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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' REQUEST FOR DISCLOSURE OF *IN CAMERA* COMMUNICATIONS

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December 7, 2012

BACKGROUND

On October 30, 2012, Plaintiff Paul Ceglia's lawyer Dean Boland moved to withdraw as Ceglia's counsel of record. Doc. No. 579. Boland LLC seeks to be the tenth law firm to abandon its representation of Ceglia in this case. In support of his motion to withdraw, Boland submitted two documents: (1) a publicly filed memorandum and (2) an "*in camera* communication" describing the "personal reasons" that purportedly justify Boland's request to withdraw. But Boland chose to conceal from the Court and Defendants a critical fact—his client, Ceglia, did not consent to his motion to withdraw.

In response, based on incomplete information, Defendants stated that they did not oppose Boland's request to withdraw, provided that withdrawal would not delay dismissal of Ceglia's fraudulent lawsuit. Doc. No. 565 at 1-3. Defendants also requested disclosure of Boland's improper *in camera* communication, which violates the Local Rules of the Western District of New York and is contrary to Second Circuit authority. *Id.* at 3-4. Although the Court permitted Boland an opportunity to submit reply papers on his motion, *see* Doc. No. 582, he chose not to do so. Instead, on November 27, 2012, Boland submitted a second *in camera* communication to the Court. Doc. No. 622 at 2.

That same day, the Court held oral argument on Boland's motion to withdraw. During that hearing, the Court asked the "obvious question" whether Ceglia consented to Boland's motion. Only at that point—under direct questioning from this Court—did Boland and his co-counsel, Paul Argentieri, finally confess that their client opposes Boland's motion. Nov. 27, 2012 Tr. at 14:25-16:5. Although Argentieri represented to the Court that Ceglia had "said he didn't have enough time" to participate in the hearing, this Court, at Defendants' counsel's suggestion, directed Argentieri to call Ceglia, who was promptly located and added to the conference. *Id.* at 20:6-7. Ceglia then personally confirmed his opposition to Boland's motion.

Id. at 24:2-4. As the Court noted, Ceglia's opposition to Boland's motion eliminates one of the grounds for permissive withdrawal under the New York Rules of Professional Conduct. *See id.* at 16:15-21; N.Y. R. Prof. Conduct 1.16(c)(10).

Given Ceglia's lawyers' attempt to conceal their client's opposition to Boland's request to withdraw, the Court permitted Defendants to withdraw their conditional consent to Boland's motion, held that motion in abeyance, and allowed the parties to submit additional briefing on Defendants' request for disclosure of Boland's two *in camera* communications. Doc. No. 613.

ARGUMENT

In their initial request for disclosure, Defendants explained that Boland's *in camera* submission[1] violates the Local Rules and is contrary to Second Circuit authority. *See* Doc. No. 595 at 3-4. Boland disregarded Local Rule 83.2(d)(1), which states that any attorney who wishes to submit his reasons for withdrawal *in camera* "must so state in the Notice of Motion." *See* Doc. No. 579. Next, Boland did not even attempt to satisfy Local Rule 5.3(a), which requires a "substantial showing" to overcome the "presumption that that Court documents are accessible to the public"—a presumption grounded in the public's common-law and First Amendment rights of access to judicial documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004).[2] Lastly, Boland did not even assert—let alone demonstrate—that *in camera* submission was "necessary to preserve the confidentiality of the attorney-client relationship between a party and its counsel," the legal standard in the Second Circuit. *Team Obsolete Ltd. v. A.H.R.M.A. Ltd*, 464 F.

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[1] Although Defendants November 14, 2012 request pertained only to Boland's first *in camera* communication, this Court should order disclosure of both *in camera* communications as procedurally and substantively improper.

[2] The presumption to public access is greatest as to "matters that directly affect an adjudication," such as "a motion filed by a party seeking action by the court." *United States v. Amodeo*, 71 F.3d 1044, 1049, 1050 (2d Cir. 1995).

Supp. 2d 164, 165 (E.D.N.Y. 2006); *see also Thekkek v. LaserSculpt, Inc.*, No. 11 Civ. 4426(HB)(JLC), 2012 WL 225924, at *3 (S.D.N.Y. Jan. 23, 2012) (denying access to withdrawal papers because "the confidential information they contain pertains only to the attorney-client relationship"); *Diamond "D" Constr. Corp. v. New York State Dept. of Labor*, No. 00-CV-335C(F), 2004 WL 1663992, at *1 (W.D.N.Y. July 23, 2004) (Foschio, J.) (unsealing documents filed in support of attorney's motion to withdraw because "no subjects of a confidential matter or work product, nor other information to which the attorney-client privilege may apply, will be revealed if the documents do not remain under seal"); *Blowers v. Lawyers Co-op. Publ'g Co.*, No. CIV-73-47, 1982 WL 221, at *5 (W.D.N.Y. Jan. 16, 1982) (granting access to transcript of *in camera* proceedings on motion to withdraw because information under discussion was "not privileged").

Yet another independent ground for disclosure arose in the November 27th hearing, during which Ceglia publicly and voluntarily revealed the content of Boland's *in camera* communications. Specifically, Ceglia explained that the reason for Boland's attempted withdrawal was Boland's alleged "fear for his own safety" and the "threats that have been made against him." *See* Nov. 27, 2012 Tr. at 25:4-5. In so doing, Ceglia—the holder of the attorney-client privilege—waived any privilege that even arguably attached to those communications, "as well as all the other privileged information relating to the same subject-matter of the disclosed information." *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 95-96 (W.D.N.Y. 2011) (Foschio, J.); *see also In re Von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (observing that the fairness considerations that underlie the doctrine of subject-matter waiver "aim to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information").

Now having been permitted another opportunity to make the "substantial showing" necessary to restrict the public's presumptive right of access, Boland fails to do so. Indeed, Boland does not even mention Local Rule 5.3(a), which this Court specifically invited Boland to address, or any of the other authorities set forth by Defendants.[3] *See* Nov. 27, 2012 Tr. at 11:5-20 ("invit[ing] Mr. Boland to formally respond" to "the intriguing question" of the interplay between Local Rules 5.3(a) and 83.2(d)(1)). Instead, Boland makes three arguments in opposition to Defendants' request for disclosure, all of which are unavailing.

First, Boland belatedly claims that his *in camera* communications "involve attorney/ client communications and content that is the product of attorney work product deliberations," the disclosure of which would "prejudice Plaintiff." Doc. No. 622 at 1. Specifically, Boland alleges, in conclusory fashion, that disclosure would provide Defendants "improper insight into the inner-workings of Plaintiff and Plaintiff's counsel's relationship." *Id.* at 6. Boland does not describe generally the client communications, attorney work product, or other confidential information that would be threatened by disclosure of his *in camera* communications.

Even more importantly, Boland's unsupported assertion that his *in camera* submissions "involve" client communications is contradicted by his prior representations about the contents of those submissions. In his motion to withdraw, Boland stated that the information contained in his first *in camera* communication is "personal" and had not even been shared with Ceglia, who at the time of Boland's motion remained in federal custody. Doc. No. 580 at 2. And during the November 27th hearing, Ceglia stated that the reason for Boland's attempted withdrawal was Boland's alleged "fear for his own safety" and the "threats that have been made against him"—claims that are clearly personal in nature, do not touch on the attorney-client relationship, and

[3] Nor does Boland explain or even address his non-compliant Notice of Motion, submitted in violation of Local Rule 83.2(d)(1).

would not provide any "improper insight" or "litigation advantage" to Defendants. Nov. 27, 2012 Tr. at 25:4-5; Doc. No. 622 at 6. In short, Boland has not come close to demonstrating that *in camera* submission is necessary to safeguard "subjects of a confidential matter or work product, []or other information to which the attorney-client privilege may apply." *Diamond "D" Constr. Corp.*, 2004 WL 1663992, at *1.

Second, Boland asserts that disclosure of his *in camera* communications would be "contrary to the practice of other courts in the Second Circuit." Doc. No. 622 at 4. Boland, however, does not discuss any of the Second Circuit case law cited by Defendants in their initial papers. Most notably, he does not address *Diamond "D" Constr. Corp.*, in which this Court explicitly held that the sealing of non-privileged documents filed in support of an attorney's motion to withdraw "would raise serious constitutional concerns as an improper burden on public access to court records"—concerns that Boland never mentions in his opposition papers. 2004 WL 1663992, at *3.

Instead, Boland cites various cases that stand for the unremarkable proposition that courts may consider an attorney's reasons for withdrawal *in camera*, which is obvious on the face of Local Rule 83.2(d)(1) itself. *See* Doc. No. 622 at 4-5 (citing *ISC Holding AG v. Nobel Biocare Invs., N.V.*, 759 F. Supp. 2d 289, 293 (S.D.N.Y. 2010); *Weinberger v. Provident Life and Cas. Ins. Co.*, No. 97 Civ. 9262(JGK), 1998 WL 898309, at *1 (S.D.N.Y. Dec. 23, 1998); *Rophaiel v. Alken Murray Corp.*, NO. 94 Civ. 9064 (CSH), 1997 WL 3274 (S.D.N.Y. Jan. 3, 1997)). Boland also asserts that the legal standard in the Second Circuit is "prejudice to Plaintiff." *See* Doc. No. 622 at 5. But as the very case on which Boland relies makes clear, the relevant potential "prejudice" is the disclosure of confidential information obtained from the attorney-client relationship. *See id.* (citing *Ficom Int'l, Inc. v. Israeli Export Inst.*, No. 87 Civ. 7461 (CSH),

1989 WL 13741, at *2 n.1 (S.D.N.Y. Feb. 10, 1989) (noting "ethical problems" caused by attorney's voluntary disclosure to opposing party of documents "replete with information obtained or generated during the attorney-client relationship" that was "potentially adverse" to attorney's client)). Indeed, that is exactly the standard set forth in *Team Obsolete*, *Thekkek*, and this Court's decision in *Diamond "D" Construction Corp.*

Boland also observes that Ceglia's opposition to his withdrawal does not preclude this Court from considering Boland's communications *in camera*. Doc. No. 622 at 5-6 (citing *Coppola v. Charles Schwab & Co.*, No. 90 Civ. 6248 (JFK), 1991 WL 180345, at *1 (S.D.N.Y. Sept. 4, 1991) (describing in publicly filed Opinion and Order documents submitted for *in camera* review)). But once again, Boland incorrectly shifts his burden. *In camera* submission is justified where "necessary to preserve the confidentiality of the attorney-client relationship between a party and its counsel," *Team Obsolete*, 464 F.Supp.2d at 165, and only upon the "substantial showing" required to curtail the public's presumptive constitutional and common-law rights of access.

Third, Boland asserts that the "outsourcing of ethical concerns is inappropriate" and that he is unwilling to "subordinate his personal and professional opinion regarding his inability to properly represent a client to the opinion" of Defendants' counsel. Doc. No. 622 at 3. Ultimately, Boland may not withdraw from this case except by Court order. *See* L.R. 83.2(d). This Court's determination of Boland's motion to withdraw is guided by its assessment of "the reasons for withdrawal and the impact of the withdrawal on the timing of the proceeding." *Sang Lan v. AOL Time Warner, Inc.*, No. 11-cv-02870 (LBS)(JCF), 2011 WL 5170311, at *1 (S.D.N.Y. Oct. 31, 2011). "In addressing motions to withdraw as counsel, district courts have typically considered whether the prosecution of the suit is likely to be disrupted by the

withdrawal of counsel." *Whiting v. Lacara*, 187 F.3d 317, 320-321 (2d Cir. 1999) (internal citation and quotations omitted). Defendants have a right to participate fully in this Court's determination of Boland's motion and to be heard on the potential disruption that could be occasioned by Boland's withdrawal. Given that Boland's client has opposed his request to withdraw and stated that Boland's withdrawal may impact these proceedings, disclosure is particularly appropriate. *See* Nov. 27, 2012 Tr. at 24:4-8. As this Court stated: it is "an unusual circumstance to have such a motion, especially in such a major case, where there's a dispute between the represented party and the attorney seeking to withdraw." *Id.* at 30:22-25.

CONCLUSION

Boland has not demonstrated that *in camera* submission of the admittedly "personal reasons" underlying his request to withdraw is "necessary to preserve the confidentiality of the attorney-client relationship between a party and its counsel." Nor has Boland made the "substantial showing" necessary to restrict the public's presumptive constitutional and common-law rights of access, as required by Local Rule 5.3(a)—authority that Boland does not even mention in his opposing papers. Accordingly, this Court should order Boland's *in camera* communications publicly docketed, or at least disclosed to Defendants, immediately. Once those communications are disclosed, Defendants will determine their position on the pending motion to withdraw that is currently being held in abeyance.

Dated: New York, New York
December 7, 2012

Respectfully submitted,

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