

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Plaintiff,

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

v.

MARK ELLIOT ZUCKERBERG and  
FACEBOOK, INC.,

Defendants.

**DECLARATION OF PAUL  
ARGENTIERI IN SUPPORT OF  
PLAINTIFF'S REPLY TO  
DEFENDANTS' OPPOSITION TO  
CEGLIA'S OBJECTIONS TO  
MAGISTRATE'S MARCH 26, 2013  
REPORT AND RECOMMENDATION**

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**PAUL ARGENTIERI** submits this declaration and declares under penalty of perjury pursuant to 28 U.S.C.1746 and the laws of the United States that the following is true and correct.

1. I am counsel for the plaintiff Paul Ceglia and I make this declaration upon my personal knowledge. If called upon to testify as to the facts contained herein, I could and would competently do so.

2. This declaration is submitted as an Appendix of documents that are relevant to Plaintiff's Objections to the Magistrate's Report and Recommendation. With the exception of Plaintiff's Declaration (Doc. 654), which was filed with Plaintiff's Objections, the Appendix documents were part of the record before the Magistrate.

3. The only document in the Appendix that does not appear in the ECF docket is the excerpt from the transcript of the hearing before the Magistrate on December 13, 2011. That excerpt is included as Exhibit D.

4. I am providing this declaration and Appendix to assist the Court in its review and determination of Plaintiff's Objections to the Magistrate's Report and Recommendation. A complete courtesy copy is being provided to the District Judge and Defendants' counsel. This declaration, as filed on the Court's ECF system, however, does not include the exhibits which are already in the ECF record, although they are incorporated in this electronically filed declaration by reference.

5. Document 189 (which is part of Appendix Exhibit Q) at page 7 of 23 contains an important embedded video which should be viewed on ECF where that document is filed. The same is true of Documents 190 and 191, which are also part of Exhibit Q.

6. True copies of the exhibits which are part of the Appendix to this declaration are:

- First Amended Complaint (Doc. 39) - **Exhibit A**;
- Magistrate's Report and Recommendation (Doc. 651) - **Exhibit B**;
- Hearing Transcript Excerpt (June 30, 2011) (Doc. 94) - **Exhibit C**;
- Hearing Transcript Excerpt (December 13, 2011) - **Exhibit D**;
- James Blanco Declaration (Doc. 459) - **Exhibit E**;
- Paul Ceglia Declaration (Doc. 230) - **Exhibit F**;
- Paul Ceglia Declaration (Doc. 654) - **Exhibit G**;
- Neil Broom Declaration (Doc. 417) - **Exhibit H**;
- Carmine Ceglia Declaration (Doc. 419) - **Exhibit I**;
- Paul Argentieri Declaration (Doc. 623) - **Exhibit J**;
- Plaintiff's Memo. in Support of Mot. for Sanctions (Doc. 199) - **Exhibit K**;
- Plaintiff's Memo. in Support of Mot. for Discovery (Doc. 397) - **Exhibit L**;
- Michael McGowan Deposition Transcript Excerpt (Doc. 496) - **Exhibit M**;

- Bryan Rose Deposition Transcript Excerpt (Doc. 498) - **Exhibit N**;
- Larry Stewart Declaration (Doc. 416) - **Exhibit O**;
- Jerry Grant Declaration (Doc. 418) - **Exhibit P**;
- Docs. in Support of Plaintiff's Mot. for Sanctions (Docs. 188-197) - **Exhibit Q**;
- Walter Rantanen Report (Doc. 421) - **Exhibit R**;
- Plaintiff's Memo. in Response to Mot. to Dismiss Excerpt (Doc. 481) - **Exhibit S**.

7. On November 1, 2011, plaintiff filed a motion for sanctions due to spoliation by defendants' experts of the Work for Hire Document. Those motion papers are in the docket at Docs. 188-197. **Exhibit Q**.

8. On December 13, 2011, Magistrate Foschio conducted a lengthy hearing on the motion at which time evidence in support of plaintiff's motion was presented to and considered by the Court.

9. At the close of the hearing, the magistrate denied plaintiff's motion for sanctions without prejudice, but acknowledged the strength of the demonstrative, electronic evidence that was presented by plaintiff which showed that defendants' experts were responsible for the "baking" or yellowing of the Work for Hire Contract.

10. At that time, the magistrate stated, "I don't know how one can explain what appeared to be to me on the screen that it was – which seems to have a contrast along the lines of what you [plaintiff's counsel] attribute to it, but the Defendants say otherwise, and I'm not going to make a ruling about that." A true copy of excerpts from the transcript of the December 13, 2011 hearing is attached hereto as **Exhibit D** (T.188:18-23).

Dated: May 22, 2013

s/ Paul Argentieri  
 \_\_\_\_\_  
 Paul Argentieri

IN ACCORDANCE WITH THE ATTACHED DECLARATION,  
THE EXHIBITS REFERRED TO THEREIN WHICH ARE ALREADY  
IN THE ECF RECORD (EXHIBITS A-C AND E-S)  
ARE NOT BEING RE-FILED, BUT ARE INCORPORATED BY REFERENCE.

EXHIBIT D IS BEING E-FILED WITH THIS DECLARATION

A COMPLETE COURTESY COPY OF THIS DECLARATION, TOGETHER  
WITH ALL EXHIBITS, IS BEING DELIVERED  
TO HON. RICHARD J. ARCARA, U.S.D.J.

EXHIBIT D

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, \* Docket No.  
\* 1:10-cv-00569-RJA  
\*  
Plaintiff, \*  
\*  
\* Buffalo, New York  
v. \* December 13, 2011  
\* 12:11 p.m.  
\*  
MARK ELLIOT ZUCKERBERG and \* ORAL ARGUMENT.  
FACEBOOK, INC., \*  
\*  
Defendants. \*  
\*

\* \* \* \* \*

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: DEAN BOLAND, ESQ.  
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For the Defendants: ORIN SNYDER, ESQ.  
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Court Reporter: LORI K. BECK, CSR, RDR, CRR  
Notary Public  
Jack W. Hunt & Associates, Inc.  
1420 Liberty Building  
Buffalo, New York 14202  
(716) 853-5600

Proceedings recorded by mechanical stenography,  
transcript produced by computer.

15:38:07 1 of cases checked about my concept of whether  
15:38:11 2 discoloration of the document constitutes  
15:38:14 3 spoliation.

15:38:15 4 I don't want to say anything on the record  
15:38:16 5 until I just take five, ten minutes with my law  
15:38:19 6 clerk, and I'll be right back, and then we will  
15:38:21 7 complete, I think, what will now be the last ruling  
15:38:26 8 for the day, then, correct?

15:38:28 9 **MR. BOLAND:** Yes, Your Honor.

15:38:29 10 **THE COURT:** So just take a ten-minute break.

15:38:38 11 (A recess was then taken.)

15:43:46 12 **THE CLERK:** Back on the record, oral  
15:43:48 13 argument, Ceglia versus Zuckerberg and Facebook.

15:43:52 14 **THE COURT:** I consulted a couple of cases  
15:43:55 15 with my law clerk's assistance which tend, in my  
15:43:58 16 judgment, to corroborate my instinct, which is that  
15:44:01 17 discoloration of -- of documents allegedly  
15:44:07 18 spoliated in a case -- it does not constitute  
15:44:12 19 spoliation as long as the underlying information  
15:44:14 20 that is contained in the document or the item,  
15:44:17 21 whether it's a disc, a computer diskette, or a -- a  
15:44:23 22 document -- an actual document such as a contract,  
15:44:27 23 is discernible and can be read and -- or, for that  
15:44:37 24 matter, analyzed by an expert. The discoloration  
15:44:41 25 in itself is not a form of spoliation.

**JACK W. HUNT & ASSOCIATES, INC.**

1420 Liberty Building

Buffalo, New York 14202 - (716) 853-5600

15:48:40 1           **MR. SNYDER:** Absolutely not. There's no  
15:48:41 2 evidence of that, and if Mr. Boland attempts to  
15:48:44 3 present some down the road, we'll respond to it.  
15:48:46 4 He's, I think, trying to bait us into giving him  
15:48:49 5 more discovery, but the Plaintiff is the criminal  
15:48:51 6 who altered the document. We did not alter this  
15:48:54 7 document --

15:48:55 8           **THE COURT:** I --

15:48:55 9           **MR. SNYDER:** -- in any way.

15:48:56 10          **THE COURT:** Thank you.

15:48:57 11           That's what I thought his position was. He  
15:48:59 12 doesn't concede that it's actually yellowed.

15:49:02 13          **MR. BOLAND:** Very well. That's --

15:49:03 14          **THE COURT:** I don't quarrel with what you  
15:49:04 15 showed on the screen, but they believe that that's  
15:49:07 16 not necessarily a -- a fact.

15:49:10 17          **MR. BOLAND:** Very well.

15:49:11 18          **THE COURT:** I don't know how one can explain  
15:49:13 19 what appeared to be to me on the screen that it  
15:49:18 20 was -- which seems to have a contrast along the  
15:49:20 21 lines of what you attribute to it, but the  
15:49:23 22 Defendants say otherwise, and I'm not going to make  
15:49:27 23 a ruling about that.

15:49:27 24          **MR. BOLAND:** Well, and as -- I kind of  
15:49:31 25 interrupted you, and I apologize. Is your ruling