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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO CEGLIA'S OBJECTIONS TO JUDGE FOSCHIO'S MARCH 26, 2013 REPORT AND RECOMMENDATION

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PRELIMINARY STATEMENT

In 2010, Plaintiff Paul Ceglia emerged from the woodwork and claimed that he had a contract from 2003 entitling him to a multibillion-dollar ownership share in Facebook. Defendants have now established, and Judge Foschio has now determined, that Ceglia's purported contract—and this entire lawsuit—is a fraud.

In an exhaustive 155-page opinion, Judge Foschio found, by clear and convincing evidence, that Ceglia fabricated the purported contract and emails at the heart of this case, and recommended that this lawsuit be immediately dismissed with prejudice. His conclusion was compelled by overwhelming objective, scientific evidence proving Ceglia's forgeries. It was compelled by the egregious acts of evidence destruction and other misconduct Ceglia committed during this litigation to conceal his crimes and further his fraud. And it was compelled by common sense. Ceglia's claim—that for more than six years he simply *forgot* that he possessed a contract giving him a multibillion-dollar stake in the global corporation he supposedly co-founded with Mark Zuckerberg—is not remotely plausible. Indeed, viewing the same evidence as Judge Foschio, the United States Attorney for the Southern District of New York and a federal grand jury independently decided to charge Ceglia with two felony counts for the multiple acts of criminal fraud that he committed in bringing this lawsuit.

Judge Foschio, who ordered and ably presided over the expedited discovery that confirmed Ceglia's fraud, identified three independent grounds that each warrants dismissal. *See* Report and Recommendation (Doc. No. 651) ("R&R") at 48-49, 118-19, 143.

First, when Defendants' experts examined Ceglia's computer, they made a case-ending discovery: they found the *authentic* contract between the parties. Exactly as Zuckerberg had attested under oath at the outset of this case, that contract concerned only his limited website development work for Ceglia's now-defunct company, StreetFax—it said *nothing* about

Facebook. Zuckerberg Decl. (Doc. No. 46) ¶¶ 7-10. Because the parties agree that there was only one contract between them, the discovery of the authentic contract (the "StreetFax Contract") on Ceglia's own computer necessarily meant that his purported contract (the "Work for Hire Document") was a forgery. Because Ceglia "utterly failed to rebut" the "plethora of evidence" establishing the authenticity of the StreetFax Contract, Judge Foschio determined that dismissal was warranted "on this basis alone." R&R 48-49.

Second, Judge Foschio recommended dismissal because objective, scientific evidence established that "it is highly probable and reasonably certain that the Work for Hire Document and the supporting e-mails were fabricated for the express purpose of filing the instant action." *Id*. at 118. His conclusion is backed by extensive forensic evidence, including chemical analysis of the handwritten ink on the Work for Hire Document revealing that the ink was *less than two years old* even though the contract was purportedly signed in 2003. In addition, one of the nation's leading document authentication experts examined the typesetting and formatting of the Work for Hire Document and concluded that it was an "amateurish forgery." As to Ceglia's purported emails with Zuckerberg, *none* were located on Harvard University's server, which *did* contain many genuine emails between the parties concerning StreetFax. And when ordered to produce them, Ceglia failed to produce any actual emails—all he had were backdated Word documents containing time-stamp anomalies and other indicators of fraud.

Third, Judge Foschio recommended dismissal based on Ceglia's willful destruction of critical evidence. Among other egregious acts of misconduct, Ceglia destroyed six USB devices, one of which contained files entitled "Zuckerberg Contract page1.tif" and "Zuckerberg Contract page2.tif" that he stored in a folder labeled "Facebook Files." Moreover, during this litigation, Ceglia created a new physical version of his fraudulent Work for Hire Document to give to

Defendants' experts. This was a new forgery, different from the forgery attached to his Complaint, that he "baked" through extended exposure to light in an effort to frustrate ink analysis and give the document an artificially aged appearance. Judge Foschio reasonably concluded that Ceglia committed all of this spoliation and misconduct with a "culpable state of mind," and that dismissal was warranted given the extreme prejudice to Defendants. R&R 143.

Ceglia attacks Judge Foschio for supposedly "viewing the evidence in the light most favorable to the moving defendants." Obj. 4 (citing R&R 32 & n.13). This is a gross misrepresentation. What Judge Foschio *actually* said was that because "the parties have submitted almost 4,500 pages supporting and opposing Defendants' Motion to Dismiss," a "thorough discussion of all the evidence would be overwhelming to the reader and unnecessary." R&R 32 & n.13 (footnote omitted). Thus, Judge Foschio quite reasonably "*[d]iscusse[d]* only the evidence most favorable to Defendants' Motion to Dismiss and any relevant rebuttal evidence submitted by Plaintiff." *Id*. at 32 (emphasis added). As Judge Foschio's opinion makes abundantly clear, he was not *viewing* the evidence in the light most favorable to Defendants; rather, he focused his *discussion* on the evidence he believed provided a sufficient basis to grant Defendants' motion. Discussing *all* the evidence in the record would have made an 155-page opinion even longer. And as that comprehensive opinion makes clear, he did not ignore Plaintiff's rebuttal evidence but carefully analyzed and evaluated all of it.

The remainder of Ceglia's objections largely rehash the same factual assertions and legal theories that Judge Foschio described as "beyond absurd." R&R 44. Nothing in Ceglia's brief comes close to calling into question Judge Foschio's painstaking and meticulous analysis of the extensive evidentiary record in this case. This Court regularly overrules Rule 72 objections that are "nothing more than a rehashing of the same arguments and positions taken in the original

papers submitted to the Magistrate Judge," *Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) (Arcara, J.), and it should do so here as well.

Ceglia is a convicted felon with a long track record of scamming honest citizens. He has now been indicted by a federal grand jury for his criminal conduct in this case. Ceglia's own lawyers at the Kasowitz law firm withdrew from the case upon determining that the Work for Hire Document is "fabricated"—a conclusion that they promptly shared with Ceglia's other lawyers at the time. Doc. No. 589-18 (April 13, 2011 letter reminding DLA Piper and Lippes Mathias of ethical obligations to report "false statements of material fact" contained in First Amended Complaint, which they had filed two days earlier); Doc. No. 584 at 9. Over the course of this litigation, nine law firms have withdrawn from representing Ceglia—and a tenth sought unsuccessfully to do so.

We respectfully submit that this Court should adopt Judge Foschio's Report and Recommendation in its entirety and dismiss this fraudulent lawsuit with prejudice.

BACKGROUND

I. The Parties.

Mark Zuckerberg is the founder and CEO of Facebook, Inc. He conceived of the idea for Facebook around December 2003 during his sophomore year at Harvard University, Zuckerberg Dec. (Doc. No. 46) ¶ 11, and launched Thefacebook.com on the afternoon of February 4, 2004. Zuckerberg Dec. (Doc. No. 29-2) ¶ 25; Southwell Dec. (Doc. No. 331) ("Southwell MTD Dec."), Exs. J, K. In the years that followed, Facebook developed into the world's most popular social networking website. It is a company that spans the globe and has revolutionized the ways in which people connect and share with one another. Its growth has been extraordinary: today, Facebook has more than 1 billion monthly active users and the company employs more than

4,900 people. *See* Facebook, Inc. Form 10-Q for the Period Ending March 31, 2013, at 20, 44 (May 2, 2013).

Paul Ceglia is a convicted felon and scam artist. In March 1997, he was convicted in Texas of aggravated possession of a controlled substance, a first-degree felony, and sentenced to 10 years of probation. Henne Decl. (Doc. No. 49) ¶ 10. In 2005, Ceglia was arrested in Florida for trespass while trying to sell property that he did not own to an elderly couple. *Id*. ¶ 12. Ceglia forged government documents as part of this scheme, which involved the sale of worthless land in numerous states and foreign countries. *Id*. ¶¶ 12-15. Ceglia pleaded no contest to first-degree misdemeanor trespass, and was ordered to pay a fine. *Id*. ¶ 12. In 2009, Ceglia was arrested and charged with consumer fraud by the Allegany County District Attorney's Office—and sued by then-Attorney General Andrew Cuomo—for running another scam in which he promised to sell wood pellets to local residents for heating purposes, but then kept their money and never delivered the pellets. *Id*. ¶¶ 5-8. Resolution of the civil case was contingent on Ceglia paying $25,000 in penalties, and more than $100,000 in restitution to the dozens of customers that he victimized. *Id*. ¶ 6.

II. In April 2003, Long Before He Conceived Of Facebook, Zuckerberg Agreed To Perform Freelance Computer Programming Services As An Independent Consultant For StreetFax.

In early 2003, while Zuckerberg was still a freshman at Harvard, and long before he had created or even conceived of Facebook, he responded to an online job listing regarding the development of a website named StreetFax. Zuckerberg Dec. (Doc. No. 46) ¶¶ 6, 11. StreetFax provided an on-line database of photographs of traffic intersections for use by insurance adjustors. Am. Compl. (Doc. No. 39) ¶ 13. Paul Ceglia was Zuckerberg's primary point of contact at StreetFax. *See id.* ¶¶ 15-16; Zuckerberg Dec. (Doc. No. 46) ¶ 7.

On April 28, 2003, Zuckerberg entered into a written contract with Street Fax, Inc., titled "STREET FAX," under which he agreed to provide limited website development services for StreetFax.com. Zuckerberg Dec. (Doc. No. 46) ¶ 7; Doc. No. 241-1 (Appendix Ex. A) (StreetFax Contract); Southwell MTD Dec., Ex. L (Appendix Ex. B). The StreetFax Contract, provided by Ceglia, stated that StreetFax would pay Zuckerberg a total of $18,000 for his services: "Buyer [Street Fax Inc.] agrees to pay seller [Zuckerberg] the Sum of $3,000 at the onset of this contract. The Buyer agrees to pay seller $2,000 on the due date of the project, and upon completion Buyer agrees to pay seller an additional $13,000 US dollars within Thirty days of delivery of the Final approved program." *See* Southwell MTD Dec., Ex. L § 3. The StreetFax Contract did not concern Facebook or any related social networking service or website. Zuckerberg Dec. (Doc. No. 46) ¶ 9; Southwell MTD Dec., Ex. L. Zuckerberg did not enter into, and has never entered into, any contract or agreement with Ceglia or StreetFax concerning Facebook or any related social networking website. Zuckerberg Dec. (Doc. No. 46) ¶ 10.

Zuckerberg performed his web development work for StreetFax in 2003 and early 2004. But Ceglia paid Zuckerberg less than half of what he was owed: $9,000 out of $19,500.[1] *See* Rose Dec. (Doc. No. 333), Ex. F. In a series of emails that Ceglia has himself proffered to this Court as authentic, *see* Doc. No. 224-1, Ceglia repeatedly acknowledged this debt and begged Zuckerberg for forbearance as Ceglia scrambled to find funds to pay the amount due. *See, e.g.*, Rose Dec. (Doc. No. 333), Ex. F. Ultimately, however, Ceglia never paid Zuckerberg anything more and their communications soon ended. Ceglia and Zuckerberg had no further communication after May 2004.

[1] In November 2003, Ceglia had also agreed to pay Zuckerberg to build a separate "scroll search" functionality for the StreetFax website for $1,500, in addition to the $18,000 that Zuckerberg was due under the StreetFax Contract. *See* Rose Dec. (Doc. No. 333), Exs. D, F.

III. In 2010, Ceglia Emerges From The Woodwork And Claims That He Owns 84% Of Facebook Based On A Forged Contract.

By June 2010, Facebook had long been the subject of widespread media coverage. The press had reported extensively on the extraordinary growth that Facebook had experienced since 2004. Numerous sources reported that Facebook had been valued in the tens of billions of dollars and there was widespread public speculation that the company would soon undertake an initial public offering. In addition, there had been numerous reports concerning the 2008 settlement of a lawsuit brought by Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, who claimed partial ownership of Facebook. This lawsuit was the subject of a movie—"The Social Network"—that purported to recount the origins of Facebook and Zuckerberg's dispute with the Winklevosses. In June 2010, there was substantial publicity surrounding the forthcoming release of the movie, which arrived in theaters that October.

In the midst of this widespread media coverage, Ceglia commenced this action in the Supreme Court for Allegany County. On June 30, 2010, he filed a three-page complaint in which he claimed to own 84% of Facebook. *See* Compl. (Doc. No. 1-4). The Complaint alleged that, "[o]n April 28, 2003, [Zuckerberg] and [Ceglia] entered into a written contract, including but not limited to, [Ceglia] acquiring [a] Fifty Percent (50%) interest in the business of [Zuckerberg] and Facebook." *Id.* ¶ 4. The Complaint also alleged that Ceglia and Zuckerberg had agreed that, "after January 1, 2004, [Ceglia] would acquire an additional 1% interest in the business, per day, until the website was completed"; that "the website, thefacebook.com, was completed and operational on February 4th, 2004"; and that Ceglia had therefore "acquired an additional 34% interest in the business for a total of eight four percent (84%)." *Id.* ¶¶ 6-8.

Ceglia attached to his Complaint a document entitled "'WORK FOR HIRE' CONTRACT," purporting to be the contract he signed with Zuckerberg on April 28, 2003.

Compl. (Doc. No. 1-4), Ex. B (Appendix Ex. E). The first page of the Work for Hire Document states that it "reflects two seperate [sic] business ventures," the first being Zuckerberg's work for StreetFax, and the second being "a website similar to a live functioning yearbook with the working title of 'The Face Book.'" *Id.* § 2. The Work for Hire Document provides that Ceglia would pay Zuckerberg $1,000 for Zuckerberg's development of the StreetFax website, and would pay Zuckerberg an additional $1,000 for "the work to be performed for 'The Page Book.'" *Id.* § 3. The Work for Hire Document goes on to state that Ceglia would "own a half interest (50%) in the software, programming language and business interests derived from the expansion of ['The Face Book'] to a larger audience," and that Ceglia would receive an additional 1% interest "for each day the website is delayed" beyond January 1, 2004. *Id.* §§ 2-3. Page 2 contains signatures purporting to be of Zuckerberg and Ceglia, and page 1 contains a handwritten interlineation with the initials "PC" and "MZ." Compl., Ex. B (Appendix Ex. E). All references to "The Face Book" or "The Page Book" appear on page 1.

When reporters asked Ceglia why he had remained silent for the past seven years regarding his claim to own 84% of Facebook, Ceglia explained that he had forgotten about the Work for Hire Document but had fortuitously discovered it when he was looking through his papers in the wake of his then-recent arrest for consumer fraud. *See* Bob Van Voris, *Facebook Would-Be Owner Says He Owes His Claim To Arrest*, Bloomberg.com, Aug. 2, 2010.

IV. When Defendants Make Clear They Will Not Submit To Extortion, Ceglia Responds By Hiring New Lawyers And Filing An Amended Complaint With New Allegations And Purported "Emails."

Ceglia's lawsuit was nothing more than an attempted shakedown. Days after he filed his complaint, Ceglia's counsel, Paul Argentieri, suggested an immediate meeting to discuss "settlement." Declaration of Lisa Simpson (Doc. No. 335) ¶ 4. Defendants refused, and made clear that they had no intention of acquiescing to Ceglia's extortionate demands. After Ceglia

tried to keep this lawsuit out of federal court based upon spurious arguments concerning Zuckerberg's domicile, *see* Doc. No. 36, Defendants' attorneys told Ceglia's lawyers that the lawsuit was fraudulent and that Ceglia's Work for Hire Document was a forgery.

Defendants' unwavering position that they would not submit to extortion made Ceglia realize that he was unlikely to get a quick payoff based on his original Complaint. He thus embarked on a quest to hire new lawyers who might be able to repackage and bolster his fraudulent claims. To that end, Ceglia's attorney Argentieri sent a pitch document entitled "Lawsuit Overview" to "multiple top tier law firms." Southwell MTD Dec., Ex. G at 3. The Lawsuit Overview—which Defendants obtained after the Court rejected Ceglia's attempt to conceal it through frivolous claims of "privilege" (Doc. No. 208 ¶ 14; Doc. No. 156-2 at 4)—left no doubt as to Ceglia's intentions. It compared Ceglia's claims to the claims asserted by the Winklevosses, noting that the Winklevoss lawsuit "settled for a reported $65 million of shares in Facebook." Southwell MTD Dec., Ex. G at 5. And it mapped out Ceglia's strategy to extract a large payment from Defendants through "immediate settlement negotiations." *Id.*

DLA Piper LLP apparently found Ceglia's pitch attractive and signed on to represent him. Their team was headed by Robert Brownlie, who had previously worked at the Milberg Weiss law firm, and was augmented by attorneys from Lippes Mathias Wexler Friedman LLP. These lawyers filed Ceglia's Amended Complaint on April 11, 2011. Am. Compl. (Doc. No. 39). Like the original Complaint, the Amended Complaint attached a copy of the Work for Hire Document as an exhibit and claimed that Zuckerberg had breached the purported contract.

But the Amended Complaint went well beyond the original version by purporting to quote what Ceglia alleged were "emails" between Ceglia and Zuckerberg—emails that had not been mentioned in the original Complaint or at any time during the then nine-month pendency of

the lawsuit. Ceglia also changed his legal theories. He abandoned his claim that he owned 84% of Facebook, Inc., replacing it with a comparatively more modest, yet still preposterous, demand for 50% of the shares that Zuckerberg received upon the formation of Facebook, Inc. *See* Am. Compl. ¶¶ 3-4 & pp. 23-24. Ceglia also alleged, for the first time, that he had formed a general partnership with Zuckerberg. *Id.* ¶ 57. Whereas Ceglia had originally claimed that he signed the Work for Hire Document in 2003 and forgot about it until 2010, he now claimed that, after signing the Work for Hire Document, he and Zuckerberg engaged in an intense, months-long period of creative collaboration during which Ceglia contributed sweat equity to Facebook, along with many innovative business and marketing ideas—after which they had an emotionally charged falling out in 2004 and Ceglia forgot about Facebook until 2010. *See id.* ¶¶ 31-55.

V. Defendants Seek Expedited Discovery To Obtain Corroborating Evidence Of Ceglia's Fraud In Anticipation Of Moving To Dismiss.

On July 1, 2011, the Court granted expedited discovery based on Defendants' *prima facie* "good cause" showing that Ceglia was perpetrating a fraud. Doc. No. 83 at 1. Defendants' motion for expedited discovery was supported by declarations from Zuckerberg and some of the world's leading forensic experts. Doc. Nos. 45-53. The Court ordered Ceglia to produce all of his computers and electronic media; any original signed versions of the Work for Hire Document and all hard and electronic versions of that document; and all hard and electronic versions of the purported "emails" described in the Amended Complaint. Doc. No. 83 at 2. At the same time, the Court granted Ceglia discovery by ordering Zuckerberg to produce handwriting exemplars to Ceglia for signature analysis and emails from his Harvard account, *see id.* at 2-3 (thus putting the lie to Ceglia's claims that he was denied meaningful discovery or that "[t]he truncated discovery [] was designed for the benefit of Defendants," *see* Obj. 29).

What Defendants and the Court had anticipated would be a brief period of expedited discovery extended to nearly nine months.[2] That delay was entirely attributable to Ceglia's bad faith litigation strategy of stonewalling, concealing and destroying evidence, and contemptuously defying court orders. Ceglia submitted multiple false declarations; withheld critical electronic evidence, including the very hard drive that contained the StreetFax Contract; instructed his attorneys not to comply with this Court's orders to compel; made frivolous assertions of attorney-client privilege in an effort to suppress evidence; tricked the court videographer into signing a misleading declaration drafted by Ceglia's attorney; and repeatedly filed frivolous motions for the sole purpose of harassment, all of which were denied or withdrawn. During the expedited discovery period alone, Defendants filed numerous motions to compel Ceglia's compliance, all of which the Court granted. The Court ultimately sanctioned Ceglia for his willful and bad faith litigation misconduct, finding that Ceglia had demonstrated "a plain lack of respect" for court orders "which cannot be countenanced." Doc. No. 283 at 22.

The difficulties in securing Ceglia's compliance during expedited discovery were compounded by his revolving door of lawyers. On the eve of the expedited discovery hearing, Ceglia's lawyers at DLA Piper and Lippes Mathias withdrew en masse. To date, *nine* law firms have abandoned their representation of Ceglia. Two of his lawyers withdrew after swearing under oath that Ceglia had ordered them not to comply with the orders of this Court. Doc. Nos. 153-1, 153-2. One of his law firms—the Kasowitz firm, which did not formally enter an appearance—terminated its representation of Ceglia after concluding that page 1 of the Work for

[2] During expedited discovery, Judge Foschio conducted five hearings totaling more than 15 hours of argument. The parties filed more than 160 briefs in support of, and opposition to, the various motions considered at those hearings, which generally concerned Defendants' *prima facie* showing warranting expedited discovery, Ceglia's serial non-compliance with the Court's expedited discovery orders, and Defendants' dispositive motions and request for a stay.

Hire Document is "fabricated" (a conclusion it shared with DLA Piper and Lippes Mathias, who nevertheless chose to continue their prosecution of Ceglia's claims). Doc. No. 589-18.

VI. Defendants Move To Dismiss Ceglia's Lawsuit Under This Court's Inherent Authority To Sanction Fraud.

Despite Ceglia's obstructionism, the expedited discovery confirmed the obvious: the Work for Hire Document and purported emails are forged. Defendants moved to dismiss this lawsuit under the Court's inherent authority to sanction fraud on the court—authority that the Supreme Court and the Second Circuit have repeatedly recognized, and that Ceglia does not dispute. *See Chambers v. NASCO, Inc*., 501 U.S. 32, 45 (1991); *Shangold v. Walt Disney Co*., 275 F. App'x 72, 73 (2d Cir. 2008); Doc. No. 481 at 8. The overwhelming objective evidence of Ceglia's fraud—submitted to Judge Foschio in ten sworn expert reports and supporting declarations, *see* Doc. Nos. 319, 324-335—is summarized below.

A. The Discovery And Corroboration Of The Authentic StreetFax Contract Proves The Work For Hire Document Is A Fraud.

Although Ceglia was ordered to produce all his hard drives, he initially tried to conceal one of them—the "Seagate" hard drive. When Defendants' forensic experts ultimately obtained it, they made a case-ending discovery: they found electronic images of the authentic StreetFax Contract. *See* Appendix Ex. A. Just as Zuckerberg had attested, Zuckerberg Decl. (Doc. No. 46) ¶¶ 7-10, the StreetFax Contract only concerns StreetFax and says nothing about Facebook.

The electronic images of the StreetFax Contract were attached to two emails that Ceglia sent on March 3, 2004 to Jim Kole—a lawyer at the law firm Sidley Austin who was an initial member of StreetFax—at Kole's email account at Sidley, jkole@sidley.com. The subject line of the first Ceglia-to-Kole email states: "page 1 of 2 for Streetfax contract w mark." That email, which is signed "Paul," includes a telephone number that Ceglia admits was his. Doc. No. 481 at 57. The subject line of the second Ceglia-to-Kole email, which has no text, states: "2 of 2 for

streetfax contract." *See* Doc. No. 325 at 84, 88 (Appendix Ex. C). Ceglia scanned the two images of the StreetFax Contract to his computer minutes before he sent the emails to Kole on the morning of March 3, 2004. *See* Stroz Friedberg Report (Doc. No. 325) at 12-16.

Sidley Austin Possesses Identical Emails. Defendants also uncovered identical copies of Ceglia's emails and the StreetFax Contract on the Sidley computer server, where the documents had resided since 2004. By examining their Internet headers—routing information that can be used to reconstruct an email message's path through the Internet—Defendants confirmed that the emails were actually sent by Ceglia and received by Sidley on March 3, 2004. *See* Doc. No. 319 at 32-33.

Ceglia and Kole's Follow-Up Emails. The authenticity of the StreetFax Contract is further confirmed by follow-up emails between Ceglia and Kole. On March 4 and 5, 2004, they corresponded about the version of the StreetFax Contract that Ceglia had sent Kole on March 3. That correspondence—which Ceglia does not dispute is genuine—contains a handwritten note referring to the low-resolution, scanned images of the StreetFax Contract that Ceglia had sent to Kole just days before. *See* Doc. No. 319 at 33-34; Appendix Ex. D.

Authentic Emails Quote Language From StreetFax Contract. Zuckerberg exchanged many emails with representatives of StreetFax during 2003 and 2004 that have been preserved on the server at Harvard. Indeed, Ceglia produced many of them to this Court as authentic communications between the parties. *See* Doc. No. 224-1. Those emails refer to, and in some cases quote directly from, the StreetFax Contract, using language that appears in the StreetFax Contract but not in the Work for Hire Document. For example, an August 28, 2003 email quotes the term "late thereafter," which appears only in the StreetFax Contract. *See* Rose Decl. (Doc. No. 333), Ex. C; *see also* Doc. No. 224-1 at 33 (emails produced by Ceglia).

Authentic Emails Reflect Payment Terms Of StreetFax Contract. Similarly, the authentic emails reflect an agreement to pay the $18,000 specified by the StreetFax Contract and not the $2,000 specified by the Work for Hire Document. *See* Rose Decl. (Doc. No. 333), Exs. F, H; *see also* Doc. No. 224-1 at 73-74. For example, in a January 25, 2004 email to Karin Peterson of StreetFax, Zuckerberg wrote, "The deal was for $18k. I received $3k upfront and $5k over the summer, and that's it for the original deal. There was a side deal for the scroll search which was for $1.5k of which I have been paid $1k. . . . To date I have received $9k out of a total $19.5k that was owed to me." Rose Dec. (Doc. No. 333), Ex. F. In fact, Ceglia has produced the three checks totaling $9,000 that he wrote to Zuckerberg. Doc. No. 319 at 37. These payments are completely consistent with the terms of the StreetFax Contract and utterly *in*consistent with the terms of the Work for Hire Document. By Ceglia's own admission he paid Zuckerberg $9,000, yet the Work for Hire Document calls for a total payment of only $2,000—an inconsistency that Ceglia has never explained.

The discovery of the StreetFax Contract is fatal to Ceglia's claim. Ceglia and Zuckerberg agree that they signed a single contract on April 28, 2003. *See, e.g.*, Am. Compl. (Doc. No. 39) ¶¶ 21-22; Ceglia Dec. (Doc. No. 65) ¶¶ 5-8; Zuckerberg Dec. (Doc. No. 46) ¶¶ 7-10. Thus, the StreetFax Contract and the Work for Hire Document cannot both be real. One has to be a forgery. Because irrefutable forensic proof establishes that the StreetFax Contract existed in 2004—and that Ceglia was emailing it at that time to other members of StreetFax—it is an indisputable factual certainty that the StreetFax Contract is real and the Work for Hire Document is a forgery. Indeed, there is no evidence that the Work for Hire Document existed prior to June 2010, when Ceglia first produced the document.

Ceglia's Delusional Explanation. In response to this irrefutable forensic evidence, Ceglia spins a preposterous theory that makes alien-abduction stories seem plausible by comparison. According to Ceglia, in March 2004—six years before Ceglia reappeared out of the blue, claiming ownership of Facebook—Zuckerberg created the StreetFax Contract by manipulating the Work for Hire Document and removing all references to Facebook, then surreptitiously accessed Ceglia's computer and caused the computer to email the made-up StreetFax Contract to Kole.

No rational individual could credit Ceglia's theory. Moreover, when Stroz Friedberg discovered the authentic StreetFax Contract and the Kole emails on Ceglia's Seagate hard drive in early August 2011, Ceglia did *not* claim that they were forgeries created by Zuckerberg. Quite the contrary, Ceglia conceded their authenticity by claiming that they were communications with his purported lawyer, Jim Kole, and were protected by the attorney-client privilege. *See* Southwell Decl. (Doc. No. 241), Ex. B, at 1; *see also* Doc. No. 319 at 34-35. It was only when the Court rejected his bogus privilege claim and ordered him to produce the documents that Ceglia—realizing that they exposed his fraud for the world to see—abruptly changed his position and asserted that the emails were forgeries created by Zuckerberg. *See* Southwell MTD Dec., Ex. I.

B. Forensic Testing Confirms The Work For Hire Document Is A Recently-Created Forgery.

Ceglia's claim that he and Zuckerberg signed the Work for Hire Document in April 2003 is a historical impossibility: Zuckerberg did not even conceive of the idea for Facebook until approximately December 2003. Zuckerberg Dec. (Doc. No. 46) ¶ 11. The origins of Facebook have been extensively documented, and there is no evidence whatsoever that Zuckerberg had so much as thought of Facebook as early as April 2003, let alone was sufficiently advanced in his

thinking that he would sell ownership interests in the venture. The Work for Hire Document is impossible as a matter of historical fact. Defendants' forensic inspections confirmed the fraud.

The Handwritten Ink Is Less Than Two Years Old. Ceglia claims that the handwritten ink interlineation on page 1 of the Work for Hire Document was added on April 28, 2003. *See* Am. Compl. (Doc. No. 39) ¶ 22. Forensic testing of that ink has shown this to be false: in August 2011, Defendants' expert Gerald LaPorte determined the handwritten ink on the Work for Hire Document to be *less than two years old*. LaPorte is a world-renowned forensic chemist and document dating specialist who trained with the Secret Service and has nearly two decades of experience in forensic science. In this case, LaPorte conducted a well-established chemical ink dating test developed by Ceglia's own expert Dr. Valery Aginsky and concluded that it is "highly probable"—meaning the evidence is "very persuasive" and Mr. LaPorte is "virtually certain"—that the ink on the Work for Hire Document is less than two years old and that the handwritten interlineation was written after August 2009. LaPorte Report (Doc. No. 326) at 2.

Font And Formatting Discrepancies. Professor Frank Romano—one of the nation's leading document authentication experts with more than 50 years in the field—concluded, "with the highest degree of certainty possible," that page 1 of the Work for Hire Document is an "amateurish forgery" because there are numerous discrepancies in the font and formatting of the two pages of the document. Romano Report (Doc. No. 327) at 11. For example, the two pages of the Work for Hire Document are composed in different fonts. Professor Romano also noted that all references to "The Face Book" appear on page 1 of the forged document. *Id.* at 2.

Different Printers, Different Toner, Different Paper. Ceglia's Amended Complaint alleges that he "printed and saved" the Work for Hire Document on April 25, 2003, and it was signed three days later. But forensic analysis determined that the first and second pages of the

document were printed separately—with different printers, different toner, and different paper. Based on differences in the "edge gradient" visible only under magnification, Professor Romano concluded that page 1 of the Work for Hire Document was produced by a newer printer with more advanced technology than page 2. Similarly, LaPorte concluded that the paper used for pages 1 and 2 of the Work for Hire Document was different. The texture of page 2 was significantly more tensile, or stiff, than that of page 1. The pages also had different thickness and opacity, and illuminated differently under ultraviolet light. LaPorte confirmed these physical observations through chemical analysis, determining that the two pieces of paper had different chemical compositions. *See* LaPorte Report (Doc. No. 326) at 8, 11-12.

"StreetFax LLC" Did Not Exist In April 2003. An additional indicator that the Work for Hire Document is a recently-created forgery is the fact that it refers to "StreetFax LLC"—an entity that did not exist in April 2003. StreetFax LLC was not created until August 2003. *See* Henne Dec. (Doc. No. 49-9), Ex. I. When Ceglia created the forged Work for Hire Document in preparation for this lawsuit, he simply forgot when StreetFax LLC had been incorporated, and he inserted into the fabricated contract an historical anomaly.

No Electronic Copy, But Seven Backdated Test Forgeries. After reviewing hundreds of electronic devices produced by Ceglia, Stroz Friedberg did not find anywhere—on any of Ceglia's hundreds of computers, hard drives, floppy disks, CDs, or other media—an electronic copy of the Work for Hire Document, which should have existed were it authentic. *See* Stroz Friedberg Report (Doc. No. 325) at 10. Instead, Stroz Friedberg found seven versions of the Work for Hire Document that are very similar but not identical to the version attached to the Amended Complaint—*test forgeries* that Ceglia created during this litigation. All of these test forgeries contain metadata anomalies indicating they were created in *February 2011* using a

computer with a system clock that was intentionally backdated to April 25, 2003—the date that Ceglia's Amended Complaint alleges he saved a copy of the Work for Hire Document. And one of the test forgeries contains metadata that reveals his step-by-step construction of the Work for Hire Document through a trial-and-error process of insertions, deletions, and other manipulations. *See id.* at 39-40.

Use Of A Hex Editor. Stroz Friedberg also found several documents produced by Ceglia that demonstrate he made extensive use of a hex editor—a program that allows a user to edit the raw data that make up a file, rather than the text of the file. Hex editors are commonly used by electronic forgers because they can manipulate data in a way that is difficult, if not impossible, to detect using traditional digital forensic analysis. *See* Aycock Decl. (Doc. No. 334, unredacted version) ¶¶ 11-15; Stroz Friedberg Report (Doc. No. 325, unredacted version) at 41-43.

C. The Purported Emails Quoted In The Amended Complaint Are Fabricated.

The Amended Complaint purported to quote from email exchanges between Ceglia and Zuckerberg—"emails" that Zuckerberg swore under oath that he never sent or received. Zuckerberg Dec. (Doc. No. 46) ¶¶ 13-14. But after Ceglia filed his Amended Complaint, he made a startling admission: he did not actually have any of the emails. Ceglia Dec. (Doc. No. 65) ¶¶ 11-12. Instead, when ordered to produce these purported emails, he produced three Word documents containing text that he claims he cut-and-pasted from emails with Zuckerberg. Evans Dec. (Doc. No. 61) ¶¶ 8-11; Ceglia Dec. (Doc. 225) ¶ 8. His failure to produce these purported emails in their native electronic format—that is, the format in which the emails were actually sent or received in a program such as MSN webmail—is an obvious indicator of fraud. Ceglia simply typed text into a Word document and declared it was the text of emails with Zuckerberg.

Backdated Word Documents. Ceglia reset the system clock on his computer to dates in 2003 and 2004, to make it appear that the Word documents were created around the same time that he claims to have emailed with Zuckerberg. But Ceglia left digital fingerprints on these Word files showing that he created them through the use of a backdated computer. Stroz Friedberg Report (Doc. No. 325) at 24-26. For example, two files have a "last written" date of October 21, 2003. This is impossible, given that they purport to contain emails from November and December 2003, and July 2004, respectively. If Ceglia were telling the truth, the "last written" date for the Word documents—a date that reflects the last time Ceglia made changes to the document—would have to be a date corresponding to the date of the last email or later. *Id*.

Incorrect Time Zone Stamps. Ceglia botched his fabrication of the text of the "emails" themselves. Each contains a "Date" line that includes the time zone from which the email was supposedly sent. The time zone is identified by its deviation from Coordinated Universal Time. Thus, Eastern Daylight Time is represented as "-0400," and Eastern Standard Time is represented as "-0500." *See Zinn v. United States*, 835 F. Supp. 2d 1280, 1287 n.3 (S.D. Fla. 2011) (Eastern Daylight Time is four hours behind Coordinated Universal Time); *Airplanes of Boca, Inc. v. United States ex rel. FAA*, 254 F. Supp. 2d 1304, 1307 n.1 (S.D. Fla. 2003) (Eastern Standard Time is five hours behind Coordinated Universal Time). *See* Stroz Friedberg Report (Doc. No. 325) at 27. Between October 26, 2003 and April 4, 2004, Eastern Standard Time was in effect. *See* Uniform Time Act, 15 U.S.C. § 260a(a) (2003). But all of the "emails" Ceglia says he exchanged with Zuckerberg within this time period contain a "-0400" stamp reflecting Eastern Daylight Time. These "emails" are a physical impossibility: there is no place in the Continental United States from which Ceglia could have sent these "emails" with those time stamps on those dates. *See* Stroz Friedberg Report (Doc. No. 325) at 27-28.

Inconsistent Formatting And Abbreviations. Although Ceglia claims that he cut-and-pasted the text of the emails from his MSN webmail account into Word documents, Ceglia Dec. (Doc. No. 225) ¶¶ 3-7, the Word documents contain formatting inconsistencies demonstrating that Ceglia typed the text of these purported emails. For one thing, the "Date" field in the purported emails sometimes abbreviates the word "Tuesday" as "Tue," and sometimes as "Tues". But the "Date" field is automatically generated by the email program, and MSN abbreviated Tuesday as "Tue" throughout 2003 and 2004; thus, "Date" fields would contain a consistent abbreviation if Ceglia's cut-and-paste story were true. Similarly, there is sometimes a single space after the colon in the "From:" and "To:" fields in Ceglia's purported emails, and there are sometimes two or three spaces. Because the formatting of these fields is automatically generated and does not vary from one email to the next within a webmail program such as MSN, the only explanation for these and other discrepancies is that the "emails" were typed in manually during Ceglia's fabrication. *See* Stroz Friedberg Report (Doc. No. 325) at 29-31.

The Purported Emails Contradict Historical Fact. The substance of the purported emails also contradicts matters of historical fact. To take just one of the more glaring examples, Ceglia produced an "email" that Zuckerberg supposedly sent him at 8:27 a.m. on February 4, 2004. In that "email," Zuckerberg allegedly wrote that Thefacebook.com had "opened for students today" and encouraged Ceglia to "take a look" at the website. Ceglia supposedly responded at 10:30 a.m. that morning, writing "Congrats Mark! The site looks great." *See* Stroz Friedberg Report (Doc. No. 325), Ex. K. But Thefacebook.com website did not go live and become available to students until the *afternoon* of February 4, 2004. *See supra* at 4. Moreover, the site was only open to Harvard students and Ceglia (not a Harvard student) could not have accessed it.

Zuckerberg's Harvard Account Does Not Contain Any Of The Purported Emails. All of the "emails" quoted in the Amended Complaint purport to have been sent to and from Zuckerberg's Harvard email account—yet not a single one exists on the Harvard server. Rose Decl. (Doc. No. 333) ¶ 4. What *does* exist in the Harvard account are numerous emails between Zuckerberg, Ceglia, and StreetFax employees concerning Ceglia's failure to pay Zuckerberg for his StreetFax work—and Ceglia's repeated pleas for forgiveness and his promises to scrape together the money he owed Zuckerberg. The authentic emails in Zuckerberg's account show that Zuckerberg never discussed Facebook or any social networking website with Ceglia or his colleagues—exactly as Zuckerberg attested—and that Ceglia's story of a purported "partnership" with Zuckerberg to launch Facebook is a complete fiction. *See* Rose Decl. (Doc. No. 333).

Linguistic Analysis. Professor Gerald McMenamin—Professor Emeritus of Linguistics at California State University in Fresno and a forensic linguist who has rendered expert opinions in more than 600 cases—compared the text of the purported Zuckerberg emails in the Amended Complaint to a sample of emails genuinely authored by Zuckerberg to Ceglia and other persons affiliated with StreetFax during the relevant time period. Based on discrepancies in spelling, sentence structure, and other linguistic stylistics, Professor McMenamin concluded that "[i]t is probable that Mr. Zuckerberg is not the author" of the purported Zuckerberg emails in the Amended Complaint. *See* McMenamin Dec. (Doc. No. 50) ¶ 4.

D. Ceglia Destroyed Critical Evidence.

In addition to submitting a forged Work for Hire Document and fabricated emails, Ceglia intentionally destroyed highly relevant evidence in furtherance of his fraud.

Ceglia Created Multiple Forgeries. The physical document that Ceglia produced for inspection by Defendants in July 2011 is not the same document attached to his Complaint—it is a *new* forgery. Gus Lesnevich, a leading handwriting expert, examined images of four versions

of the Work for Hire Document: the version Ceglia emailed to Argentieri on June 27, 2010 (Q-1); the version attached to Ceglia's Complaint on June 30, 2010 (Q-2); the version scanned by Ceglia's expert, Dr. Aginsky, during his inspection of a hard copy of the document in January 2011 (Q-3); and the version produced by Ceglia, and scanned by Defendants' expert Peter Tytell, on July 14, 2011 as part of the Court-ordered inspection (Q-4). Lesnevich found 20 significant discrepancies on the first page of these four images, including discrepancies in letter formation and design of the handwriting—for example, the slant and slope of the legs of the letter "M" in "May" on page 1—as well as in the relative placements of the individual letters and numerals in the handwriting as compared to the typed text. *See* Appendix Ex. H. Lesnevich identified 12 such differences on the second page of these four images.[3] Lesnevich concluded that Ceglia has proffered at least two different physical versions of his forged Work for Hire Document as the same document. *See* Doc. No. 319 at 52-54; Doc. No. 329 at 30; Doc. No. 472-1 at 73.

Ceglia "Baked" The Work For Hire Document. Having apparently been advised by his own expert Dr. Aginsky that Defendants' experts would attempt to identify and date the ink on the Work for Hire Document, Ceglia then "baked" the version of the document that he provided to Defendants by exposing it to light for extended periods. When Ceglia's lawyer Paul Argentieri brought the purported original Work for Hire Document to the court-ordered inspection and removed it from a U.S. Postal Service envelope on the morning of July 14, 2011, it was immediately apparent that something was very wrong: the pages had an off-white color and the ink was dramatically faded, appearing brown or even yellowish in places and containing

[3] Lesnevich documented these findings in his Supplemental Report. Doc. No. 472-1. The Court denied Ceglia's motion to strike the Supplemental Lesnevich Report, finding that the Supplemental Report "merely sets forth information that was not available" to Lesnevich when he prepared his initial report. Doc. No. 583 at 18. Ceglia now complains that Judge Foschio's consideration of the Supplemental Lesnevich Report, prepared and submitted in accordance with the Court's discovery orders, "compounded the unfairness" shown to him. Obj. 30. But Ceglia himself filed two unauthorized Sur-Rebuttals "without obtaining leave from the court," R&R 7, and Judge Foschio nonetheless considered both of them. *See id.* at 15-16, 20 n.10, 22 n.11, 48 n.27.

numerous breaks and spaces where there was no visible ink at all. This damage was observed first-hand by Defendants' experts Peter Tytell and Professor Romano, both of whom were present at the inspection, and confirmed in high-resolution images captured seven minutes after Argentieri removed the document from its envelope. *See* Tytell Report (Doc. No. 330) at 4-10 and Figs. 5-8; Tytell Dec. (Doc. No. 238) ¶¶ 15-25; Romano Report (Doc. No. 327) at 3; Appendix Ex. F. This damage had *not* existed seven months earlier, in January 2011, when Ceglia presented the same Work for Hire Document to his own expert Dr. Aginsky; indeed, Dr. Aginsky admitted that the ink on the document he examined in January 2011 was "black" and was not faded in any way. Southwell Dec. (Doc. No. 332), Ex. P at 7-8; *see also* Tytell Report (Doc. No. 330) at 7. It is thus indisputable that Ceglia "baked" the version of the Work for Hire Document he presented to Defendants between January and July 2011, during this case. *See* Appendix Ex. G.

In addition to the faded ink, the fronts of the pages of the Work for Hire Document had an off-white color, whereas the backs of the pages and two small fluorescing rectangular tabs at the top of each document were brighter white. Like tan lines from a swimsuit, these tabs indicate areas that were covered up—likely by clips or clothespins used to hang the document—while the rest of the document was exposed to light. *See* Doc. No. 319 at 57; Appendix Ex. I. By "baking" the version of the Work for Hire Document he produced to Defendants, Ceglia spoliated valuable physical evidence and prevented Defendants' experts Dr. Albert Lyter and Gerald LaPorte from performing various types of ink identification and ink dating analysis. Lyter Report (Doc. No. 328) at 8; LaPorte Report (Doc. No. 326) at 13-14.

Ceglia Willfully Destroyed Electronic Evidence. During the pendency of this litigation, Ceglia willfully destroyed critical electronic evidence, including six USB removable storage

devices, one of which contained documents that Ceglia had named "Zuckerberg Contract page 1.tif" and "Zuckerberg Contract page 2.tif" and placed in a folder labeled "Facebook Files." There is no question that Ceglia's destruction was intentional, as he had used one of the devices as recently as April 4, 2011, and three were used while this litigation was pending. Given the titles and formats of these files, it is virtually certain that the storage devices contained electronic images of the document central to this case—arguably the most relevant and important evidence in a case concerning the authenticity of a contract between Zuckerberg and Ceglia. Judge Foschio ordered Ceglia to return from Ireland to the United States to search for the "missing" USB devices, Doc. No. 208 ¶¶ 1-2; although Ceglia returned and purported to conduct a "search," he claimed not to have located a single one of these devices.

Multiple Reinstallations Of Windows. Ceglia attempted to delete electronic data from his Seagate hard drive twice during the pendency of this litigation by reinstalling the Windows operating system on the hard drive, a destructive action that overwrites existing data. The first reinstallation occurred before Ceglia's experts at the Capsicum Group imaged the drive in March 2011—an investigation that prompted Ceglia's then-counsel at the Kasowitz firm to conclude that page 1 of the Work for Hire Document was "fabricated" and terminate its representation of Ceglia. Doc. No. 589-18 (Appendix Ex. J) at 3. That first reinstallation likely destroyed data related to the authentic StreetFax Contract that had been created prior to December 2010. The second installation occurred *after* the Capsicum imaging and Kasowitz withdrawal, and thus after Ceglia knew the Seagate hard drive contained the authentic StreetFax contract. That second reinstallation likely destroyed any data created between December 29, 2010 and March 2011. *See* Doc. No. 319 at 60-61; Stroz Friedberg Report (Doc. No. 325) at 46-47.

Deletion And Concealment Of Other Relevant Evidence. Finally, Ceglia deleted all electronic copies of the version of the Work for Hire Document that is attached to his Amended Complaint. Ceglia also deleted additional relevant electronic files while this case was pending, including deleted files entitled "mark emails 082903," "Work for Hire ContractMZ.doc," and "Work for hire SF template.doc." These files were last accessed on February 18, 2011, and were deleted on or after that date. Ceglia also failed to disclose multiple email accounts, the contents of which Ceglia appears to have deleted or taken no action to preserve during the pendency of this litigation. *See* Doc. No. 319 at 61-62.

VII. Ceglia Engaged In Extensive Litigation Misconduct.

Ceglia engaged in numerous other acts of litigation misconduct, including his discovery non-compliance and obstructionist stonewalling, which ultimately necessitated *nine* successful motions to compel during and after the expedited discovery period, *see* Doc. Nos. 95, 129, 155, 245, 295, 382, 461, 512, 522; his many false declarations, *see, e.g.*, Doc. Nos. 88, 225, 482; his frivolous assertions of privilege and confidentiality made in an effort to conceal critical evidence, most of which have since been overruled, *see, e.g.*, Doc. Nos. 107, 357; his filing of frivolous motions in an effort to bury Defendants in paper on the eve of holidays, *see, e.g.*, Doc. No. 228; his trickery of witnesses, *see* Doc. No. 218 ¶ 9; and his egregious mischaracterizations of witness testimony, *see, e.g.*, Doc. No. 386.

VIII. Criminal Prosecution of Ceglia.

On October 26, 2012, federal agents arrested Ceglia on two felony counts for the many acts of fraud that Ceglia committed in bringing this lawsuit. A federal grand jury subsequently returned an indictment. *United States v. Ceglia*, No. 12-CR-00876-ALC, Indictment (S.D.N.Y. Nov. 26, 2012). While Ceglia's criminal case is a distinct proceeding, the fact that the United States Attorney for the Southern District of New York made the independent decision to charge

Ceglia is a powerful, objective indicator that Ceglia is perpetrating a fraud on the federal courts and Defendants. As Judge Colleen McMahon stated during Ceglia's detention hearing: "It appears to me from reading the criminal complaint that the strength of the government's case is overwhelming." Southwell Dec. (Doc. No. 589) Ex. D at 21:24-22:1.

IX. Judge Foschio Recommends Dismissal With Prejudice.

On March 26, 2013, Judge Foschio issued a 155-page Report and Recommendation in which he recommended that this Court exercise its inherent power to dismiss Ceglia's fraudulent lawsuit with prejudice for three independently sufficient reasons.

First, Defendants have proven, by clear and convincing evidence, that the StreetFax Contract is the "authentic contract governing the business relationship" between Ceglia and Zuckerberg. R&R 33, 48. Because that conclusion necessarily "requires finding fraudulent both the Work for Hire Document and the supporting e-mails," Ceglia's lawsuit should be dismissed "on this basis alone." *Id.* at 49; *see also id.* at 48 (the fraudulent nature of the Work for Hire Document "logically follows" from the authenticity of the StreetFax Contract).

Second, Defendants have proven, by clear and convincing evidence independent of the authentic StreetFax Contract, "the fraudulent nature of the Work for Hire Document and the supporting emails." Indeed, Judge Foschio determined that "it is highly probable and reasonably certain that the Work for Hire Document and the supporting e-mails were fabricated for the express purpose of filing the instant action." *Id.* at 118.

Third, Defendants have proven, by clear and convincing evidence, that Ceglia "engaged in sufficient spoliation of evidence to support outright dismissal of the action," *id.* at 121, given that "it is not possible to restore Defendants to the position they would have been in absent the

spoliation," *id.* at 143. Ceglia committed these numerous acts of spoliation "with a culpable state of mind," in that he "had to have understood the ramifications of his actions." *Id*.[4]

STANDARD OF REVIEW

A party objecting to a magistrate judge's report and recommendation "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority." L.R. 72(b). In turn, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). Where, however, a party advances "frivolous, conclusory or general objections" or "attempt[s] to engage the district court in a rehashing of the same arguments made before the magistrate judge," the district court reviews only for "clear error or manifest injustice." *Singh v. N.Y. State Dep't of Taxation & Fin.*, 865 F. Supp. 2d 344, 348 (W.D.N.Y. 2011) (internal citations and quotation marks omitted); *see, e.g.*, *Camardo*, 806 F. Supp. at 382 (W.D.N.Y. 1992) (Arcara, J.).

ARGUMENT

Ceglia's objections generally rehash the same baseless arguments that Judge Foschio painstakingly analyzed and decisively rejected in his 155-page opinion.

I. THIS COURT'S INHERENT POWER TO DISMISS FOR FRAUD IS WELL-SETTLED.

A. The Court's Inherent Power Allows Dismissal Based On Clear And Convincing Evidence.

As Judge Foschio explained, district courts have the inherent power to dismiss fraudulent lawsuits. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (explaining that "outright dismissal of a lawsuit" under the court's inherent authority "is within the court's discretion");

[4] Because the evidence supporting dismissal of Ceglia's lawsuit is "so strong"—strong enough that Judge Foschio did not even find it necessary to discuss all of Defendants' evidence—Judge Foschio did not address the merits of Defendants' Motion for Judgment on the Pleadings, which he recommended the Court dismiss as moot. *Id*. at 150. Judge Foschio also determined that Ceglia's extensive litigation misconduct (apart from his evidence destruction) was not "sufficiently established" to warrant dismissal. *Id*.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 250 (1944) (a district court is "warranted in dismissing [a] case" once it "learn[s] of the fraud"). It is "elementary that a federal district court possesses the inherent power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). As the Second Circuit has held, "[a] court has inherent authority . . . to conduct an investigation to determine if it is the victim of a fraud, and may impose sanctions, including dismissal, upon determining that such a fraud has taken place." *Corto v. Nat'l Scenery Studios*, No. 95-5080, 1997 WL 225124, at *3 (2d Cir. May 5, 1997).

The inherent power to dismiss is a long-recognized and critical gatekeeping authority that protects courts and juries from becoming "mute and helpless victims of deception and fraud." *Hazel-Atlas*, 322 U.S. at 246. As Judge Friendly explained, "fraud on the court" is "that species of fraud which does or attempts to defile the court itself . . . so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (2d Cir. 1960) (internal quotation marks omitted). Accordingly, to "protect the sanctity of the judicial process" and "maintain institutional integrity," a court may exercise its inherent dismissal power "to combat those who would dare to practice unmitigated fraud upon the court itself" and "defend [its] integrity against" such "unscrupulous marauders." *Aoude*, 892 F.2d at 1118-19.

B. Dismissal For Fraud Does Not Conflict With The Seventh Amendment Or The Federal Rules.

Although Ceglia concedes that the Court possesses inherent authority to dismiss the case for fraud, *see* Doc. No. 481 at 8, he asserts that a farrago of constitutional, evidentiary, and procedural rules restrict a court's exercise of this authority. Ceglia's arguments are meritless.

Seventh Amendment. Ceglia now claims—contrary to his previous concession, *see* Doc. No. 481 at 8—that dismissal would violate his Seventh Amendment right to a jury trial. Obj. 26. This argument—which, as Judge Foschio noted, Ceglia failed to support with any caselaw, *see* R&R 18-19—is obviously wrong. In *Pope v. Fed. Express Corp.*, 974 F.2d 982 (8th Cir. 1992), for example, the court held that dismissal based on a fraudulent exhibit did not violate the Seventh Amendment because, without the exhibit, there was no issue left for the jury to resolve. *Id.* at 984. This was true even though the court relied on "expert testimony and demonstrative evidence" to determine that the exhibit had been fabricated, *id.* at 983—the same type of evidence-weighing that Ceglia objects to here. Similarly, in *REP MCR Realty, LLC v. Lynch*, 363 F. Supp. 2d 984 (N.D. Ill. 2005)—a case involving "flagrant bad faith misconduct that began with document fabrication and concluded with multiple instances of perjury and the provision of willfully false testimony in federal court"—the court refused to take a "counter-intuitive" approach limiting pre-trial dismissal, observing that any argument that dismissal would conflict with the Seventh Amendment "would be unavailing under the caselaw." *Id*. at 1015. As Judge Foschio noted, the only two cases Ceglia has offered in response "are distinguishable from the instant case as neither case involved fraud," but instead discuss the Seventh Amendment implications of directed verdicts based on insufficiency of the evidence. R&R 18. Ceglia also fails to address Judge Foschio's observation that the court's inherent power "to protect the integrity of its own processes and judgments against purposeful fraud … predat[es] adoption of the Seventh Amendment." R&R 19.

FRE 901. Ceglia claims that he effectively authenticated the Work for Hire Document under Federal Rule of Evidence 901. Obj. 26. Yet as Judge Foschio observed, *see* R&R 20-21, Rule 901 governs the authentication of evidence that is to be admitted *at trial*. It says nothing

about the type of evidence a court must consider when exercising its inherent power to dismiss an action for fraud. Moreover, even if Rule 901 imposed a burden on Judge Foschio at this stage of the proceedings, it would not compel a finding that Ceglia's evidence was "authentic," but merely allow the Court to *consider* such evidence. And Judge Foschio did just that. *See id.*

FRE 1008. Ceglia raises a similar argument with respect to Rule 1008, which provides that "in a jury trial, the jury determines" any issue regarding whether "an asserted writing . . . ever existed" or "another one produced at the trial or hearing is the original." Rule 1008 is a component of the Best Evidence Rule and, as Judge Foschio observed, is limited "on its face" to determining whether evidence is admissible at trial. It does not apply in the context of a motion to dismiss. R&R 21. Ceglia cites no case to the contrary, and no court has ever interpreted the rule as limiting a court's inherent power to dismiss for fraud. In fact, in the cases discussed above, the court—not the jury—determined that the document in question was a forgery and dismissed the lawsuit based on that determination. A court *necessarily* resolves disputed facts when exercising its gatekeeping function and dismissing fraudulent lawsuits under its inherent power. Any other outcome would turn courts into "mute and helpless victims of deception and fraud." *Hazel-Atlas*, 322 U.S. at 246.

FRCP 12(d). Finally, Ceglia argues that Federal Rule of Civil Procedure 12(d) requires that this matter "be treated as one for summary judgment under Rule 56" and that "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.'" Obj. 7. But Rule 12(d) applies when a court considers evidence outside the pleadings "on a motion under Rule 12(b)(6) or 12(c)." Fed. R. Civ. P. 12(d) (emphasis added). Defendants' Motion to Dismiss implicates neither rule. The cases Ceglia cites all involve Rule 12(b)(6) motions, and none suggests that Rule 12(d)'s conversion requirement should be applied

outside the Rule 12(b)(6) and 12(c) context. Nor is this a case where the structure of a Rule 56 motion is necessary to ensure that all parties have notice before a court makes factual determinations outside the pleadings. Ceglia has been on notice that the Court would consider affidavits and other extra-pleading evidence for nearly two years, since both parties moved for expedited discovery to test the Work for Hire Document's authenticity, and Defendants made clear at the time their intention to move to dismiss on the basis of fraud once Ceglia complied with his court-ordered expedited discovery obligations. *See* June 30, 2011 Tr. 29:19-30:1.

II. JUDGE FOSCHIO CORRECTLY RECOMMENDED DISMISSAL OF THIS FRAUDULENT LAWSUIT.

A. Judge Foschio Did Not Commit Legal Error.

1. Ceglia Mischaracterizes The Legal Basis For Dismissal.

Ceglia argues at length that Judge Foschio incorrectly recommended dismissal "for lack of subject matter jurisdiction pursuant to 12(b)(1)." Obj. 5. But that argument mischaracterizes Judge Foschio's opinion. Judge Foschio concluded, based on well-established Supreme Court and Second Circuit authority, that the Court has the inherent power to dismiss a lawsuit as a sanction for fraud on the court, and he relied on that authority in recommending that this lawsuit be dismissed. *See* R&R 16-17. Judge Foschio also concluded that the exercise of the judicial authority to root out fraud on the court does not violate the Seventh Amendment right to trial by jury or Federal Rules of Evidence 901 or 1008, *see id*. at 18-22, and that the Court may consider expert evidence in deciding a motion to dismiss pursuant to its inherent power, *see id*. at 22-24.

Judge Foschio then provided, in a portion of his opinion that was not essential to the outcome and that raised an issue "not addressed by the parties," a theoretical explanation for *why* a court has the inherent power to dismiss a case and resolve factual disputes in exercising that power. R&R 24 (discussing the "unstated premise" of the decisions exercising the inherent power to dismiss). Judge Foschio suggested that this inherent power derives from the court's

authority to determine whether the case before it presents an "actionable case or controversy." *Id*. at 25. Although Ceglia disagrees with that theoretical explanation of why the Court has the inherent power to dismiss, this disagreement is academic because Ceglia has conceded—as the decisions of the Supreme Court and the Second Circuit make abundantly clear—that this Court *does* have the inherent power to dismiss when it finds, by clear and convincing evidence, that a litigant has committed a fraud on the court. *See* Doc. No. 481 at 8.

2. Ceglia Misstates The "Clear And Convincing" Standard.

Although Ceglia agrees that dismissal is proper if Defendants prove his fraud by clear and convincing evidence, he misstates the burden imposed by that standard. Clear and convincing evidence is equivalent to a "highly probable" standard of proof. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Miller v. Racette*, No. 11-cv-0426(MAT), 2012 WL 1999490, at *8 (W.D.N.Y. June 4, 2012). The Second Circuit has described clear and convincing evidence as requiring proof "with a high degree of certainty"—"something more than 'preponderance of the evidence,' and something less than 'beyond a reasonable doubt.'" *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985). Ceglia nevertheless urges the Court to apply a different standard. He asserts that "clear and convincing" means evidence such that "no reasonable jury could find in favor of the non-moving party." Obj. 22. But that is the standard for judgment as a matter of law. *See* Fed. R. Civ. P. 50(a)(1).

3. Ceglia Wrongly Asserts That Judge Foschio Erred In Weighing The Evidence.

Ceglia repeatedly—and falsely—claims that Judge Foschio misapplied the burden of proof by viewing the evidence in the light most favorable to the Defendants. Obj. 3; *see also id.* at 4, 17, 28, 29, 30, 30 n.6, 32, 41, 42, 44, 45. Ceglia bases his argument on Judge Foschio's statement that because "the parties have submitted almost 4,500 pages" in connection with the motion to dismiss, he would focus his *discussion* on "the evidence most favorable to Defendants'

Motion to Dismiss and any relevant rebuttal evidence submitted by Plaintiff." R&R 32 & n.13. But Judge Foschio plainly *considered* all of "the evidence in the record," *id.* at 118, and he did *not* say that he would view the evidence in the light most favorable to Defendants. It is regrettable—but very much typical—that Ceglia would misrepresent Judge Foschio's words and then attack his own false construct.

Judge Foschio's approach was completely sensible: the law obviously does not require federal judges to specifically address in their written opinions every piece of evidence submitted to the court. The fact that Judge Foschio—in the course of an opinion spanning 155 pages—chose to focus his discussion on what he considered Defendants' *strongest* evidence is not error. To the contrary, it was reasonable for him to limit his discussion to the evidence sufficient to establish fraud under the "clear and convincing" standard, and stop there. Had Judge Foschio added on a discussion of all the *other* evidence Defendants submitted regarding Ceglia's fraud and misconduct, the opinion would likely have exceeded 200 pages. Just as a losing party is not prejudiced when a judge declines to reach the winning party's alternative arguments, Ceglia was not prejudiced because Judge Foschio declined to discuss the *additional* evidence of his fraud.

Although Ceglia suggests that Judge Foschio failed to place the burden of proof on Defendants, *see, e.g.*, Obj. 45, he concedes this very point elsewhere in his brief. *See, e.g.*, Obj. 20 ("The Magistrate . . . acknowledge[d] that defendants bore the burden to prove by clear and convincing evidence that the Work for Hire Document was a forgery."); 21 ("As the Magistrate recognized, the defendants had the burden to establish plaintiff's supposed fraud upon the Court by clear and convincing evidence."). And Judge Foschio's opinion itself leaves no doubt that he properly held Defendants to their burden. *See, e.g.*, R&R 27 (explaining that dismissal is warranted if "*Defendants* can prove by 'clear and convincing' evidence that the Work for Hire

Document is a fraud") (emphasis added); *see also id*. at 119 ("*Defendants* have thus established by clear and convincing evidence the Work for Hire Document and supporting e-mails are fabrications") (emphasis added); 143 ("*Defendants* have thus established all three elements necessary for an award of sanctions based on spoliation of evidence"). Thus, Ceglia's claim that Judge Foschio misapplied the burden of proof is meritless.

4. Ceglia Errs In Claiming That Judge Foschio Relied On Inadmissible Evidence.

Ceglia argues that Judge Foschio erred by treating expert evidence alone as sufficient to meet the clear and convincing evidence standard. Obj. 21-22. Ceglia cites *Schiel v. Stop & Shop Co*., No. 3:96CV1742, 2006 U.S. Dist. LEXIS 73508, at *21 (D. Conn. Sept. 7, 2006), but the court there simply stated that *under the particular facts of that case*, evidence from one expert was insufficient to overturn the judgment—not that expert testimony can never constitute clear and convincing evidence of fraud. Moreover, *Schiel* concerned a post-judgment Rule 60(b)(3) motion, not a motion to dismiss for fraud on the court. The evidentiary bar for Rule 60 motions is especially high given concerns about disturbing the finality of judgments, particularly in cases where a factfinder has already had an opportunity to assess evidence of fraud at trial. In any event, Judge Foschio's recommended disposition was not based on expert testimony alone. Judge Foschio explained that he considered "the numerous objective and undisputed facts established without reference to any expert opinions that Defendants have also identified," such as the authentic emails reflecting the language and payment terms of the StreetFax Contract—emails that Ceglia himself proffered to the Court as authentic—and the historical impossibilities that undermine Ceglia's Work for Hire Document and purported "emails." R&R 29.

Ceglia also argues that Judge Foschio erred in relying on "numerous, inadmissible, non-*Daubert*-qualified, expert opinions offered by Defendants." Obj. 24-25. To the extent that

Ceglia is arguing that Judge Foschio failed to analyze whether the expert opinions offered by Defendants satisfied *Daubert*, Ceglia is wrong. Judge Foschio expressly recognized that "courts are required to evaluate the admissibility of each expert's opinion," and explained that, under *Daubert*, "when expert scientific testimony is proffered, [a] trial court must first determine whether [the] expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact in understanding or determining a fact in issue." R&R 30. Judge Foschio then devoted more than 100 pages of his opinion to applying those standards and explaining why the opinions of Defendants' experts should be credited because they were reliable and scientifically supported, and why the opinions of Ceglia's experts should *not* be credited because they were unreliable, unsupported, and irrelevant. R&R 30-133.

To the extent that Ceglia is arguing that the district court was required to hold a full-fledged *Daubert* hearing before ruling on Defendants' motion to dismiss, he is mistaken. As Judge Foschio explained, "'[n]othing in *Daubert*, or any other Supreme Court or Second Circuit case, mandates that the district court hold a *Daubert* hearing before ruling on the admissibility of expert testimony.'" *Id.* 50 n.30 (quoting *Colon v. BIC USA, Inc*., 199 F. Supp. 2d 53, 71 (S.D.N.Y. 2001)). "Whether to hold a hearing rests within the discretion of th[e] Court," and "the fact that the evidentiary record is well-developed in [a] case makes a *Daubert* hearing that much less necessary." *Colon*, 199 F. Supp. 2d at 70-71. Because Judge Foschio was able to conduct a thorough analysis of the reliability of the parties' experts based on the extensive record already before him—including numerous declarations and deposition transcripts—a *Daubert* hearing would have wasted the time and resources of the Court and the parties, and Judge Foschio reasonably exercised his discretion in declining to order one. *See* R&R 26, 50 n.30.

B. Judge Foschio's Determination That The StreetFax Contract Is Authentic Is Amply Supported By The Evidence.

Judge Foschio concluded that a "plethora of evidence" establishes the authenticity of the StreetFax Contract, and that both the Work for Hire Document and purported emails are therefore *necessarily* fraudulent. R&R 48-49. That evidence—set forth in eighteen pages of detailed analysis in the R&R—includes the electronic images of the StreetFax Contract attached to the Kole emails, which Defendants discovered on Ceglia's own Seagate hard drive and which Ceglia initially designated as authentic privileged attorney-client communications.[5] The fantastical theory that Ceglia subsequently concocted to account for the StreetFax Contract and Kole emails—that, in March 2004, Zuckerberg himself created the StreetFax Contract, surreptitiously accessed Ceglia's computer, planted the StreetFax Contract there, and caused the computer to email it to Kole—is, as Judge Foschio noted, "beyond absurd." R&R 44. Judge Foschio also considered the emails quoting from and reflecting the payment terms of the StreetFax Contract—emails that Ceglia himself proffered as authentic contemporaneous communications between the parties; the "indisputable checks" totaling $9,000 and "contemporaneous emails" establishing that Zuckerberg received payment from Ceglia that is consistent with the terms of the StreetFax Contract and "totally inconsistent" with the Work for Hire Document; and the March 4-5, 2004 emails between Ceglia and Kole regarding the low-

[5] In an improperly submitted new declaration, Ceglia denies that he referred to the Seagate hard drive as his own computer during a detention hearing in his criminal case. Doc. No. 654-1 ¶ 30. As an initial matter, the new factual arguments in Ceglia's declaration should be disregarded under Local Rule 72(c), which requires Ceglia to "explain[]" why any new arguments "were not raised to the Magistrate Judge." Not only did Ceglia fail to do so—he affirmatively misrepresented to this Court that his Objections "do[] not raise any new legal/factual arguments." Obj. 49. Furthermore, Ceglia's improper new argument about his detention hearing statements mischaracterizes the record. Ceglia argues that when he referred to the Seagate hard drive as "my computer" during that hearing, he was merely "attempting to quote what [the Government] had stated earlier in the hearing." Doc. 654-1 ¶ 30. That is false: although he referred to "[t]he so-called" StreetFax contract images, he included no such caveat with respect to his ownership or control of the computer. Southwell Reply Decl. (Doc. No. 589) Ex. D, at 25. And of course, Ceglia never denies that he "specifically identified the Seagate Hard Drive as in his 'possession, custody or control'" in his July 15, 2011 Declaration, R&R 39 (quoting Doc. No. 88 ¶ 2.A), or that he listed the Seagate hard drive as the source of the emails he authored when attempting to withhold them as privileged, *id.* (quoting Southwell Reply Decl. (Doc. No. 589) ¶ 5 & Ex. C).

resolution version of the StreetFax Contract that Ceglia had sent on March 3. R&R 48. Judge Foschio also found that Ceglia had attempted to mislead the Court by falsely asserting that the telephone number contained in the first Kole email (which Ceglia admits was his own) was a traditional Florida-based land line when it was actually a portable, Internet-based connection, and that Ceglia's false assertion to the Court was "properly construed as in furtherance of the fraud on the court." R&R 42-43.

Ceglia does not even attempt to rebut any of this evidence. Instead, he offers the following two-sentence "objection" to Judge Foschio's case-ending conclusion that the StreetFax Contract is authentic: "Plaintiff objects to the Magistrate's finding that the StreetFax Document is the authentic agreement between Plaintiff and Zuckerberg. This is plainly refuted by the Declaration of James Blanco, Doc. 459, pp. 90-91; Doc. 417, pp. 21-24." Obj. 37.

This Court should adopt Judge Foschio's well-supported conclusion that clear and convincing evidence establishes the StreetFax Contract's authenticity. The Blanco Declaration, on which Ceglia primarily relies, responds to *none* of this evidence. Blanco—a document examiner who is not qualified to address, and does not address, any of the digital forensic evidence establishing the StreetFax Contract's authenticity—stated only that page 1 of the StreetFax Contract "does not represent a supposed original" to page 2 of the Work for Hire Document. Doc. No. 459 ¶ 234. But Blanco offered this irrelevant observation to rebut a strawman "page 1 substitution theory" that Defendants never advanced. Defendants never asserted that page 1 of the StreetFax Contract was originally appended to page 2 of the Work for Hire Document, and that Ceglia then substituted a new forged first page; rather, *Ceglia* first discussed this irrelevant theory and attempted to attribute it to Defendants' experts. R&R 71.

Ceglia's two-sentence "objection" also includes a bare citation to pages 21-24 of the Broom Report. *See* Obj. 37 (citing "Doc. 417, pp. 21-24" without comment). The Broom Report states that the "dimensions" of the electronic images of the StreetFax Contract are 2.4 inches x 3.2 inches. Ceglia has misleadingly distorted this finding to suggest the original StreetFax Contract was therefore "smaller than a postcard." Doc. No. 454-2 (capitalization altered). Judge Foschio correctly rejected this hypothesis as "spurious." R&R 43. Because the size of electronic images of a document can easily be reduced after the document is scanned, the size of the electronic images does not necessarily reflect the actual size of the scanned physical documents. Broom himself acknowledged that there are several reasons why one might reduce the dimensions of an electronic image, including limitations on the maximum file-size of email attachments or the maximum capacity of floppy disks. *See* Broom Tr. (Doc. No. 495) 149:3-151:13. Ceglia indisputably used floppy disks, and Broom testified that, if the images of the StreetFax Contract were not reduced in size, they could not have been stored on a standard floppy disk. *Id*. at 152:11-153:25. It thus makes perfect sense that Ceglia would have scanned the standard-size StreetFax Contract and reduced the dimensions of the electronic scans.

In sum, overwhelming record evidence—none of which Ceglia attempts to rebut in his Objections—establishes that the StreetFax Contract is authentic. Because it "logically follows" that both the Work for Hire Document and purported emails are fraudulent, dismissal is warranted on this basis alone. R&R 48-49.

C. Judge Foschio's Determination That The Work For Hire Document And "Emails" Are Fabricated Is Amply Supported By The Evidence.

Judge Foschio also correctly determined that both the Work for Hire Document and purported emails are fake. They were fabricated by Ceglia and/or those working in concert with him "for the express purpose of filing the instant action." *Id.* at 118. The overwhelming

evidence supporting Judge Foschio's determination includes the "wet" handwritten ink on the first page, the multitude of font and formatting discrepancies, and the physical inconsistencies demonstrating that the two pages were printed with different printers, using different toners, and on different paper, in addition to different fonts. Judge Foschio also considered the significant time zone and formatting anomalies in Ceglia's backdated Word documents containing the purported emails; the "complete absence" of any of the "emails" from Zuckerberg's Harvard email account; the fact that the purported emails contradict matters of historical fact; and the linguistic analysis demonstrating that Zuckerberg did not write the purported emails attributed to him. Ceglia's objections to Judge Foschio's well-documented findings are meritless.

1. The Work For Hire Document Is A Recent Forgery.

The Handwritten Ink Is Less Than Two Years Old. Mischaracterizing Defendants' experts' sworn reports, Ceglia asserts that Judge Foschio could not conclude that the ink of the Work for Hire Document was less than two years old in August 2011 because those experts purportedly admitted that the ink could not be analyzed. Specifically, Ceglia asserts that Defendants' expert Dr. Albert Lyter "concluded that the TLC results were not useable and [he] could not preform ink identification, TLC Densitometry or Relative Aging," and that Gerald LaPorte "concluded that the ink formulation could not be determined" based on such tests. Obj. 38. But these are *different* tests than the PE test conducted by LaPorte and considered by Judge Foschio in concluding that Ceglia's Work for Hire Document is a recent forgery. Thus, Judge Foschio properly rejected Ceglia's arguments as having "no bearing on LaPorte's determinations *based on PE testing*." R&R 61 (emphasis added).

Ceglia continues to rely on the opinion of the discredited Larry Stewart in claiming that it is "not possible to perform 'ink age' determination" on the Work for Hire Document, Obj. 39—reliance that Judge Foschio described as "misleading." R&R 58. Stewart is not an expert on ink

dating. He admitted, for example, that he has not used chemical GC/MS analysis—the widely-used standard method for testing compound substances—in thirty years. *See* Stewart Tr. 258:15-20. And he has not published an article in an academic journal since he was indicted for perjury by the United States Department of Justice in 2004. *See* Doc. No. 416-4 at 11-12.

Font and Formatting Discrepancies. Relying on James Blanco, a discredited expert whose deceptive practices got him expelled from the American Academy of Forensic Sciences in 2008 (*see* Southwell Decl. (Doc. No. 589) ¶ 12, Ex. K), Ceglia argues that the numerous font and formatting discrepancies between the two pages of the Work for Hire Document are "indicative of a layperson creating a contract." Obj. 39. That argument is specious. Ceglia identifies no reason why a "layperson" would, as here, use different fonts for the first and second pages of a two-page document, use different margins on the two pages, and use spacing that varies on one page but is uniform on the second page. Indeed, Ceglia's own expert, John Paul Osborn, admitted that the "varying marginal formatting" and "malformatting" in the Work for Hire Document are red flags that "would raise suspicion" about a document's authenticity. *See* Osborn Tr. (Doc. No. 489) 87:24-88:24. Moreover, many of these formatting irregularities, such as the spacing variations, appear only on the bogus page 1 of the Work for Hire Document—whereas no similar irregularities appear on page 1 of the authentic StreetFax Contract. And the font and formatting of page 2 of the Work for Hire Document are the same as the font and formatting of page 2 of the StreetFax Contract. All of these irregularities demonstrate fraud.

Different Printers, Different Toners, Different Paper. Ceglia asserts that his expert, Walter Rantanen, found that paper samples from the two pages of the Work for Hire Document are "consistent with coming from the same mill and production run." Obj. 40. But Ceglia misleadingly quotes Rantanen's first report, which reflected Rantanen's testing of paper samples

that Larry Stewart provided from *the wrong document* and was superceded by a supplemental report. R&R 66 (noting that the Court had previously found that the "record established Rantanen analyzed paper samples from [a separate, undisputed] Specifications Document rather than the Work for Hire Document"). After purportedly obtaining and analyzing paper samples from the correct document (the Work for Hire Document), Rantanen concluded that those samples were "consistent with . . . being from the same source and manufacturing facility" (Doc. No. 610-2 at 7). But this finding is meaningless: as Rantanen confirmed at his deposition (Doc. No. 589-15 at 149:10-16), this finding is equally "consistent with" the paper having come from different sources; it signifies only that it is not "factually impossible" for the two samples to have come from the same source. In any event, it ultimately does not matter whether the paper of pages 1 and 2 of the Work for Hire Document are the same or different. Either way, the evidence establishes that both pages are recent fabrications. *See* Doc. No. 588 at 20-21.

Ceglia next asserts that Larry Stewart found that "[t]est results indicate the toner found on page 1 matches that found on page 2." Obj. 40; Stewart Report (Doc. No. 416) ¶ 92. As Judge Foschio explained in rejecting this argument, the forensic determination of "match" does not mean "the same." R&R 66-67. Rather, as Stewart acknowledged, it means that the toner could not be differentiated at his level of analysis. *See* Stewart Tr. (Doc. No. 611) 317:4-18.

Ceglia relies on Blanco's finding that that "there is no perceivable difference in 'edge definition' as alleged by" Defendants' expert Professor Romano. Blanco is incorrect: Romano's sworn report includes high-resolution documentation of the discrepancies that led him to conclude that pages 1 and 2 were created on different printers. *See* Romano Report (Doc. No. 327) at 8; *see also* R&R 63. Blanco also claims that the pages of the Work for Hire Document were stapled only once, and that the interlineation on page 1 made indentations on page 2. Obj.

41. But even assuming *arguendo* that this is true, it suggests only that *both* pages of the Work for Hire Document are recent forgeries, and does not refute Defendants' showing that page 1 is a fabrication. *See* Osborn Tr. (Doc. No. 489) 107:8-22.

Mark Zuckerberg's Handwriting. Ceglia asserts that Blanco concluded that Zuckerberg's purported initials and signature on the Work for Hire Document were written by Zuckerberg. Obj. 42. But Blanco ignores the compelling evidence—documented by Gus Lesnevich in his supplemental report—that Zuckerberg's purported signature, date of signature, and initials on the Work for Hire Document were slowly drawn traceries, as opposed to being naturally written. *See* Lesnevich Supp. Report (Doc. No. 472-1) at 11-18. Judge Foschio determined that Lesnevich's supplemental findings—which Ceglia did not attempt to rebut—"support Defendants' argument that Zuckerberg's initials and signatures on the Work for Hire Document were forged." R&R 86. Blanco also considers only the general similarities between the "MZ" initials on the Work for Hire Document and samples of other initials written by Zuckerberg—general similarities that one would *expect* to find in the forged Work for Hire Document because those initials were traced in an effort to make them look like Zuckerberg's. *See* Lesnevich Supp. Report (Doc. No. 472-1) at 16-18. Further, Blanco disregards the many significant *differences* between the initials on the Work for Hire Document and the samples of Zuckerberg's initials—each of which, standing alone, forecloses the conclusion that Zuckerberg wrote the "MZ" initials on the Work for Hire Document.

Digital Forensic Evidence Remains Undisputed. Ceglia vaguely objects to the digital forensic evidence further establishing his fraud—including the absence of any electronic copy of the Work for Hire Document on his computers or hard drives, the seven backdated near-versions that *were* found, and his use of a hex editor—as "inconclusive" and already "addressed by

Plaintiff's experts." Obj. 43. Ceglia did not respond to any of this evidence in opposing Defendants' Motion to Dismiss—a "complete silence" that "suggests acquiescence." R&R 94; *see id.* 87-94. It is well settled that a party waives an argument by failing to respond when that argument is clearly raised in a motion or brief. *See Goodwin v. Burge*, No.08-CV-00660A(F), 2011 WL 2117595, at *11 (W.D.N.Y. Mar. 7, 2011 (collecting cases), *report and recommendation adopted*, No. 08-CV-660, 2011 WL 2119324 (W.D.N.Y. May 27, 2011).

Ceglia's "Lie Detector" Argument Is Meritless. Finally, Ceglia claims that he passed a "lie detector test" that "confirms he is telling the truth." Obj. 2. But "the 'traditional rule' in the Second Circuit is that polygraph results are inadmissible" because they are notoriously unreliable and subject to manipulation. *Collins v. Bennett*, No. 01-CV-6392, 2004 WL 951362, at *5 (W.D.N.Y. Apr. 13, 2004) (citing *United States v. Messina*, 131 F.3d 36, 42 (2d Cir. 1997)). This "lie detector test" was a desperate attempt to prop up Ceglia's crumbling story: the polygraph examiner did not even ask Ceglia about the fabricated emails. *See* Doc. No. 72 at 2; Pliszka Decl. (Doc. No. 63) ¶ 8. This is a telling omission—either Ceglia's lawyers instructed the examiner not to ask about the purported emails because they knew or suspected their client was lying, or the polygraph examiner *did* ask Ceglia, who then conspired with his lawyers to conceal the incriminating results.

2. The Purported Emails Are Fabrications.

Time Zone Evidence. Ceglia concedes that his purported emails contain erroneous time zone stamps, but argues that those anomalies may reflect an incorrectly set system clock and do not necessarily indicate fraud. Obj. 43-44. Ceglia is wrong. Modern computer clocks *automatically* toggle between standard time and daylight savings time. Thus, even if Ceglia's system clock had been incorrectly set, it would have been inaccurate during *both* standard time and daylight savings time. Significantly, Ceglia's fake emails do not toggle: they contain the

time zone stamp for Eastern Daylight Time, "-0400," on dates when Daylight Savings Time both was and was not in effect. *Compare* Doc. No. 325 at 94 (email with "-0400" dated Nov. 30, 2003, during Eastern Standard Time), *with id.* at 92 (email with "-0400" dated April 6, 2004, during Eastern Daylight Time). Furthermore, the fake emails containing incorrect time zone stamps were allegedly sent by both Ceglia *and* Zuckerberg, and thus purportedly reflect the time zone settings of at least *two* computers. As Judge Foschio observed, Ceglia's conjecture that both his and Zuckerberg's computers were incorrectly set *in precisely the same way* "is, to say the least, unlikely." R&R 103. In fact, the authentic Harvard emails prove that both Ceglia's and Zuckerberg's computers were *accurately* set and automatically adjusted for daylight savings time during the relevant period.[6]

Formatting Inconsistencies. Ceglia's purported emails reflect "numerous formatting inconsistencies that are best explained as indicative of fraud." R&R 111. Although Ceglia purports to object to this finding, he does not engage with Judge Foschio's analysis. Instead, he vaguely asserts that Defendants' experts "were directly refuted by Plaintiff's experts." Obj. 45. But this is not so. As Judge Foschio pointed out, Ceglia's expert's report *did not address* many of the telling formatting inconsistencies in the fake emails and thus did not rebut the analysis of Defendants' experts. R&R 110-11. Ceglia does not even attempt to rebut the specific formatting inconsistencies that prove his purported emails are manually typed fabrications, such as the inconsistent spelling of the word "Tuesday," which MSN automatically abbreviated as "Tue" during 2003 and 2004, and which is consistently abbreviated as "Tue" in the authentic emails.

[6] For example, on November 19, 2003, Ceglia responded to Zuckerberg's November 19, 2003 email; Ceglia's response includes Zuckerberg's original email and correctly represents the time that Zuckerberg's email was sent as "Wed, 19 Nov 2003 03:23:13 -0500 (EST)," a date on which standard time was in effect. Southwell Reply Dec. (Doc. No. 589) Ex. M at 4-5. Emails forwarded by Zuckerberg also show that his computer was set to automatically adjust for daylight savings time. On July 30, 2003, Zuckerberg forwarded an email to Ceglia; Zuckerberg's email correctly represents the time of the forwarded email as "Wed, 30 Jul 2003, 05:45:19 -0400," a date on which daylight savings time was in effect. Southwell Reply Dec. (Doc. No. 589) Ex. M at 2-3.

Ceglia Misrepresents Grant's Opinion. Further mischaracterizing the record, Ceglia asserts that his expert, Jerry Grant, "confirmed that copies of the emails were placed within MS Word files in 2003-2004." Obj. 45. In his deposition, however, Grant acknowledged that he did not "confirm" anything of the sort. Southwell Reply Dec. (Doc. No. 589) Ex. Q 86:11-14, 89:8-20. In March 2011, Grant received 41 floppy disks from Paul Argentieri; he identified two as relevant and examined only those disks. Throughout his deposition, Grant repeatedly emphasized that his examination focused exclusively on identifying "impossibilities"—such as the use of a font that did not exist in 2003—and that he was *not* offering a definitive opinion about the authenticity of the purported "emails." *Id*. at 87:18-21, 89:4-20, 176:15-16. Indeed, Grant admitted that he was not claiming that Ceglia's purported emails are real; that they were actually sent or received; or that they were actually copied-and-pasted into Word documents, in 2003-04 or any other time period. *See id*. at 69:5-11, 70:4-20.

The Harvard Emails. Zuckerberg's Harvard email account contains hundreds of authentic communications between the parties, yet it does not contain a single one of Ceglia's fabricated emails. Judge Foschio found that the "complete absence" of the purported emails from the Harvard account "begs the question of their authenticity." R&R 114. Judge Foschio further found that the existence of numerous *genuine* emails between Zuckerberg, Ceglia, and other representatives of StreetFax that directly contradict Ceglia's claims further confirms the fraudulent nature of the purported emails. *Id.* at 114-15 (explaining that the content of the genuine emails "is consistent with the text of the StreetFax e-mails, the StreetFax Document, and the $9,000 in payment Zuckerberg received from Plaintiff for work on StreetFax"). Ceglia alleges that the Harvard account lacks other supposedly authentic emails from March 2003 until June 2003, which he claims shows that the account was incomplete and thus should not be

trusted. Obj. 46-47. But this argument does not rebut the complete absence of the purported emails from the Harvard account. The simple fact is that Ceglia's purported emails do not exist in the world anywhere other than in Ceglia's backdated Word documents. Judge Foschio correctly concluded that after considering this evidence, "any remaining hint of authenticity [of the purported emails] is annihilated." R&R 114-15.

Historical Impossibility. Ceglia objects to Judge Foschio's finding that the purported emails contradict matters of historical fact, such as the documented afternoon launch of Thefacebook.com on February 4, 2004. *Id.* at 111-12. After waiving his response to this evidence in his opposition to Defendants' Motion to Dismiss—a silence that Judge Foschio deemed "significant," *id.* at 112—Ceglia now falsely asserts that Judge Foschio "erroneously placed the burden of proof on Plaintiff." Obj. 45. But there was no burden-shifting here: Ceglia simply failed to respond to this evidence. Moreover, Ceglia *still* offers no reason to question the many publicly available sources that corroborate Facebook's afternoon launch, nor provides any explanation of how he could have viewed the site on that day without a Harvard email account.

Linguistic Analysis. Finally, Ceglia objects to Judge Foschio's crediting of the linguistic analysis of Defendants' expert Gerald McMenamin because that analysis was criticized by another linguist. Obj. 47. Judge Foschio carefully reviewed McMenamin's analysis and fully considered the linguist's criticism, concluding that it "fails to account" for at least some of McMenamin's findings. R&R 118. Ceglia offers no reason to reject that conclusion.

D. Judge Foschio's Spoliation Finding Is Amply Supported By The Evidence.

Judge Foschio correctly determined—based on overwhelming evidence—that Ceglia destroyed key evidence in furtherance of his fraudulent lawsuit. First, Ceglia created at least two different physical versions of the Work for Hire Document, only one of which he actually

produced to Defendants. Second, Ceglia "baked" the version that he produced to Defendants "in an attempt to age the document and interfere with or thwart [] forensic chemical analysis of the ballpoint ink." R&R 132. Third, Ceglia destroyed critical electronic storage devices and files, and erased data from his computer by repeatedly reinstalling Windows during this litigation.

Ceglia asserts that Judge Foschio failed to "apply the correct standard of review for spoliation." Obj. 27. In fact, Judge Foschio explicitly applied the *exact* same legal standard that Ceglia advocates. *Compare* Obj. 28 *with* R&R 121. As he ultimately acknowledges, Ceglia challenges not Judge Foschio's application of the law but his "assessment of the evidence." Obj. 28. Judge Foschio's finding that Ceglia deliberately destroyed critical evidence during this lawsuit is abundantly supported by objective scientific proof, and the Court should adopt it.

1. Ceglia Created Multiple Versions Of The Work For Hire Document.

Ceglia asserts, without any explanation, that Blanco "factually refutes" the overwhelming evidence—documented by Lesnevich in numerous high-resolution images presented to the Court, *see* Doc. Nos. 319 at 52-54, 472-1 at 6—that Ceglia proffered multiple different physical versions of his forged Work for Hire Document as the same document. But Blanco did not even consider the evidence set forth in the Supplemental Lesnevich Report identifying 12 significant differences on the second page of the four images of the Work for Hire Document. *See* Doc. No. 459 ¶¶ 51-85. That evidence goes completely unaddressed in Ceglia's objections. Lesnevich also identified 20 significant differences on the first page of the four images of the Work for Hire Document. As Judge Foschio noted, Blanco's efforts to rebut these findings—which Ceglia does not even bother describing in his objections—simply "do[] not address the many dissimilarities … observed by Lesnevich[,] the significance of which are readily appreciated by the eye of one not trained in such sciences." R&R 83.

2. Ceglia "Baked" The Version Of The Work For Hire Document That He Presented To Defendants' Experts.

Judge Foschio determined that Ceglia "expos[ed] the Work for Hire Document to a light source for an extended period of time in an attempt to age the document and interfere with or thwart [] forensic chemical analysis of the ballpoint ink." *Id.* at 132. Ceglia's objection to that well-supported finding is replete with falsehoods.

Ceglia asserts that Judge Foschio "failed to address" his submissions blaming Defendants' experts for the damage Ceglia himself inflicted on the Work for Hire Document. Obj. 33. That is incorrect. Judge Foschio addressed at length Ceglia's various claims regarding Defendants' testing of the Work for Hire Document, as well as Stewart's and Blanco's assertion that the Work for Hire Document had not been altered when Argentieri first produced it. R&R 122-133. Judge Foschio simply rejected those claims as "preposterous" and "plainly absurd," *id.* at 131, particularly given that neither Blanco nor Stewart were present when Argentieri produced the document. The sworn, first-hand accounts from Tytell and Professor Romano, both of whom *were* present the moment the document was produced, confirm that the Work for Hire Document had faded ink and an off-white cast at the time. *See* Doc. No. 319 at 55-57.

Ceglia accuses Defendants of damaging the Work for Hire Document after exposing it to "18 hours" of UV light. Ceglia's own expert destroys this false claim. Blanco admitted that he accepts Tytell's first-hand representation that the document was in that condition when Argentieri first produced on the morning of July 14, 2011, Doc. No. 588 at 29-31, and further testified that he observed, by 5 p.m. on the *second day* of testing, "deterioration (fading/yellowing)" of the Work for Hire Document and that "the writing pen inks were virtually gone," Blanco Report (Doc. No. 459) ¶ 173.

Finally, Ceglia asserts that his "baking" did not prejudice Defendants, since Defendants' experts were able to examine the Work for Hire Document and "to render opinions as to its authenticity." This is ludicrous. As Dr. Lyter explained, "[d]ue to the physical condition of the 'Work for Hire' document…, the examination I intended to perform was thwarted. . . . I could not perform Ink Identification, TLC Densitometry, or Relative Aging." Lyter Report at 8. LaPorte experienced the same problem: although he was able to determine, using PE analysis, that the handwritten ink on page 1 of the Work for Hire Document was less than two years old, LaPorte was unable to *identify* the specific manufacturer or formulation of those inks using TLC analysis, a different test, due to the degradation of the inks. LaPorte Report at 13-14. Judge Foschio correctly determined that Ceglia's spoliation "thwart[ed] forensic chemical analysis of the ballpoint ink" on the Work for Hire Document, severely prejudicing Defendants. R&R 132.

3. Ceglia Willfully Destroyed Critical Evidence In The Midst Of Litigation.

Ceglia objects to Judge Foschio's determination that Ceglia willfully destroyed six USB devices by asserting that he did not have "control" over the devices. But Ceglia has previously conceded that "two of the six USB drives identified were [] attached to a computer" that he owned. Doc. No. 481 at 62. Moreover, all six USB devices at issue were, at some point, inserted into computers that were in Ceglia's possession, custody, and control, and that he produced pursuant to the Court's expedited discovery orders. Doc. No. 319 at 57-59. Consequently, the Court's orders required Ceglia to produce the USB drives as well.

Ceglia makes a baseless "no harm, no foul" defense, arguing that two of the destroyed files—documents that Ceglia himself named "Zuckerberg Contract page 1.tif" and "Zuckerberg Contract page 2.tif"—were images of the Work for Hire Document that were "likely" independently produced to Defendants, and thus any claim of prejudice is "vitiate[d]." Obj. 35;

see also Doc. No. 481 at 62-63. But of course, the evil of spoliation is that the victim can never know what was destroyed. *See Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998). The destroyed files could have been, for example, different scans of the document that would have further confirmed Ceglia's fraud. And of course there is no way to determine what other critical documents might have been on the USB devices that Ceglia intentionally destroyed—documents that are now gone forever.

Nor can Ceglia explain why the Seagate hard drive that contained copies of the authentic StreetFax Contract was *twice* overwritten by reinstalling Windows during the pendency of this litigation. Instead, Ceglia baldly asserts that there is no basis to conclude that "evidence relevant to Defendants' defenses was destroyed." Obj. 35. But the Kasowitz Letter reveals that Ceglia had recently learned from his withdrawing lawyers that the authentic StreetFax Contract had been found on Ceglia's Seagate hard drive. When Ceglia then reinstalled Windows—for a second time during this litigation—in an apparent attempt to delete the StreetFax Contract, he backdated the hard drive to conceal the reinstallation.

Finally, Ceglia denies that he deleted all electronic copies of the version of the Work for Hire Document that is attached to his Amended Complaint, deleted additional relevant files with names such as "Work for Hire ContractMZ.doc," and deleted data in his email accounts. Obj. 36. However, Ceglia did not respond to—much less rebut—any of this evidence in opposing Defendants' Motion to Dismiss. *See* Doc. No. 588 at 34. This Court should reject Ceglia's belated generic objections and adopt Judge Foschio's well-reasoned conclusion that Ceglia destroyed critical electronic evidence during the pendency of this case. *See* R&R 140-43.

CONCLUSION

This Court should adopt Judge Foschio's Report and Recommendation and dismiss this case with prejudice.

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Respectfully submitted,

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