

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 RESPONSE TO
MOTION FOR PROTECTIVE
ORDER**

MEMORANDUM

As the court knows, there are two cases, this matter and a criminal case, that have an interest in the original Facebook Contract. The government has an interest in seeing the document, which they have never seen, to do an independent investigation, which it claims it has already completed, to determine the contract's authenticity. The need for preservation of the Facebook Contract in this matter is obvious.

The government and defense counsel in the criminal case, discuss the very concerns raised by Plaintiff's motion here on the record on November 28, 2012. Two days earlier, the grand jury subpoenaed Mr. Argentieri seeking the original Facebook Contract.

At the November 28, 2012 arraignment in the Manhattan Federal Court, the Court indicated "it may make sense for the parties to come up with some sort of

protective order for this contract...” Hearing Transcript, November 28, 2012 at 20.

The prosecutor, Mr. Frey, “I think that’s fine. I think the parties can talk amongst themselves and see if we can resolve the issue.” Mr. Frey went on to say, “[t]he government has shared only what is publicly available at this time with counsel for Facebook....” Id. at 21.

The court in the criminal matter indicated he did not want to “frustrate the purposes of the civil action and that judge’s ruling.” Id. at 22. The court then ordered the parties to submit a joint status report on this issue by December 3, 2012. Id.

On November 30, 2012, the government received Mr. Argentieri’s response to the subpoena containing all records responsive to the subpoena in his possession, custody or control. That response did not include the original Facebook Contract. The original Facebook Contract is not in Mr. Argentieri’s possession, custody or control and has not been since December 29, 2011. It was placed into a safety deposit box in the sole possession, custody and control of counsel for Plaintiff, Dean Boland as of December 29, 2011. This is a fact that could have been obtained by the government with a simple phone call to Plaintiff’s counsel.

Mr. Argentieri’s December 3, 2012 calls to both Mr. Frey and Ms. Echenberg, the prosecutors from Manhattan, to communicate this fact, were never returned.

Mr. Argentieri was served a second subpoena, again seeking the original Facebook Contract, on December 5, 2012, the same day Plaintiff filed the motion for protective order. Mr. Argentieri again responded on December 6, 2012 that he had

already provided all documents responsive to the subpoena that were in his possession, custody or control. The government and defense counsel in the criminal case had not yet approached the court with a proposed protective order.

While simultaneously dragging its feet in the criminal case to reach a protective order preserving the original Facebook Contract, the government has aggressively pursued possession of it with grand jury subpoenas. Obtaining the original Facebook Contract via grand jury subpoena, of course, gives the government limitless and unrestricted ability to handle, store, test and share the document with any other third party including Facebook's lawyers from Gibson Dunn, two former assistant United State's Attorneys from the Manhattan office where the criminal prosecution of Plaintiff originated.

The failure of this court to provide a protective order gives the Defendants an unfair advantage. Should the government take destructive samples, unregulated by this court, Defendants can seize on that damage to the original Facebook Contract to question its authenticity further in front of the jury. Defendants can claim spoliation, even if caused by the Government, laying it at Plaintiff's feet nonetheless during the civil case.

The bottom-line is that both cases have an interest in preserving the original Facebook Contract and not permitting any testing of it to occur without notice to both the parties in the civil matter and those in the criminal matter. This matter could easily be resolved by an order from this court consistent with this notion. The criminal court judge has already acknowledged he would essentially abide by any

order this court issues designed to preserve the original Facebook Contract.

CONCLUSION

Therefore, a simple order from this court, as follows, out to suffice to protect all interested parties' concerns:

1. The original Facebook Contract shall be transferred to the possession of the Government by a representative of Plaintiff upon disclosure to this court of the government's justification for obtaining control of the original Facebook Contract; and
2. The Government shall preserve the document in its current condition including leaving it sealed in its currently sealed envelope; and
3. The Government shall not conduct any testing of the document, or share the document with any third parties, including Facebook's lawyers and any of Facebook's experts, without obtaining the approval of this court including a testing protocol which can be worked out at that time; and
4. Some remedy for Plaintiff in the event the original Facebook Contract is damaged, lost or destroyed while in the government's possession, custody or control.

CONCLUSION

The original Facebook Contract has already been irreparably damaged by Defendants' experts. The issuance of an order consistent with the above information will protect the interest of all parties to this litigation while preserving

the original Facebook Contract for the government's use in the criminal matter
should it have a need to test the document in the future.

Respectfully submitted,

/s/ Paul A. Argentieri

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