UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

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

REPLY TO DEFENDANTS' RESPONSE REGARDING MOTION TO STRIKE NEW EXPERT REPORT

DEFENDANTS ENTERED JUDICIAL ADMISSION THAT THE SIGNATURES ON PAGE TWO OF THE FB CONTRACT ARE NOT IN DISPUTE

Lesnevich's new report focuses on the signatures on page two of the FB Contract. Lesnevich was hired more than a year ago and long before the June 30, 2011 to evaluate the signatures on page two of the FB Contract.

I was asked to examine and determine the authenticity of a questioned handwritten entry and the questioned signatures of "Mark Zuckerberg" and "PaulCeglia" appearing on a purported "WORK FOR HIRE" CONTRACT. Doc. No. 52 at ¶10.

Lesnevich's new report is not evaluating new evidence, it is manufacturing new theories to confront new problems in Defendants' case. Lesnevich was instructed to examine the signatures on page two of the FB Contract before submitting his expert report attached to the Motion to Dismiss on March 26, 2012. They have had more than a year to examine those signatures, and undoubtedly had examined them producing no report for obvious reason. Defendants have waived any dispute over the signatures on page two of the FB Contract because defense attorney Snyder entered a judicial admission of authenticity of page two. During the June 30, 2011 hearing, Snyder entered the following judicial admission confirming the

authenticity of page two of the FB contract.

THE COURT: But [Defendant Zuckerberg] did sign some agreement.
MR. SNYDER: Correct. So the question is not whether the signature --
THE COURT: So the question is whether it's [Defendant Zuckerberg's] signature on this agreement.
MR. SNYDER: That's not a disputed issue in the case. Hearing Transcript, June 30, 2011 at 56.

Snyder's statement above is a deliberately made unambiguous admission of fact. A judicial admission is "a clear and unambiguous admission of fact." *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir.1984) *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir.2010) (quoting *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir.1997) ("[I]n order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.")). Plaintiff and this court relied upon Defendants' judicial admission. Defendants' used this judicial admission as part of their argument to obtain "efficient" and "limited" one-sided discovery.

THE ATTEMPTED SUBMISSION OF THIS NEW REPORT VIOLATES RULE 26

Plaintiff opposed the use of Defendants' expert LaPorte's report. In rejecting that motion, the court held that F.R.Civ.P. 26 was violated by LaPorte, but the violation was de minimis. Doc. No. 457 at 14. The court did not hold that Rule 26 was inapplicable to the one-sided discovery or the discovery connected with their motion to dismiss. Id.

Defendants expressed during expert depositions that they were not required to share documents with us that their experts relied on in reaching their conclusions. This is despite the fact they demanded such documents from Plaintiff and he provided them. They asserted this arguing that this court was not ordering "Rule 26 depositions" but depositions under the court's inherent power. Therefore, they did not have to follow Rule 26 or any other rules in the

conducting of expert depositions. Without Rule 26's restrictions, Defendants feel free to provide new reports, to tell LaPorte to hide his notes in his hotel room and hide the results of their analysis of twenty-eight Zuckerberg computer devices. The lack of any report on those twenty-eight devices is telling. It is obvious that had Defendants examined those twenty-eight devices and found no evidence relevant to Plaintiff or the authenticity issues in this case, they would have highlighted that in bold letters in every brief filed following that discovery. Instead, silence. That silence tells this court all it needs to know about whether Defendants are withholding information relevant to the court's motion to dismiss determination. Meanwhile they demand more from the court and Plaintiff.

NO JUSTIFICATION FOR DEFENDANTS' DELAY IN PROVIDING NEW REPORT

Defendants offer no excuse for their delay in providing this report timely. A review of the report exposes that the data underlying it was available to Defendants for more than a year before its submission.

LESNEVICH REPORT ADDS NEW THEORY, NOT BASED ON NEW FACTS

There is no clear or convincing substance to Lesnevich's new report. Defendants' were compelled to attempt to maneuver around the Court's clear deadline to provide something to duel with Blanco's conclusions. Lesnevich's new report continues to underline expert disputes on meaningful facts relating to Defendants' motion to dismiss for fraud on the court.

Lesnevich New Conclusion #1 - Plaintiff has disposed of Lesnevich's first conclusion regarding the nonsensical theory that there were two physical documents (Doc. No. 472-1 at 73). Lesnevich supported his first expert report with a comparison an original to an image altered by Argentieri. Doc. No. 481 at 33.

Lesnevich New Conclusion #2 - Lesnevich's new report concluded, "that the

questioned Zuckerberg signature and date found on the Work for Hire document were modeled after a near-identical source-signature and date...unnaturally written tracings...not written by Mark Zuckerberg." Doc. No. 472-1, at 74. At best, this conclusion merely rebuts Blanco's previously unrebutted conclusion that the Mark Zuckerberg signature on page two of the FB Contract is not a trace forgery. Doc. No. 415 at 38. More dueling experts.

Lesnevich New Conclusion #3 - Lesnevich's new report concluded that "the questioned Zuckerberg initials...were not written by Mark Zuckerberg." No. 472-1 at 74. This conclusion, at best, disputes Blanco's previously unrebutted conclusion that "the questioned 'MZ' initials...represent the natural, normal and genuine handwriting characteristics of Mark Zuckerberg...." Doc. No. 415 at 46. More dueling experts.

Lesnevich New Conclusion #4 - Lesnevich concluded that Plaintiff forged his own signature. Defendants cannot even reasonably argue that Lesnevich is the more reliable expert over Blanco. Lesnevich not only failed to examine the handwriting his first time around or the intervening ten months, but also provided in his March 26, 2012 report, a comparison to an obviously altered image presuming it to be unaltered. This is not the work of an expert whose conclusions are reliable. It is at best sloppy and at worst contrived to meet a pre-determined conclusion. Not to escape the obvious question here, but how can a person forge their own signature and why would they? It is their signature, they could just sign it.

DEFENDANTS' CHANGING DEFENSE THEORY MAKES NEW REPORTS SUPERFLUOUS

The clear and convincing standard, if it means anything, means a defense that has a theory that is not fluctuating with every new expert report. From the outset of this case, until Lesnevich's March 26, 2012 report, Defendants have consistently urged a page one substitution theory in this case. That is, they have, in various forms and at various times, attempted to

distinguish the two pages of the FB contract, focusing on the claimed forgery of page one of the contract and acknowledging the authenticity of page two of the FB contract.

Defendants repeatedly emphasized this page one substitution theory of fraud.

DEFENDANTS DESIRE TO OPEN THE FLOODGATES OF NEW REPORTS

Defendants intended to ambush Plaintiff at the beginning of or during Lesnevich's deposition by not previously providing the new seventy-five page report. It strains credulity that Lesnevich forgot or failed, during this months of access to evidence, to consider the conclusions he now seeks to provide to this court outside scrutiny of Plaintiff's experts. Doc. No. 472-1. The court should ponder why Defendants would seek to enter new reports into the record strategically and procedurally positioned to evade scrutiny from Plaintiff's experts.

It has taken a full six months to get from the submission of the Defendants' motion to dismiss (Doc. No. 318) to where we are today, at the brink of a ruling that Defendants' have no clear and convincing evidence of fraud. Defendants know full well that fairness dictates that in order for the court to consider any expert opinions presented by the Defendants, that the Plaintiff should be given the opportunity for his experts to review the new reports, depose the Defendants' expert about the information in the new reports and permit Plaintiff's experts to submit a report in response. To do otherwise would be to consider allegations made by Defendants in a dispositive motion without ever giving Plaintiff a chance to respond.

The last six month process was not only time consuming, but financially draining on Plaintiff. Defendants desire nothing more than to start a second six month process to delay the inevitable in hopes that they can bankrupt the Plaintiff before justice is served. The cost and expense of motion practice and expert fees to permit a second indeterminant period would be prejudicial to Plaintiff. Plaintiff was unable to depose Lesnevich previously because of the

unreasonable expert fees demanded and that situation persists. Plaintiff desires to move this litigation on towards trial.

If the Court decides not to strike the Lesnevich report, Plaintiff will be prejudiced. Plaintiff cannot and will not again depose Defendants' expert as part of another protracted process serving Defendants' aim to financially punish Plaintiff in hope of winning this case avoiding the obvious facts entitling Plaintiff to a trial. Plaintiff sought additional discovery and was met with a motion denial and looming sanctions. Defendants have sought and received additional time and information repeatedly. The court *interpreted* Plaintiff's motion for discovery as merely a strategy to delay. Defendants' motions, however, have *actually caused delay* and have been met with unequivocal approval. Plaintiff sought an extra week to submit expert reports and was denied following Defendants cacophonous bleating about delay, etc. Defendants easily ignore hypocrisy seeking delays and receive those delays unhindered by the Court's history of greeting Plaintiff's motions, incidentally including delay, with harsh rejection.

FAIRNESS

Plaintiff's request for additional time to file his expert's reports (Doc. No. 391) was denied by the Court (Doc. No. 408). It was clear to Plaintiff that it was not the Court's intention to allow the parties to file expert reports at will. If the court's order were properly interpreted to allow periodic "updating" of information in expert reports, Plaintiff had no need to approach the court about the denied one week extension. He could have just timely submitted his reports as they were and added information to them throughout the months afterward. The court nor Defendants indicated in any filings or rulings that this was the understanding of either -- and with good reason -- it's not the court's order. Defendants would have clearly sought exclusion of any Plaintiff's expert report filed even one day late. Yet, here, Defendants seek to file new reports

more than six months late.

Endorsing Defendants' late-comer strategy by permitting filing of the new Lesnevich report, would encourage Defendants to add as many unrefuted expert reports as possible in their reply. Even if the Court desires to deny this motion to strike, the Court should clearly state no other reports will be permitted until Defendants' motions to dismiss are decided.

THE UNEXPLAINED IRRATIONALITY OF DEFENDANTS' TWO PAGE FORGERY CLAIM

Along with being Defendants' theory du jour, the new two page forgery theory makes no rational sense. To be believed, Defendants have to explain, which they have not attempted, why a supposed expert forger would know enough to forge two documents, copy the fonts and margins exactly on page two and disregard them completely on page one. The inconsistency in their theories is underlined by their inconsistency in their description of Plaintiff. They oscillate between Plaintiff being an "amateur forger" and others a near genius that he could trace Defendant Zuckerberg's signature with machine precision. Defendants claim Plaintiff is capable of a sophisticated trace forgery, matching margins and fonts to page two of the Street Fax digital images, but blatantly disregarding matching those same fonts and margins to page one of the Street Fax digital iimages.

DEFENDANTS DENY REALITY HOPING THIS COURT PLAYS ALONG

Defendants sought expedited discovery claiming their expert Romano had determined that page one of the FB contract was an "amateurish forgery." They crowed about having enough fabrication evidence to obtain a dismissal in June 2011, but wanted more scientific evidence which they claimed all experts would converge on. That did not happen. In fact, there are now nationally recognized experts in every relevant field in this case on opposite sides of every relevant conclusion about the FB contract and the emails. The focus of those experts and

Defense Counsel Orin Snyder, was persuading the court that page one of the FB contract was a fraud attached to the authentic page two.

Some of Defendants' early examples of what they predicted would become undisputed areas of fraud proof included:

1. Toner or paper that wasn't manufactured in 2003, making the contract unarguably fake. That claim was neatly rebutted by several of Plaintiff's experts.
2. The Romano "amatuer forgery" theory was deduced from visually examining a copy of the contract that we now know was altered by Mr. Argentieri before filing the New York state complaint. Doc. No. 536.

They failed in all of these promised claims and more. By March 26, 2012, Lesnevich and Tytell, both Defendants' handwriting experts, gave no opinion on the signatures of page two. This is consistent with Defendants then existing page one substitution argument. Defendants now suggests that page two was not ignored. They focused on page one, but their experts did not think of thoroughly examining page two of the FB contract until they read Plaintiff's expert reports. This is an incredible statement about the the incompetence of their handwriting experts that they did not realize to test both pages of a two page document until the Plaintiff's experts completed their tests. Incompetence is not a substitute for a justification for not conducting tests when Defendants were afforded the opportunity to do so.

THE AMBUSH AVERTED

Defendants intended to ambush Plaintiff's counsel with this new report on the day of Lesnevich's deposition. That is obviously untimely per the court's order as well as the parties' agreement to timely share documents before deposition days. Defendants claim they made Plaintiff aware of the new expert report before the end of depositions. This point is irrelevant.

What they craftily did not do is make Plaintiff aware of the new Lesnevich report sufficiently before the day of Lesnevich's deposition. Their ambush was thwarted and they ask this court for permission to formally ambush Plaintiff with Lesnevich's new report and certainly many others their experts are preparing now in anticipation of this court granting them, unfairly, unrefuted shots into their reply. Other of Defendants' experts admitted during their deposition that they were working on other tasks and generating additional conclusions that could easily be converted into new reports as well.

LESNEVICH'S NEW 'FINDINGS' CONTRADICT DEFENDANTS' OTHER EXPERTS

Lesnevich's new report only partially aligns with his original report, while nearly perfectly aligning with Tytell's report. Tytell found that the handwritten inks on page one of the FB Contract match the inks on page two. LaPorte's PE testing, however, found the inks on page one and page two distinguishable, i.e. a page one substitution supporting conclusion. This is completely inconsistent with what Defendants have represented to this court before as noted above.

Defendants used the page one substitution theory to induce this court to grant them one-sided discovery. The June 30, 2011 hearing is filled with commentary and incisive questions from the court exposing that Defendants were not then disputing the authenticity of page two of the FB contract. Hearing Transcript, June 30, 2011 at 51-64.

Defendants still suggest that Lesnevich's new report should help rather than hinder this court's ability to find clear and convincing proof, proof so overwhelming, so uncontested, that no jury could find in favor of authenticity. The new report masquerading as mere supplemental findings does just the opposite. It creates disputed questions of fact between their own experts and their own lawyers. Defendants' expert Romano also underlined Defendants' page one

substitution theory, now apparently abandoned, in his report. "I observed numerous significant inconsistencies between Pages 1 and 2 of Exhibit B." Doc. No. 48 at ¶ 14. "Furthermore, all the references to "The Face Book or "The Page Book" appear on Page 1. Thus, it is my conclusion that Page 1 of Exhibit B is an amateurish forgery." Id. at ¶16. Emphasis added.

In Doc. No. 330, Defendants' expert Tytell, also underlines the page one substitution theory:

I observed significant differences between pages 1 and 2 of the Work for Hire document in the typeface and line spacing of the printed text.15 Such differences are not normally seen in a two-page document prepared in a single, continuous process." Doc. No. 330 at 11. The line spacing of the text on page 2 of the Work for Hire document measured 3.175 mm, or 9 points.16 The line spacing of the text on page 1 of the Work for Hire document measured 3.245 mm, or just under 9.2 points, within paragraphs. There is extra space between paragraphs on page 1; however, this formatting feature is not present on page 2. Id. at 12.

His conclusion was the following: "The two-page Work for Hire document is not consistent with the normal preparation of a two-page document. Rather the use of multiple type styles and the pattern of ink usage indicate preparation of the two pages at different times." Id. at 13. Emphasis added.

CONCLUSION

Defendants' attempted submission of Lesnevich's new report merely underlines there are dueling experts in this case. It is being submitted in violation of Rule 26 and Defendants offer no excuse why this report could not have been presented on March 26, 2012 with their other reports. The admission of this untimely new report at this late stage would entitle Plaintiff to counter reports and perhaps further depositions dragging this case past deadlines this court has fought to protect from Plaintiff's motions in the past. Until this Court grants regular discovery, Defendants will continue to manufacture reasons to deny Plaintiff his right to discovery, a trial and generally delay these proceedings.

Respectfully submitted,

/s/Dean Boland

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