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

DECLARATION OF PAUL ARGENTIERI IN SUR REBUTTAL TO DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO THEIR MOTION TO DISMISS FOR FRAUD ON THE COURT

DECLARANT, submits this declaration and hereby declares under penalty of perjury and pursuant to 28 U.S.C. 1746 and under the laws of the United States that the following is true and correct:

1. I make this declaration upon personal knowledge.

2. I represent Paul Ceglia in this matter.

3. I have reviewed the Defendants' reply to Plaintiff's Response to Defendants' Motion to Dismiss for supposed Fraud on the Court.

New Cases Defining Fraud on the Court

4. Since the filing of Plaintiff's response, several new cases from the Second Circuit defining "Fraud on the Court" have been published that represent controlling authority on this court in considering Defendants' motion.

5. *In Space Hunters, Inc. v. US*, Court of Appeals, 2nd Circuit 2012, the Court found that, A "fraud on the court...seriously affects the integrity of the normal

process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). A fraud on the court "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Hadges v. Yonkers Racing Corp*., 48 F.3d 1320, 1325 (2d Cir. 1995). Emphasis added.

6. In *Impeva Labs, Inc. v. System Planning Corporation*, Dist. Court, ND California 2012, the Court found that, Fraud on the court includes "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." In determining whether conduct constitutes fraud on the court, **the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party**, but whether it harmed the integrity of the judicial process." Emphasis added. "Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." *United States v. Int'l Telephone & Telegraph*, 349 F. Supp. 22, 29 (D. Conn. 1972). Emphasis added. "Filing a baseless claim, like failing to disclose evidence, is a wrong that the

judicial machinery is designed to handle." Id. "The reason the courts do not treat nondisclosure alone as fraud on the court is because the plaintiff usually has the opportunity to challenge the nondisclosure." Id.

7. In *Weaver v. Bellsouth Telecommunications, Inc.*, Dist. Court, WD Kentucky 2012, the Court found that, "Bellsouth **argues that Weaver fabricated a document** relating to a key issue in this case and that Weaver should thus be sanctioned in the form of dismissal of this action with prejudice. Because it is not clear from the record that Weaver committed fraud on the court, the court will deny Bellsouth's motion to dismiss."

8. "Finding that a factual dispute remains as to whether the e-mail was fabricated and as to whether Weaver committed fraud, the court will not evaluate whether the "extreme sanction" of dismissal is appropriate in this action, as it has not been clearly shown that any sanction is warranted at this time. Accordingly, IT IS ORDERED that Bellsouth's motion to dismiss for plaintiff's fraud on the court, R.39, is DENIED." Id.

9. In *Harris v. City of New York*, Dist. Court, SD New York 2012, the Court found that, "[a] fraud upon the court is different from fraud perpetrated on an adverse party, because a fraud upon the court 'is limited to fraud which seriously affects the integrity of the normal process of adjudication.'" *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). A fraud upon the court "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial

machinery cannot perform in the usual manner its impartial task of the adjudging cases." *Hadges v. Yonkers Racing Corp*., 48 F.3d 1320, 1325 (2d Cir. 1995)(citation omitted). A fraud upon the court "involves far more than an injury to an individual litigant." *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir. 1994). Emphasis added.

Dueling Experts Table

10. Defendants quote *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) as precedent for dismissing a case involving dueling experts. Defendants quote that "a district court must instead exercise its 'gatekeeper' function and disregard expert opinions 'that are without factual basis and are based on speculation or conjecture.'" Id. at 311. *Major League Baseball Props* is irrelevant because it discussed expert opinions "that are without factual basis and are based on speculation or conjecture.", while Plaintiff's experts in this case supported their opinions with scientific analysis rendered from legitimate, industry standard forensic analysis. Defendants' failure to produce any other citations proves that there is no precedent to dismiss a case of "dueling experts."

11. Defendants reply alleges there remain no areas of disagreement between the various experts on both sides of this case. "In any event, even if Ceglia's experts disagreed with Defendants' experts (and they do not)...." Doc. No. 588 at 10.

12. Exhibit A, the "Dueling Experts Table", is a table that shows every claim

presented by Defendants experts in the left hand column. The right hand column shows the precise areas of disagreement with each and every claim presented by Defendants' experts. There is not one single expert claim presented by Defendants' experts that remains uncontested. Dueling experts exist as to every key area of authentication of the relevant evidence in the case.

13. The Dueling Expert Table shows that Defendants failed to present the court with the definitive scientific proof of fraud that they promised to deliver.

Clear and Convincing Evidence Case Law

14. Defendants' attempt to persuade the court that the proper definition of "clear and convincing" evidence is evidence that is "highly probably." Doc. No. 588 at 9. They do so using a case that pre-dates newer Second Circuit cases all defining "clear and convincing" consistent with Plaintiff's definition advanced in his papers.

15. In *Cruzan, By Her Parents and Co-Guardians, Cruzan et ux. v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the court held that "T[t]e function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to `instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"

16. Two additional U.S. Supreme Court cases define "clear and convincing" evidence to mean evidence such that no reasonable juror could find in favor of

the non-moving party. To show "actual innocence" one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 2515, 120 L. Ed. 2d 269 (1992). See Also, *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 853, 130 L. Ed. 2d 808 (1995).

17. Three additional cases define clear and convincing the way Plaintiff has urged this court define and apply it in this case.

18. In *US v. Goba*, 220 F. Supp. 2d 182 - Dist. Court, WD New York 2002, the Court found, "Clear and convincing evidence" has been defined in a number of different settings, i.e., in cases involving civil litigation as well as in criminal cases. Nevertheless, there appears to be a generally accepted definition which is as follows: The clear and convincing standard of proof has been variously defined ... as evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. *Cruzan* at 285 n. 11.

19. Additional cases define clear and convincing with an even higher standard. In *Parker for Lamon v. Sullivan*, 891 F. 2d 185 - Court of Appeals, 7th Circuit 1989, the court states that "Proof by clear and convincing evidence has been defined as "the quantum of proof which leaves no reasonable doubt in the mind

of the trier of fact as to the truth of the proposition in question." *Estate of Ragen*, 79 Ill.App.3d 8, 34 Ill.Dec. 523, 528, 398 N.E.2d 198, 203 (1st Dist. 1979).

7th Amendment is Relevant

20. Defendants raise two cases to attempt to mislead the court into believing there is not a Seventh Amendment issue to be concerned with.

21. *Pope v. Fed. Express Corp*., 974 F.2d 982, 984 (8th Cir. 1992) - In *Pope*, the dismissal for fraud came after there was an admission of manufactured documents. ("Appellants concede, however, that Exhibit 203 was a manufactured document. Therefore there is no jury issue." Id. at 984. Emphasis added. There has been no admission of wrongdoing in this case.

22. *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 1015 (N.D. Ill. 2005) - In *REP MCR Realty*, the issue of Seventh Amendment is not even raised. ("Third, Lynch does not argue that a grant of the sanctions motion would conflict with the Seventh Amendment. Id. at 1015. Further, Lynch, the party who forged documents, had no expert testimony in support of the authenticity of the documents that were determined to be forged.

Defendants' Attacks on Plaintiff's Experts' Reputations

23. Defendants' reply presented never before argued claims about the integrity of two of Plaintiff's experts, Larry Stewart and James Blanco. Defendants' attempts to personally attack the experts expose their inability to effectively attack the conclusions those experts developed.

Jim Blanco

24. Defendants misrepresent Plaintiff's expert Jim Blanco's deposition testimony when Attorney Snyder stated that Blanco "admitted that he accepts Tytell's first-hand representation that the document was in that condition when Argentieri first produced it on the morning of July 14, 2011." Doc. No. 588 at 34. Blanco did not make that admission as can be affirmed by a plain reading of the portions of the transcript cited by Defendants. (Blanco Tr. 117:21-119:4).

25. Defendants attempt to besmirch Plaintiff's expert Jim Blanco with their mention of his expulsion from a professional society (Doc. No. 588 at 25). They omit the second half of that story in which Blanco successfully sued that organization resulting in a rescinding of the expulsion. (Doc. 415-1 Exhibit 6 [refiled as 459]). In that settlement, the federal court judge stated: "I'm convinced that Mr. Blanco has done nothing wrong. I have dealt with some organizations like the one he's dealing with and, you know, frankly, they're a bunch of old fogies who don't know what they're doing." (See EXHIBIT 8 attached to Blanco declaration Doc 415-1 [refiled as Doc. 459]).

26. While Defendants make the accusation that Plaintiff's expert Jim Blanco "has little regard for accuracy", (Doc. No. 588 at 26) they failed to mention that Blanco voluntarily submits himself to formal proficiency testing twice a year conducted by Collaborative Testing Services Inc. ("CTS" Tests), the same tests given to document examiners in government crime labs. While Blanco has a "Zero Personal Examiner Error rate" and brought over 120 pages of

documentation to his deposition to prove his claim if asked, Defendants' did not challenge Mr. Blanco on this point although they had the opportunity to do so and none of the Defendants' experts can make any such claims regarding their own personal error rates since they don't even bother to formally take these ongoing proficiency tests. None of Defendants' experts submit to accuracy testing.

Larry Stewart

27. Defendants' attempt to portray Plaintiff's expert Larry Stewart as unfit to be trusted. They describe him as one of the "publicly discredited and desperate men who have been cast out of their professional communities" (Doc. No. 588, page 7, para 2). To support such defamatory theories, Defendants submit a failed indictment of Mr. Stewart. Defendants fail to inform the Court, however, that Mr. Stewart was acquitted of all charges under the Indictment. It is a matter of fundamental law that arrests, which do not result in convictions, are inadmissible, either as proof of guilt or for impeachment (*People v. Williams* (2009) 170 Cal.App.4th 587, 88 Cal.Rptr.3d 401).

28. Defendants' state that "Larry Stewart is Irrelevant" (Doc. No. 588, page 21, para 1). They continue by arguing that Stewart is not an expert on the use of GC/MS - "the gold standard for chemically testing compound substances that is widely used in forensic laboratories across the nation and world..." What Defendants' fail to mention to the Court is that Larry Stewart not only was the first developer of the technique modified for use by LaPorte, ("Ballpoint Ink

Age Determination by Volatile Component Comparison," L.F. Stewart, Presented at the American Academy of Forensic Sciences meeting, Orlando, Florida, February 1982, and Mid-Atlantic Association of Forensic Scientists/ Northeastem Association of Forensic Scientists joint meeting, Harrisburg, Pennsylvania, April 1982. Published in the Journal of Forensic Sciences, April 1985.), but he has remained a proponent of the proper use of the technique by reporting along with others the necessity for addressing concerns regarding contamination, reproducibility and storage conditions, all before the technique can be used in casework. It is clear the U.S. Government agrees with Stewart that no one within the federal laboratory system utilizes the LaPorte approach for ink age analysis.

29. Defendants' argue that Stewart "has not published an article in an academic journal since he was indicted for perjury ..." Doc. No. 588 at 21. This argument is false. Defendants lawyers habit of such outright falsity should be considered by this court in relying on any other of their arguments or those of their experts for that matter. Stewart's publications from the last five years include:

30. "Forensic Science – Fake Fingerprints?," L.F. Stewart, Published in the Forensic Expert Witness Association, Fall, 2007.

31. "Crime Scene Investigation," L.F. Stewart, on-line published by the American College of Forensic Examiners Institute, January 2009.

32. "Identity Theft," L.F. Stewart, A-Z Literary Book Publisher, 2009.

33. "Document Examination," L.F. Stewart, A-Z Literary Book Publisher, 2009.

34. "Forensic Science – Fake Fingerprints?," L.F. Stewart, Published in the HG Experts Legal Experts Directory on-line publication, Spring, 2010.

35. "Forensic Science - The Good and the Bad," L.F. Stewart, Published in the HG Experts Legal Experts Directory on-line publication, Spring, 2010.

36. "Forensic Science - Erroneous Handwriting Opinions," L.F. Stewart, Published in the HG Experts Legal Experts Directory on-line publication, Spring, 2010.

37. "Forensic Handwriting Examination - Selecting Your Expert," L.F. Stewart, Published in the HG Experts Legal Experts Directory on-line publication, Winter, 2011.

Retesting of Facebook Contract

38. Defendants allege that Plaintiff's expert Larry Stewart sent out paper samples from the wrong contract to be tested. Defendants allege that the six page technical specifications document was tested instead of the two page Facebook Contract.

39. To eliminate any doubt regarding Rantanen's important conclusion that the paper samples from page one and page two of the Facebook Contract were "consistent with coming from same mill and production run", Larry Stewart retested paper samples known to come from the Facebook Contract.

40. Larry Stewart's declaration is attached as Exhibit B.

41. The re-test report concludes that paper samples known to be from page one and page two of the Facebook Contract are consistent with "being from the same source and manufacturing facility." Exhibit To Stewart Declaration,

Second Rantanen Report confirming the results of the first report.

Criminal Complaint Exaggerations

42. Defendants state that "Federal prosecutors reviewed the record in this case and determined that the evidence of fraud was so clear-cut that Ceglia should be prosecuted." Doc. No. 588 at 5. Emphasis added.

43. None of Ceglia's expert witnesses or attorneys were interviewed and none of the over one thousand pages of expert reports by Ceglia's experts were referenced in the Complaint, which provide ample reason to consider the Facebook Contract as legitimate. Therefore, to be accurate, federal prosecutors reviewed Facebook's experts' reports to determine evidence of fraud, a one-sided review.

44. In consideration of the thoughtfulness and value of the government's conclusions of criminal fraud, the court should note that the Postal Service **Inspector witness who swore out Ceglia's criminal complaint, has never even seen or tested the Facebook Contract**.

45. Defendant Zuckerberg has still never filed a declaration in this case declaring that the Street Fax digital images found on Plaintiff's parents' computer represent that authentic contract.

46. In point of fact, Defendants have not produced one non-expert witness to declare any acts of fraud that the Plaintiff has either committed before or after the commencement of his litigation.

I hereby declare under penalty of perjury and pursuant to 28 U.S.C. 1746 and under the laws of the United States that the following is true and correct:

DATED: November 25, 2012.

/s/ Paul Argentieri

Paul Argentieri