

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

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

Plaintiff,

v.

**RESPONSE IN OPPOSITION TO
DEFENDANTS' REQUEST FOR
DISCLOSURE OF IN CAMERA
SUBMISSIONS**

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

MEMORANDUM

The undersigned filed a motion to withdraw as counsel. Doc. No. 579. That motion did not indicate that Plaintiff consented to the motion. *Id.* Coincident with that filing, an *in camera* submission was made to the court containing justifications for the motion that affect Plaintiff's rights, involve attorney/client communications and content that is the product of attorney work product deliberations. Because the contents of this in camera submission would prejudice Plaintiff if disclosed, the local rule was used to communicate this information. This submission is specifically authorized by the local rules. Loc.R. 83.2(d).

Defendants filed a response to that motion noting they were unopposed to the motion provided it produced no delay. That lack of opposition to the granting of the motion contained a request by Defendants for disclosure, either publicly on the docket or to Defendants exclusively, of the *in camera* submission. *Id.*

On November 27, 2012, the undersigned filed a supplement to the previous *in camera* submission with the court. That same day the court held oral argument on the motion by phone conference. The phone conference was attended by all current counsel and Plaintiff. During that phone conference the court noted the filing of the second *in camera* submission. During that phone conference, Plaintiff made clear his lack of consent to the undersigned's withdrawal.

ARGUMENT

During the phone conference, the undersigned pointed out that the Defendants' lack of opposition to the withdrawal motion certainly "diminishes any interest they would have in disclosure of the *in camera* submissions." The court noted that fact as the phone conference continued. It was only later, after Plaintiff affirmatively stated his lack of consent to the motion, that Defendants sought and received permission to withdraw their lack of opposition to the motion citing the potential for delay occasioned by Plaintiff's lack of consent to the withdrawal.

Defendants' claimed potential for delay was the speculation that this court would order oral argument on any of the pending motions to dismiss and, if such an oral argument was ordered and, if the motion to withdraw was granted, Mr. Argentieri may not be able to be lead counsel for that argument and a delay *might be caused* by Plaintiff's need to seek new lead counsel. As the court can see, this claimed potential for delay is stacked speculation at this point. Defendants have already once requested oral argument on the pending motions to dismiss which the court has denied.

Plaintiff does not believe there is any need to delay this case further by scheduling oral argument on the motions to dismiss. Both motions have been extensively briefed and both are supported by expert reports and expert depositions comprising thousands of pages. Defendants have inconsistently sought to prevent delays of these proceedings and then, at other times, sought delays for their benefit. This case is fully briefed and ready for a decision by the court. Any oral argument delay proposed by the Defendants is inefficient and unjustified at this point.

OUTSOURCING OF ETHICAL CONCERNS IS INAPPROPRIATE

Even if Defendants were provided copies of the *in camera* submissions, the only possible use of those documents would be to support their opposition to the motion to withdraw. As counsel for Plaintiff, the undersigned cannot subordinate his personal and professional opinion regarding his inability to properly represent a client to the opinion of another lawyer, especially one opposing in this matter. It may well be that opposing counsel regards the ethical considerations now confronting the undersigned as insufficient to cause an inability to effectively represent Plaintiff. However, opposing counsel faces no risk of disciplinary proceedings or malpractice lawsuits for advancing such an opinion on Plaintiff's counsel's behalf. Meanwhile, the undersigned has to consider those very factors and make a sober assessment which is personal to the undersigned and his professional responsibility to Plaintiff.

Rule 83.2

(d) Attorney Withdrawal. An attorney who has appeared as attorney of record may

withdraw only by Court order, or by stipulation, in accordance with the following:

(1) An attorney of record may file and serve a Motion to Withdraw as Attorney. If the attorney wishes to submit his or her reasons for withdrawal in camera, he or she must so state in the Notice of Motion. The moving attorney then must submit any in camera document(s) to the Judge, and must serve such documents on his or her client. The Court may grant the motion upon a finding of good cause.

(2) An attorney may withdraw upon a stipulation endorsed by the client and by all counsel of record and unrepresented parties in the case. The stipulation shall be effective when signed by the Clerk of Court.

The rule above does not further refine what may be submitted to the court. The case law does.

**DEFENDANTS' INSISTENCE ON DISCLOSURE
IS CONTRARY TO PRACTICE**

Defendants' seek disclosure of the in camera submissions authorized by the local rule above. That disclosure is contrary to the practice of other courts in the Second Circuit.

“On the contrary, it is normal practice and there is no impropriety [not disclosing in camera submissions connected with attorney withdrawals].’ *ISC Holding AG v. Nobel Biocare Investments, N.V.*, 759 F.Supp.2d 289, 293 (S.D.N.Y., 2010). See also, *Weinberger v. Provident Life and Casualty Insurance Company*, No. 97 Civ. 9262(JGK), 1998 WL 898309, at *1 (S.D.N.Y. Dec. 23, 1998).

"However, it is appropriate for a Court considering a counsel's motion to withdraw to consider in camera submissions in order to prevent a party from being prejudiced by the application of counsel to withdraw." *Id.* See also, *Rophaiel v. Alken Murray Corp.*, 94 Civ 9064, 1997 WL 3274, at *1 (S.D.N.Y. Jan. 3, 1997).

THE STANDARD IS PREJUDICE TO PLAINTIFF

The standard, therefore, is "prejudice to the client" whose lawyer is seeking withdrawal not the need of opposition counsel to see the reasons for the withdrawal being sought. The *in camera* submission rule also avoids potential ethical issues for the attorney seeking withdrawal. Disclosure to opposing counsel of reasons for seeking to withdraw as counsel could "pos[e] ethical problems" and thus indicating that "the proper practice for an attorney in applying for an order relieving him of responsibility in a case is ... to submit supporting documents to the trial court for inspection in camera." *Ficom Int'l, Inc. v. Israeli Export Inst.*, 87 Civ. 7461, 1989 WL 13741, at *3 n. 1 (S.D.N.Y. Feb. 10, 1989).

CLIENT'S LACK OF CONSENT TO WITHDRAWAL NOT A FACTOR IN DISCLOSURE DECISION

Near the beginning of the recent November 27, 2012 phone conference, the court noted that Defendants' then filed response to the motion to withdraw indicated no opposition. As the phone conference developed, Defendants' voiced their desire to withdraw their lack of opposition to the withdrawal based entirely on the lack of Plaintiff's consent to it. Plaintiff's lack of consent is no basis for the court to grant Defendants' request for disclosure of the in camera submissions

which could prejudice Plaintiff.

"Mr. Kantor requested, **over the objection of his clients**, that he be permitted leave to withdraw as Petitioners' counsel pursuant to Local Rule 3(c). Mr. Kantor submitted for *in camera* review documents in support of his motion to withdraw, and the **Court accepted those documents for in camera review over Respondents' objection.**" *Coppola v. Charles Schwab & Co.*, 1991 WL 180345 (S.D.N.Y.), 1 (S.D.N.Y.,1991). Both the client's not consent and the opposing party's objection are insufficient to justify disclosure of the *in camera* submissions,

**PREJUDICE TO PLAINTIFF ARISES
NO MATTER THE WITHDRAWAL DECISION**

The pending motion to withdraw merits one of two orders, granted or denied. If the court grants the motion, the disclosure of the *in camera* submissions provides Defendants a basis to attempt to dislodge the next counsel for Plaintiff for litigation advantage. If the court denies the motion, the disclosure of the *in camera* submissions now provides improper insight into the inner-workings of Plaintiff and Plaintiff's counsel's relationship and another litigation strategic advantage. Any time a party can learn of the circumstances existing on the opposition's team that are so severe they rise to the level of compelling attorney withdrawal, it is a clear strategic advantage. Meanwhile, Defendants' failed to articulate any substantial prejudice to them absent disclosure.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court deny Defendants' request to disclose the *in camera* submissions associated with Plaintiff counsel's motion to withdraw.

Respectfully submitted,

/s/Dean Boland

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