

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

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

Plaintiff,

**MEMORANDUM IN SUPPORT
OF MOTION FOR PROTECTIVE
ORDER**

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

MEMORANDUM

Plaintiff seeks a protective order prohibiting the government or any other entity from taking possession of the original Facebook contract at issue in this case. It has come to the attention of Plaintiff, via subpoena to Plaintiff's counsel, Paul Argentieri, that the U.S Government is seeking sole possession of the original Facebook contract in this case.¹ The Government's possession of that document poses a number of problems relevant to this pending civil matter.

THE DOCUMENT IS PRIMARILY THE EVIDENCE IN THIS CASE

The FB contract is the key evidence in this matter which has been pending for more than two years. It has been securely maintained, transported and tested during that time. There have been no complaints by either side regarding the storage, transportation or maintenance of the FB contract during that time. The

¹ The Facebook contract refers to the two page document tested by Defendants' experts in July 2011 and tested by Plaintiff's experts thereafter which has been securely held by Plaintiff's team since the inception of this matter.

Government does not obtain a superior right to what is evidence controlled by this court merely because it has selected to prosecute Plaintiff. Moreover, its prosecution has started without it having even seen the FB contract to this point, further diminishing its legitimate interest in merely possessing the document now with the attendant risk of damage or loss that brings. The Government's case is in the initial stages and as of this writing, counsel in the civil case are unaware of even a discovery request by either side in that case having been filed.

PROTECTING PLAINTIFF'S KEY EVIDENCE

Both sides in this matter have an interest in the preservation of the Facebook Contract. Plaintiff's interest arises from the fact that this one two-page document is the underlying evidence supporting his entire case. Without that document, it's fair to assume this matter would have been dismissed long ago as having insufficient evidence. Therefore, the Government should be made by this court to provide sufficient insurance, a bond or in whatever form the court finds appropriate to financially protect Plaintiff and his evidence and to make Plaintiff whole, should the document be damaged, destroyed or lost while in the Government's possession. For purposes of this litigation, this document is irreplaceable. Plaintiff cannot be assured Defendants in this case would agree to a jury instruction directing the jury to not consider the documents non-existence at the time of a civil trial in this matter merely because the Government cannot produce it.

It is unknown whether the government would claim or could succeed in claiming immunity for any suit by Plaintiff for the government's loss or destructin

of the Facebook Contract.

This potential immunity issue means that the Government's loss or damage of the document may not only disable Plaintiff's civil litigation, but leave him without a remedy at law at all for compensation for the damage of his key evidence in the case.

TESTING

The Facebook Contract has undergone extensive testing already. Experts like Valery Aginsky and others could perform additional tests during regular discovery in this matter. Those tests and their necessity is unknown until that regular discovery unfolds. However, if the Facebook Contract leaves this court's control, there is no restriction on the Government's testing of the document (which necessarily includes some partial destruction of it) nor sharing of the document with others, including Facebook's attorneys. Without this court's close control of the Government's storage, handling and testing of the Facebook Contract, it is also a danger that its testing methods, experts or other unforeseen circumstances could damage the document making its usefulness as evidence in this case diminished or deleted. The universe of suitable ink, toner, paper and signature experts is not expansive leaving few, if any, qualified to test the document with little or no unnecessary damage to it

THE GOVERNMENT'S NEED

As of this writing, the undersigned has no information that the Government has expressed to the court in the criminal matter why it needs possession of the

document at all. The Government arrested, filed a criminal complaint and now indicted Plaintiff despite never having seen the document before. This fact certainly diminishes any urgent need of the Government to take possession of the Facebook Contract now.

The Government has not disclosed any testing protocol it intends to use, or even if it intends to test the Facebook Contract at all. If the Government intends no testing of the document, it's reasonable that it not be permitted to take possession of it. If the Government intends to test the document it is reasonable that it join with the parties to the civil matter in a joint protocol to manage that testing.

EQUAL AUTHORITY

The criminal case, staged four hundred miles from this court, is overseen by a District Court Judge identical to this matter. The Government has no more right to the Facebook Contract than any other party. Given the advanced stage of this civil matter, the preservation of the Facebook Contract is far more critical to this civil matter than the nascent criminal matter.

ORAL ARGUMENT

Defendants requested oral argument on the motion to dismiss and motion for judgment on the pleadings (now converted to a summary judgment motion). The court has rejected that request on one occasion already. At the most recent hearing, Defendants' claimed that *if* this court grants oral argument on the pending motions and allows Plaintiff's counsel Dean Boland to withdraw that *may* cause a delay in the case.

Plaintiff's position is that there should be no more delay in this matter. The case is ripe for a decision on Defendants' motions. The court has had access to thousands of pages of expert reports, deposition transcripts and pleadings by both parties. There is no meaningful exposition of information that can occur in a compressed highlight reel of an oral argument at this stage of the case. Without oral argument no opposition to Plaintiff counsel's withdrawal motion exists. With oral argument, this court must review the actual Facebook Contract.

CLEAR AND CONVINCING IS HOLDING THE FACEBOOK CONTRACT

At the core of Defendants' motions is their claim that the two page Facebook Contract is not authentic. At oral argument, Plaintiff has a right to present the FB Contract to this court for its consideration. This is not merely an exercise in imaginative lawyering, but the real and practical task the court should embark on before considering and then ruling on Defendants' motions.

This court, based upon the clear and convincing standard, must determine if "any reasonable juror" could find in favor of the authenticity of the Facebook Contract. Obviously, at a trial of this matter, the jury would be provided the opportunity to don gloves and visually examine the two page Facebook Contract. This court, having to grapple with the clear and convincing standard, should also don gloves, handle and examine the critical document at the heart of this case and Defendants' motions. That examination will yield powerful information for the court and a visceral appreciation that the Facebook Contract looks like every other two page document of the same approximate age containing commonly viewed ink

signatures and printed matter. That review will yield the inescapable result that reasonable jurors could easily conclude the Facebook Contract is authentic based upon their examination of it and an evaluation of the dueling experts' opinions.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court enter a protective order as follows:

1. The government and any non-party to this matter is prohibited from taking possession of the Facebook Contract or any other evidence submitted in this case until further order of this court.

Respectfully submitted,

/s/ Paul Argentieri

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