducted hours of deposition preparation with Defendants' counsel via telephone, traveled to New York, and conducted deposition

[1] Ceglia responds that "Defendants' case law centers on attorneys who cancel depositions, untimely, when they are the noticed party responsible to present themselves and their witness for a deposition." Opp. at 3. But Rule 30(g) applies to all untimely cancellations—regardless of which party chose to cancel and adversely affect the opposing party. *See, e.g.*, *Edmonds v. Seavey*, No. 08 Civ. 5646, 2009 WL 1285526 (S.D.N.Y. May 5, 2009); *Root Bros. Farms v. Mak*, No. 05 Civ 10863, 2007 WL 2789481 (S.D.N.Y. Sept. 25, 2007); *Donini Int'l., S.P.A. v. SATEC (U.S.A.) LLC*, No. 03-civ-9471, 2006 WL 695546 (S.D.N.Y. Mar. 16, 2006); *Barrett v. Brian Bemis Auto World*, 230 F.R.D. 535 (N.D. Ill. 2005).

preparation with Defendants' counsel for 1–2 days—all reasonably incurred expenses that could have been avoided had Ceglia provided timely notice of the cancellation of the depositions.

Attempting to evade responsibility for the reasonable costs incurred as a result of his untimely cancellations, Ceglia offers a grab-bag of irrelevant and unsupported objections.

First, Ceglia argues that Rule 30(g) only applies to two situations in which a party is informed of the impending cancellation: (1) by the opposing party's absence at the deposition itself or (2) where the opposing party cancels depositions in an "attempt to gain leverage." *See* Opp. at 13–14. Setting aside the fact that Ceglia's last-minute cancellations were an obvious attempt to gain leverage, Ceglia's argument is wrong. In fact, federal courts in this District and around the country frequently grant reimbursement for travel and lodging costs, expert appearance fees, and expert and attorney preparation time where the opposing party cancels depositions within 24 or 48 hours—not merely where, as Ceglia argues, a party is "left sitting in the deposition room wondering when opposing counsel and the witness were going to appear." Opp. at 14.[2]

Second, Ceglia accuses Defendants of "adding phantom terms to the parties' agreement," by seeking costs and expenses that were not explicitly contemplated. Opp. at 1, 3–6. But this is a non-sequitur. Defendants are not making this application under the agreement reached by the

[2] *See, e.g.*, *Carlson v. Geneva City School Dist.*, No. 08-CT-6202, 2011 WL 3957524 (W.D.N.Y. Sept. 7, 2011); *Star Direct Telecom v. Global Crossing Bandwidth*, No. 05-cv-6734T, 2010 WL 3420730 (W.D.N.Y. Aug. 23, 2010); *Edmonds v. Seavey*, No. 08 Civ 5646, 2009 WL 1285526 (S.D.N.Y. May 5, 2009); *Root Bros. Farms v. Mak*, No. 05 Civ. 10863, 2007 WL 2789481 (S.D.N.Y. Sept. 25. 2007); *Miller v. Dyadic Int'l, Inc.*, No. 07-80948-civ, 2008 WL 2116590 (S.D. Fla. May 20, 2008); *Barrett v. Brian Bemis Auto World*, 230 F.R.D. 535 (N.D. Ill. 2005); *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989).

Ceglia's only challenge to Defendants' support in the case law is completely misleading. Ceglia argues that the court in *Edmonds* held that cancellations are only improper where the cancelling party is attempting to "gain leverage." Opp. at 13. But the court's finding of bad-faith was dicta. Indeed, the court characterized the aggrieved party's motion as "compelling," and awarded costs, including attorneys' fees, for the opposing party's untimely cancellation, faulting the party's "cancell[ation] and re-scheduling . . . [and] attempt to cancel again on the eve of the deposition, when it was impossible to seek court intervention." *Edmonds*, 2009 WL 1285526, at *3.

parties, but rather under the Federal Rules and the law of this Circuit. The parties' agreement, made before Ceglia cancelled 7 of the 10 depositions he noticed, pertains to reimbursement for depositions that actually occur. It does not purport to govern reimbursement for depositions that are cancelled without reasonable notice—an issue controlled by Rule 30(g). The parties' agreement does not in any way limit the relief this Court is authorized to award under Rule 30(g) for Ceglia's serial untimely cancellations.

Third, Ceglia suggests that the untimely cancellations of the depositions of Jason Novak and Eric Friedberg, Gus Lesnevich, and Frank Romano were "reasonable" because each of the deponents could have returned home to "put[] in a full day's work on the previously scheduled day of [their] deposition." Opp. at 15–17. This is also irrelevant. Based on Ceglia's deposition notices and repeated confirmations, Defendants' experts prepared for and blocked out time to attend their deposition. Ceglia cites no authority to support the contention that Defendants' experts had an obligation to "put in a full day's work" after Ceglia cancelled the long-scheduled depositions at the last minute and Defendants incurred these expenses.

Fourth, Ceglia argues that his counsel Dean Boland's asserted illness and cancelled flights should excuse his untimely cancellations of the depositions of Peter Tytell, Al Lyter, and Gerald McMenamin. But Ceglia's excuses are disingenuous. As Defendants informed Boland at the time, and set forth in their opening papers, *see* Doc. No. 518 at 3 n.2, numerous flights and trains were available that could have put Boland in New York well before the start time for the depositions. Furthermore, Defendants offered to start the depositions late to accommodate Boland's travel difficulties. *Id.* But these overtures were refused.

Ceglia's defense that Boland fell ill, forcing him to cancel and postpone three depositions the eve before their commencement cannot be credited. In support of his argument, Ceglia cites

only one case, *Tomlinson v. St. Paul Reinsurance Mgmt. Corp.*, No. 96 Civ. 4760, 1997 WL 167051 (S.D.N.Y. Apr. 9, 1997). But *Tomlinson* does not implicate Rule 30(g) at all and is therefore entirely irrelevant to the issues raised in Defendants' instant application.

Fifth, Ceglia attempts to quibble with the specific costs entailed by his untimely cancellations. Under Rule 30(g), "reasonable expenses" include a large variety of incurred fees and costs, including experts' travel and lodging costs and preparation costs incurred by experts and attorneys. *See* Doc. No. 518 at 8 (citing cases). Defendants have conservatively requested reimbursement only for expert travel and one or two days of associated preparation and lodging time—even though much more time was expended in preparing telephonically over the preceding four months. *See id.*at 9. In addition, Defendants only claim reimbursement for the time expended by one associate attorney, with a partner's oversight, for each expert's preparation. *See id.* These limited expenses are reasonable.

Ceglia provides no legal basis and cites no case law for his assertion that Defendants' requests are unreasonable. For example, Ceglia now complains that several of Defendants' experts, including Professor Gerald McMenamin, charged a flat day rate. This objection is both unavailing and hypocritical, given that Ceglia was told of these fees as early as July 5, 2012, *see* Supplemental Declaration of Alexander H. Southwell, Ex. A, and that several of his own experts, including Neil Broom and Jerry Grant, also charged flat day rates. Furthermore, Ceglia challenges Defendants' request for reimbursement for travel and lodging expenses. Again, Ceglia cites no case law and instead argues that he should only be ordered to pay for one night of hotel accommodation and only for travel expenses that *he* perceives to be "reasonable"—without providing any support that would deny Defendants' reimbursement for all of the expenses to

which they are lawfully entitled.[3] Finally, Ceglia falsely states that Defendants have "double-billed" for Dr. Lyter's and Mr. Tytell's appearances. In fact, Defendants only request the additional charges entailed by Ceglia's untimely cancellations and postponements of their depositions. *See* Doc. No. 518 at 3–4.[4]

CONCLUSION

For the reasons set forth herein, and in Defendants' application for Recovery of Expenses (Doc. No. 518), Defendants respectfully request that this Court order Ceglia to reimburse Defendants for reasonable expenses incurred as a result of Ceglia's untimely cancellation of seven of the ten depositions he noticed. Those expenses, for which Defendants have submitted supporting invoices and documentation, total $98,640.75, and should be reimbursed within 14 days of this Court's order.

Defendants also request reimbursement for the reasonable time spent preparing the Motion and Reply, which could not yet be detailed, including fees incurred in connection with oral argument, or enforcement of a cost award. Information concerning those additional fees will be fully submitted once briefing and argument (at this Court's discretion) occur.

[3] By way of example, Boland mischaracterizes the hotel expense invoiced by Defendants' expert Gus Lesnevich. Mr. Lesnevich and his assistant, Khody Detweiler, spent $1,799.48 for two rooms over two nights, not the "one night" that Boland pretends. Ceglia also objects to the travel costs incurred by Professor McMenamin as unreasonable. Professor McMenamin is 68 years old who traveled on a six-hour flight each way from California to New York to attend his deposition. His contractual terms and conditions also entitle him to business-class travel, a common accommodation for experts, and this expense was incurred by Defendants.

[4] Ceglia misrepresents one of the few cases he discusses in detail, *Barrett v. Brian Bemis Auto World*. Ceglia claims that parties are not entitled to reimbursement for preparation time because it is not "wasted time." But in fact, the court in *Barrett* declined to award sanctions for time spent in preparation for the expert's deposition because it explicitly declined to "bar further deposition of [the expert]." 230 F.R.D. at 537. Because the deposition was left open, preparation time could not have been wasted.

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Respectfully submitted,

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