IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL D. CEGLIA, Plaintiff-Appellant, v. ERIC H. HOLDER, JR., as Attorney General of the United States, et al., Defendants-Appellees.	:	Docket No. 14-1752

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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I. Preliminary Statement Pursuant to F.R.A.P. 35(b)

The appellant-plaintiff, Paul Ceglia, respectfully petitions this Court, pursuant to F.R.A.P. 35, for rehearing *en banc* of the Panel's decision in *Ceglia v. Holder,* 2015 U.S. App. LEXIS 6426 (2d Cir. April 20, 2015) (summary order attached). The basis for the petition is that the Panel's decision conflicts with the decisions of the United States Supreme Court in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the *Noerr-Pennington* Doctrine[1]/, and this Court's decisions in *Brewer v. West Irondequoit Cent. School Dist*., 212 F.3d 738, 744 (2d Cir. 2000) and *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991). Consideration by the full Court is, therefore, necessary to secure and maintain uniformity of the Court's decisions.

Furthermore, the proceeding involves a question of exceptional importance because it involves an issue on which the Panel's decision conflicts with the authoritative decisions of other United States Courts of Appeals, in particular, the decision of the Eleventh Circuit in *United States v. Pendergraft*, 297 F.3d 1198, 1209 (11th Cir. 2002), which explicitly prohibits prosecuting a person for wire or mail fraud under the facts of this case, and the D.C. Circuit in *Juluke v. Hodel*, 811 F.2d 1553, 1556 (D.C. Cir.1987), which holds that the abstention doctrine does not

[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657, 669 (1965).

extend to enjoining federal prosecutions in parallel federal criminal and civil cases.

II. Facts Relevant to Petition

Plaintiff-appellant Paul Ceglia was in the middle of civil litigation in the Western District of New York against defendants-appellees, Mark Zuckerberg and Facebook, Inc., for breach of contract and related claims ("Civil Action")[2]/ when he was charged in the Southern District of New York with mail and wire fraud for filing and litigating the Civil Action. He, as well as his lawyers, was threatened with further criminal prosecution if additional papers were filed in support of his Civil Action. Ceglia's main counsel in the Civil Action was so shaken by the prospect of being himself criminally charged for representing Ceglia that he moved to withdraw from the Civil Action and stopped all further work on the case.[3]/

Ceglia filed a complaint in the Western District of New York seeking to have the criminal case brought against him in the Southern District of New York for mail and wire fraud enjoined. The basis for his injunction action is discussed below, but, in sum, it was based on the fact that he has immunity from prosecution under the

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[2] *Ceglia v. Zuckerberg, et al*, Case No. 10-cv-569 (RJA) (W.D.N.Y.).

[3] The motion to withdraw was denied by the Magistrate who stated in his Order that the attorney was said to "fear for his safety" and because of "threats ... made against him" (Civil Action, Doc. 649, p.9), even though the attorney "states his continued belief that Plaintiff has, in bringing and prosecuting this action, not committed fraud, a factor which could justify withdrawal under N.Y. Rule 1.16(c)(2), (3)." *Id.*

Noerr-Pennington Doctrine and the Indictment fails as a matter of law to charge a crime. His complaint was dismissed under Fed. R. Civ. P. 12(b)(6). He took this appeal and the Panel affirmed. *Ceglia v. Holder, supra* at *8-9. The Panel's decision conflicts with applicable Supreme Court precedents, decisions of this Court and authoritative decisions of other Circuit Courts.

III. The Panel's Decision Conflicts With the Decisions of the Supreme Court and Other Courts of Appeals Holding That Only an Injunction Against Plaintiff's Prosecution Can Avoid Irreparable Harm to His First Amendment Right

Plaintiff asserts that the Government's invocation of the mail and wire fraud statutes against him, as set out in the Indictment (SA 4-5), while the Civil Action was pending mandated injunctive relief. An injunction is the equitable intervention that restores the injured party's rights and ends the deprivation. Without equitable intervention, plaintiff has been – and a large class of civil litigants in the future will be – deprived of First Amendment rights or chilled when exercising them. The Supreme Court has consistently held:

> The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See, *NAACP v. Button,* [371 U.S. 415,] 432-433 [(1963)]; *cf. Baggett v. Bullitt, supra,* at 378-379; *Bush v. Orleans School Board,* 194 F. Supp. 182, 185, affirmed *sub nom. Tugwell v. Bush,* 367 U.S. 907 [(1961)]; *Gremillion v. United States,* 368 U.S. 11 [(1961)].

Dombrowski v. Pfister, 380 U.S. at 487 (alterations added).

The Government's arrest of plaintiff and the threat to his lawyers was meant to coerce plaintiff from continuing to exercise his First Amendment right to pursue the Civil Action. The threat that a plaintiff will have to stand trial and face criminal charges punishable by up to twenty years in prison for exercising the constitutional right to litigate a civil action is both terrifying and tyrannical.[4]/ "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser." *Dombrowski v. Pfister*, 380 U.S. at 486. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. at 433.

It is well-settled that equitable relief is the proper remedy for violations of First Amendment rights. The Supreme Court made clear nearly one hundred years ago that a federal injunction is available to prevent state officers from instituting

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[4] The Panel was obviously influenced by the fact that Ceglia and his family are missing and he is presumed to be a fugitive, having referred to his status several times in the Summary Order. If he is a fugitive, one must question the effect upon him of having to wage civil litigation against parties with unlimited resources, while simultaneously having to defend himself against the Government for litigating in the first place. This does not justify his alleged flight, but it may explain why he may have fled and why his arguments, supported by powerful forensic evidence, were disregarded by the Panel.

criminal proceedings "under extraordinary circumstances where the danger of irreparable loss [of a constitutional right was] both great and immediate." *Fenner v. Boykin*, 271 U.S. 240, 243 (1926). Because the right to petition is one of our most precious rights, the criminal indictment of a person precisely because he or she is a civil litigant is necessarily a profound infringement.

In 1907, the Supreme Court held, "[t]he right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907). In 2002, the Supreme Court reaffirmed *Chambers* and its progeny:

> We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights,' *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967), and have explained that the right is implied by 'the very idea of a government, republican in form,' *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002).

"Thus, in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled the exercise of First Amendment rights, *see, e.g., Wooley v. Maynard,* 430 U.S. 705 (1977)." *Deaver v. Seymour,* 822 F.2d 66, 69 (D.C. Cir. 1987). Where the exercise of a First Amendment right is chilled by a threatened

prosecution, an injunction is available to preserve the right. The Panel's reading of *Deaver,* that the loss of the First Amendment right – here, the right to petition the civil courts without fear of prosecution – can somehow be vindicated in a criminal proceeding while parallel Civil Action is ongoing is erroneous.

Federal prosecutors have previously argued *without success* that a broad reading should be given to *Younger v. Harris*, 401 U.S. 37 (1971) and that restraints against federal courts enjoining ongoing criminal proceedings in state courts should be extended to federal cases. Nevertheless, the Panel appears to extend *Younger's* abstention rule to *federal* prosecutions where a party seeks to "civilly enjoin a criminal prosecution". *Ceglia v. Holder,* 600 Fed Appx. at *8-9. However, the D.C. Circuit – the court that decided *Deaver* – specifically rejected the reasoning adopted by the Panel. The D.C. Circuit held:

> [a]pparently, the Government is seeking to extend the holding of *Younger v. Harris* – that a federal court will not enjoin an ongoing criminal proceeding in state court – to cover the situation in which parallel civil and criminal proceedings take place in federal court. Not only can we find no support for such an extension of *Younger,* but any such extension would be flatly at odds with the prevailing case law.

Juluke v. Hodel, 811 F. 2d 1553, 1556 (D.C. Cir.1987). *See also, Christoforu v. United States,* 842 F. Supp. 1453, 1456 (S.D. Fla. 1994) ("Younger doctrine does not require federal courts to abstain or defer from granting injunctive relief pending resolution of parallel federal criminal actions implicating the First Amendment.").

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski v. Pfister,* 380 U.S. at 486. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Brewer v. West Irondequoit Cent. School Dist*., 212 F.3d 738, 744 (2d Cir. 2000) (citations and internal quotation marks omitted). Yet, the Panel's decision holding that Ceglia has an adequate remedy at law by being subjected to a criminal trial is in conflict with *Dombrowski* and *Brewster*.

The right to petition is not dependent upon success. "Nor does the text of the First Amendment speak in terms of successful petitioning – it speaks simply of 'the right of the people ... to petition the Government for a redress of grievances.'" *BE&K Constr. Co. v. NLRB*, 536 U.S. at 532.

IV. The Panel's Decision Conflicts With the *Noerr-Pennington* Doctrine

The doctrine of Noerr-Pennington immunity derives from two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657, 669 (1965). The doctrine extends immunity to valid petitions to all departments of government for redress whether or not the injuries are caused by the act of petitioning or by

government action which results from the petitioning, even if there is an improper purpose or motive. See, *Noerr, supra*; *Pennington, supra*; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). "Under the Noerr-Pennington doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 928 (9th Cir. 2006). On the other hand, sham petitions are not protected. *Id.* However, the applicability of the sham litigation exception is subject to "the breathing space principle," which requires that "sham litigation" be both *objectively baseless and the product of an improper motive*. See, *Sosa, supra*; *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60-61 (1993).

Here, Ceglia's Civil Action was not objectively baseless. The Civil Action was ongoing from June 2010, until March 2014, with thousands of pages of expert reports and declarations filed by both sides detailing the scientific tests performed on the documents in question in order to determine their authenticity. Every assertion of forgery relating to the authenticity of the Work for Hire Contract and emails that was made by Zuckerberg and Facebook in the Civil Action was countered by plaintiff's highly qualified experts, including the former director of the U.S. Secret

Service's forensic laboratory.[5] Although the Panel was dismissive of Ceglia's experts' evidence, the evidence dispelled any notion that Ceglia's Civil Action was objectively baseless.

In his Report & Recommendation in the Civil Action, the magistrate stated that, because of the volume of evidence presented to him by *both sides* on the defendants' motion to dismiss, he *considered only the evidence most favorable to the defendants* and plaintiff's rebuttal evidence, without taking plaintiff's allegations as true or considering the affirmative evidence from plaintiff's experts that the Work for Hire Contract and emails were authentic. This turned the burden of proof on its head and, instead of accepting plaintiff's allegations as true and giving plaintiff the benefit of all favorable inferences, the Court gave those benefits to the defendants.[6]/

Plaintiff's other distinguished experts in this injunction case, like his experts in the Civil Action, also concluded "to a reasonable degree of scientific certainty" that Ceglia's Work for Hire Contract is authentic and unaltered. (A-360 and A-374).

Plaintiff's evidence was not countered by the defendants in this action, and it was ignored by the Panel when it failed to consider whether Ceglia's claims in the

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[5]A summary of the competing evidence that was presented to the District Court is found in the "Dueling Expert Table." (A-111).

[6] Magistrate's Report & Recommendation, *Ceglia v. Zuckerberg,* 2013 U.S. Dist. LEXIS 45500, *49-50 (W.D.N.Y. March 26, 2013). This error by the Magistrate is one of the primary bases for plaintiff's appeal of the District Court's decision in the related Civil Action.

Civil Action were objectively baseless so as to strip him of Noerr-Pennington immunity and require him to stand trial in the criminal case.

V. Under the Authoritative Decision of the Eleventh Circuit, in *United States v. Pendergraft*, Which The Panel Ignored, Ceglia's Indictment Does Not State a Crime as a Matter of Law and the Filing and Serving of Litigation Documents is Not a Crime

Here, the Government's Indictment for wire and mail fraud rests on Ceglia having filed and served documents in his Civil Action based upon an allegedly falsified contract with Zuckerberg, which, if true, plaintiff necessarily knew that Zuckerberg would know were falsified. That being so, Ceglia could not, as a matter of law, have intended to obtain money or property from Zuckerberg under a scheme to defraud because plaintiff knew that Zuckerberg could not possibly be defrauded by an agreement and emails Zuckerberg knew to be false. That is the effect of the holding in *United States v. Pendergraft*, 297 F.3d 1198, 1209 (11th Cir. 2002) which has been followed in numerous other jurisdictions, but which the Panel ignored entirely in its Summary Order, even though it was central to plantiff's appeal.

The alleged facts fail to establish mail and wire fraud under 18 U.S.C. §§ 1341 and 1343, respectively, as a matter of law. *United States v. Pendergraft*, 297 F.3d at 1209; *Sosa v. DirecTV, Inc.*, 437 F. 3d 923, 941 (9th Cir. 2006); *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 257 F. Supp. 2d 819, 830-31 (M.D. La. 2002); *California Pharmacy Management v. Zenith Ins.*, 669 F. Supp. 2d 1152, 1161

(C.D. Cal. 2009). *Pendergraft* is the leading case on this issue, in which the Eleventh Circuit reversed convictions for mail fraud because "The allegations in the indictment for conspiracy to commit mail fraud and for the substantive offense of mail fraud ... fail[ed] to charge offenses as a matter of law." 297 F. 3d at 1209.

The Government charged the defendants with mail fraud based on their pursuing litigation in which they used an affidavit to falsely claim that they had been threatened by the adverse party. The Court first observed, "*A number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and all have rejected that possibility.*" *Id.* at 1208 (emphasis added). The Court noted that "prosecuting litigation activities as federal crimes would undermine the policies of access and finality that animate our legal system." *Id.* Instead of resting its decision on that ground, however, the Eleventh Circuit went to the language of the mail fraud statute itself, 18 U.S.C. § 1341, and determined that it could not reach a situation in which the charged party relied on falsified evidence that the party knew the adverse party would know was false. *Pendergraft*, 297 F.3d at 1208-09.

The Court then focused on the facts before it and found them not to constitute mail fraud as a matter of law:

> In support of their suit against Marion County, Pendergraft and Spielvogel authored affidavits that falsely accused Cretul of making threats. Such falsity might have deceived some, *but it could not deceive Marion County. Cretul, after all, was the Chairman of the Marion County Board of Commissioners*, and Pendergraft and Spielvogel were aware of Cretul's

> position. *They knew that Cretul would deny making these threats, and they knew that their affidavits would not trick Cretul into admitting otherwise. If they knew that they could not deceive Marion County, then they could not have had an intent to deceive.* See *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.1991) ("A defendant cannot possibly intend to deceive someone if he does not believe that his intended 'victim' will act on his deception."); *Norton v. United States*, 92 F.2d 753, 755 (9th Cir.1937) ("*There can be no intent to deceive where it is known to the party making the representations that no deception can result.*").
>
> Since there was no intent to deceive, there was no "scheme to defraud," and we hold that Pendergraft and Spielvogel's mailing of litigation documents, even perjurious ones, did not violate the mail-fraud statute.

Id. at 1209 (emphases added).

Applying the *Pendergraft* decision to the facts of this case could not be clearer or more dispositive, yet, the Panel failed to do so. Zuckerberg has gone on record, under oath, claiming he knows the agreement with Ceglia to be falsified. On June 2, 2011, well over a year before plaintiff's Indictment on November 26, 2012, Zuckerberg filed a declaration in the Civil Action in which he categorically stated, as "the Founder, Chairman, and Chief Executive Officer of Facebook, Inc.":

> 4. I understand that Plaintiff Paul Ceglia alleges that Exhibit A [to the Amended Complaint in the Civil Case] is an agreement that entitles him to partial ownership of Facebook, and that he and I signed this document on April 28, 2003.
> ***
> 8. The document attached as Exhibit A to the Amended Complaint is not the written contract that I signed.
> ***
> 10. I did not enter into any agreement, written or otherwise, ... with Ceglia concerning Facebook or any related social networking service or web site.
> ***
> 14. I did not write or receive any of the alleged e-mails quoted in the

Amended Complaint. [Doc. 46 in the Civil Action.] (A-242-243).

As in *Pendergraft*, if Ceglia forged the contract and emails between himself and Zuckerberg, as the Indictment alleges, he necessarily knew that this forged evidence "could not deceive" Zuckerberg and Facebook, of which Zuckerberg was "the Founder, Chairman, and Chief Executive Officer." Accordingly, as in *Pendergraft*, if plaintiff knew that he could not deceive Zuckerberg and Facebook, as he perforce did under the facts stated in the Indictment, plaintiff could not have had "the intent to deceive" required by the mail and wire fraud statutes as a matter of law and there could be no "scheme to defraud" under sections 1341 and 1343, and the criminal case cannot possibly succeed. That being so, Ceglia showed more than a likelihood, if not a certainty, of success on the merits in this case; there was no conceivable reason for allowing the criminal case to continue to chill plaintiff's First Amendment right by the Panel's Order affirming the District Court.

This petition involves a question of exceptional importance because it involves an issue on which the Panel's decision conflicts with the authoritative decisions of other United States Courts of Appeals.[7]/

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[7] Although plaintiff reasserts the authenticity of the documents upon which the Civil Action is based, the District Court's finding that they were fabrications was irrelevant to determining whether the injunction should have issued. That the documents were found not to be authentic, and that Zuckerberg and Facebook knew as much, was all that was needed to invoke *Pendergraft* and halt the prosecution.

Finally, as the Eleventh Circuit noted in *Pendergraft*, there is a substantial body of case law that has "rejected the possibility" that "serving litigation documents by mail can constitute mail fraud." 297 F.3d at 1208. This was the view of every court that had considered the issue at the time of *Pendergraft*, and numerous courts since *Pendergraft*. This view is supported in the judicial function exception codified at 18 U.S.C. § 1001(b). Section 1001(b) was enacted by Congress in 1996 and added to 18 U.S.C. § 1001 for the purpose of codifying the exception which has long been recognized by many federal courts as necessary to safeguard from the threat of prosecution statements made in the course of adversarial litigation. Allowing the criminal penalties of § 1001 to apply to statements made in the course of adversarial litigation would chill vigorous advocacy and undermine the adversarial process. *United States v. Vreeland*, 684 F. 3d 653, 665 (6th Cir. 2012).

The exception in subsection 1001(b) has been repeatedly interpreted by the courts to prohibit the very kind of prosecution Ceglia faces. See, *United States v. McNeil*, 362 F.3d 570, 572 (9th Cir. 2004); *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007).

> Under 18 U.S.C. § 1001(b), criminal liability does not attach to materially false statements submitted by a party to a judge in a judicial proceeding, even if the party makes the statements knowingly and willfully.

Id. at 1081. See also, *United States v. Vreeland*, *supra* at 665.

The Second Circuit also considered the immunity exception in *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991), before § 1001(b) was enacted:

> This Circuit has yet to consider directly the adjudicative function exception. In *United States v. D'Amato*, 507 F.2d 26 (2d Cir.1974), however, we faced an analogous question – whether section 1001 covered false statements made in the course of a civil suit. There the defendant was prosecuted under section 1001 for submitting a false affidavit during a private civil action. We observed that section 1001 required 'a fraud upon the Government' or 'a deception upon an investigative or regulatory agency.' *Id.* at 28. Because the government was not a party to the suit and because the false statement was not intended to further a fraudulent scheme against the government, we reversed the conviction. We rejected the argument that 'a fraudulent statement in a court is ergo a 'fraud upon the Government.' *Id.*

Masterpol, 940 F.2d at 765. "*D'Amato* specifically rejected the argument that the submission of a false affidavit during a judicial proceeding before a federal court thereby becomes a fraud within the jurisdiction of a department of the United States." *Id.* Plaintiff's prosecution by the Government violates 18 U.S.C. § 1001(b), and this Court's decision in *Masterpol.* The Panel's Summary Order is in direct conflict with both.

Conclusion

Respectfully, the Court should grant a rehearing *en banc* to correct the conflicts between the Panel's decision and the controlling authority of the Supreme Court and the other cases from this and other circuits which are cited above.

Dated: June 4, 2015
Holmdel, New Jersey

Respectfully submitted,

s/ Gil D. Messina
Gil D. Messina, Attorney for Paul Ceglia

APPENDIX

***Ceglia v. Holder*, 2015 U.S. App. LEXIS 6426 (2d Cir. April 20, 2015)**

(Summary Order)

1 of 1 DOCUMENT

PAUL D. CEGLIA, Plaintiff-Appellant, v. MARK ELLIOT ZUCKERBERG, an individual; FACEBOOK, INC., formerly known as THEFACEBOOK, INC., a Delaware Corporation, Defendants-Appellees. PAUL D. CEGLIA, Plaintiff-Appellant, v. ERIC H. HOLDER, JR., as Attorney General of the United States; PREETINDER S. BHARARA, as U.S. Attorney for the Southern District of New York; JANIS M. ECHENBERG, as Representative of the U.S. Attorney's Office for the Southern District of New York; CHRISTOPHER D. FRYE, as representative of the U.S. Attorney's Office for the Southern District of New York, Defendants-Appellees.

No. 14-1365-cv, No. 14-1752-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2015 U.S. App. LEXIS 6426

April 20, 2015, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: **[*1]** Appeal from judgments and orders dated April 4, 2012 and March 26, 2014 of the United States District Court for the Western District of New York. (Richard J. Arcara, Judge; Leslie G. Foschio, Magistrate Judge).
Ceglia v. Holder, 2014 U.S. Dist. LEXIS 40251 (W.D.N.Y., Mar. 25, 2014)
Ceglia v. Zuckerberg, 2014 U.S. Dist. LEXIS 40264 (W.D.N.Y., Mar. 25, 2014)

COUNSEL: FOR PLAINTIFF-APPELLANT: JOSEPH M. ALIOTO, Alioto Law Firm, San Francisco, CA; Gil D. Messina, Messina Law Firm P.C., Holmdel, NJ.

FOR MARK ELLIOT ZUCKERBERG; FACEBOOK, INC., DEFENDANTS-APPELLEES: ORIN SNYDER, Alexander H. Southwell, Matthew J. Benjamin, Gibson, Dunn & Crutcher LLP, New York, NY; Thomas H. Dupree, Jr., Robert Gonzalez, Gibson, Dunn & Crutcher LLP, Washington, DC; Terrance P. Flynn, Harris Beach PLLC, Buffalo NY.

FOR ERIC H. HOLDER, JR., PREETINDER S. BHARARA, JANIS M. ECHENBERG, CHRISTOPHER D. FRYE, DEFENDANTS-APPELLEES: MARY E. FLEMING, Assistant U.S. Attorney, for William J. Hochul, Jr., United States Attorney for the Western District of New York, Buffalo, NY.

JUDGES: PRESENT: GUIDO CALABRESI, JOSÉ A. CABRANES, REENA RAGGI, Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments and orders of the District

Court be **AFFIRMED**.

Before us on appeal are two cases brought by an individual who has repeatedly demonstrated **[*2]** total disregard for our judicial system, a pattern that reached its apex on or about March 6, 2015, when he absconded from justice while under indictment. Now, plaintiff-appellant Paul Ceglia, a fugitive from the law, asks us to reverse the judgments by the District Court dismissing Ceglia's civil suit against Facebook and his separate civil action seeking an injunction against prosecution in the Southern District of New York. Ceglia's arguments on appeal, like much of his prior representations to and conduct before the court, are meritless. Even without reference to the fugitive disentitlement doctrine, we affirm on the merits the District Court's dismissals of both actions.

We assume the parties' familiarity with the underlying facts and procedural history, and recite briefly only those facts most relevant to the instant appeals. On June 30, 2010, Ceglia brought suit against defendants Mark Zuckerberg and Facebook, Inc. (the "Facebook action"), alleging that Ceglia was entitled to a 50% ownership share in the multi-billion dollar social networking corporation on the sole basis of a 2003 "Work for Hire" document of highly dubious provenance. After expedited discovery regarding the **[*3]** authenticity of the Work for Hire document,[1] which defendants vigorously disputed, defendants moved to dismiss the action.

> 1 During this period, on April 4, 2012, the Magistrate Judge granted in part and denied in part defendants' motion to stay discovery. The Court permitted a limited period of expert discovery and directed that defendants provide certain reciprocal discovery, prior to adjudication of defendants' motion to dismiss. *Ceglia v. Zuckerberg*, No. 14-1365-cv, Special App'x at 1. In appealing the District Court's dispositive judgments, plaintiff also challenges this underlying order.

On March 26, 2013, Magistrate Judge Leslie G. Foschio issued a 155-page Report and Recommendation exhaustively reviewing the overwhelming evidence that the Work for Hire document was a fabrication. *Ceglia v. Zuckerberg, No. 10 Civ. 569-A(F), 2013 U.S. Dist. LEXIS 45500, 2013 WL 1208558 (W.D.N.Y. Mar. 26, 2013)*. On this basis, as well as the alternative grounds of Ceglia's extensive spoliation of evidence, the Magistrate Judge recommended that the Facebook action be dismissed as a fraud on the court. After reviewing plaintiff's objections to the Report and Recommendation, the District Court adopted the Magistrate Judge's detailed findings and dismissed the fraudulent Facebook action pursuant **[*4]** to the court's inherent power on March 25, 2014. *Ceglia v. Zuckerberg, No. 10 Civ. 569-A, 2014 U.S. Dist. LEXIS 40264, 2014 WL 1224574 (W.D.N.Y. Mar. 25, 2014)*.

Meanwhile, on November 26, 2012, a federal grand jury indicted Ceglia in the Southern District of New York on charges of mail and wire fraud for the fabrication of the Work for Hire document and the related scheme to defraud. Ceglia then filed suit against Attorney General Eric Holder, U.S. Attorney Preet Bharara, and Assistant U.S. Attorneys Janet Echenberg and Christopher Frye (the "Holder action") in the Western District of New York, seeking the extraordinary remedy of an injunction against prosecution by the U.S. Attorney in the Southern District of New York on the basis of his *First Amendment* petition rights and the so-called *Noerr-Pennington* doctrine.[2]

> 2 *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* (establishing antitrust immunity for petitions to state legislature); *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* (extending *Noerr* immunity to petitions of public officials); *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* (extending *Noerr-Pennington* immunity to right of access to courts).

On the same day that the District Court dismissed the Facebook action, it also dismissed the Holder action. In its dismissal order, the District Court reasoned that the Facebook action was not a protected exercise of constitutional rights but rather a mere "sham," **[*5]** and, further, that Ceglia had ample opportunity to challenge the Southern District of New York indictment in that District. *Ceglia v. Holder*, No. 14-1752-cv, Special App'x at 12. The District Court also cited the basic legal precept that "'[t]he constitution of the United States does not secure to any one the privilege of defrauding the public.'" *Id.* (quoting *Plumley v. Massachusetts, 155 U.S. 461, 479, 15 S. Ct. 154, 39 L. Ed. 223 (1894))*.

Ceglia recycled substantially similar arguments regarding his *First Amendment* rights and the *Noerr-Pennington* doctrine in successive motions to dismiss the indictment in the Southern District of New York. After first Judge Carter and then, following reassignment, Judge Broderick denied those motions, Ceglia filed a notice of appeal in the criminal case on an interlocutory basis.[3]

> 3 That appeal is docketed at 15-628-cr. This Court concurrently grants the pending motion to dismiss that appeal in a separate order.

Before any of the three pending appeals could be adjudicated, however, Ceglia absconded from justice. Subject to pretrial electronic monitoring as a condition of his bail, Ceglia managed in early March to remove his electronic monitoring bracelet and flee with his wife, two children, and family dog. Before doing so, Ceglia rigged a motorized contraption to which **[*6]** he connected his GPS bracelet in an effort to deceive pretrial services into believing he was present and moving about within his home. *See* Defs.-Appellees' Affidavit in Reply to Pl.-Appellant's Response to Order to Show Cause, Ex. A at 5-6. Ceglia then failed to appear at an immediate court-ordered conference, at which the District Court revoked his bail. *Id.* at 6. Ceglia remains a fugitive.

As a general matter, we review *de novo* an order granting a motion to dismiss, accepting as true the complaint's factual allegations and drawing reasonable inferences in plaintiff's favor. *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 232 (2d Cir. 2014)*. However, we review for abuse of discretion the dismissal of a complaint as a sanction under the court's inherent power.[4] *Chambers v. NASCO, Inc., 501 U.S. 32, 54, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*. A court has "inherent power" to "fashion an appropriate sanction for conduct which abuses the judicial process." *Id. at 44-45*. Though outright dismissal is a "particularly severe sanction," the Supreme Court has found that it "is within the court's discretion." *Id. at 45*. In conducting our review, we accept the District Court's factual findings unless they are clearly erroneous. *West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)* (reviewing dismissal of a complaint on spoliation grounds for abuse of discretion).

> 4 We also review discovery rulings for abuse of discretion, **[*7]** *see Goetz v. Crosson, 41 F.3d 800, 805 (2d Cir. 1994)*, and hold that Magistrate Judge Foschio's April 4, 2012 ruling to stay general discovery and grant expedited discovery into the authenticity of the Work for Hire document was well within the court's discretion.

Defendants in the Facebook action have established by clear and convincing evidence that the Work for Hire document at the foundation of that suit is a forgery. The overwhelming forensic evidence demonstrates, *inter alia*, discrepancies in the age of the ink, the font and formatting, the printing toner, the paper, and the handwriting. Indeed, many of the suspicious irregularities cited by the experts are apparent to the naked, untrained eye. The record contains no master electronic copy of the Work for Hire document, as might be expected if it were authentic, but rather, reflects multiple similar documents that appear to be test forgeries.

Further, Ceglia's claim--that he inexplicably failed to act (or, as he told news media, forgot that he was a 50% owner of one of the world's most renowned corporations, *see* No. 14-1365-cv, Defs.-Appellee's Br. at 14-15) for seven years, until, conveniently, the year that Facebook was the subject of an Academy Award-winning movie--belies common **[*8]** sense. Finally, the discovery of the real StreetFax contract signed by Ceglia and defendant Zuckerberg, which bears all of the indicia of authenticity that the Work for Hire document lacks, and which exclusively pertains to a separate project unrelated to Facebook, puts the lie to Ceglia's claim. In light of the extensive record evidence of fraud detailed in the Magistrate Judge's meticulous Report and Recommendation, the District Court's dismissal of the Facebook action was most certainly not an abuse of discretion.

The District Court also found clear and convincing evidence of spoliation by Ceglia of multiple electronic media and of the Work for Hire hard copy, which he exposed to intense light in an apparent attempt to "age" the forged document. *See* No. 14-1365-cv, Special App'x at 123-147, 159. This extensive spoliation forms a sound alternative ground for dismissal of the Facebook action.

Additionally, the District Court was justified in its dismissal of the Holder action. Where, as here, an action seeks a mandatory injunction altering the status quo, we consider whether plaintiff has demonstrated a "clear showing that the moving party is entitled to the relief requested." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995)*.

Pursuant to the rule of abstention, **[*9]** the Supreme Court instructs that a court may civilly enjoin a criminal prosecution only "when absolutely necessary for protection of constitutional rights," and only "under extraordinary circumstances, where the danger of irreparable loss is both great and immediate." *Younger v. Harris, 401 U.S. 37, 45, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. Generally, no danger exists where the defendant has the opportunity to offer a defense in the criminal prosecution. *Id.* Plaintiff has had ample opportunity to do so in a federal forum. *See Deaver v. Seymour, 822 F.2d 66, 69, 261 U.S. App. D.C. 334 (D.C. Cir. 1987)* (affirming the denial of an attempt to enjoin prosecution by an independent counsel, and also noting that "in no case that we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment"). Ceglia's attempts to rehearse in appellate briefing the same constitutional and *Noerr-Pennington* arguments already raised before two judges in the Southern District of New York merely confirm this.

After Ceglia absconded, this Court issued an order to show cause why both pending civil appeals should not be dismissed on the grounds that a fugitive from justice is not entitled to adjudication of his civil claims. *See* No. 14-1365, Dkt. 128; No. 14-1752, Dkt. 85. All parties subsequently **[*10]** submitted responses. Though the fugitive disentitlement doctrine may indeed create a compelling, independent basis to dismiss these appeals (in particular, the Holder action), we need not exercise our discretion to dismiss on that basis in light of our analysis here of the merits--or, more accurately, the lack thereof.

CONCLUSION

We have considered all of the remaining arguments raised by plaintiff and find them to be without merit. For the foregoing reasons, we **AFFIRM** the District Court's judgments and orders of April 4, 2012 and March 26, 2014.