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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12 Cr. 876 (ALC)

5 PAUL CEGLIA,

6 Defendant.

7 -----x

8 July 22, 2014  
9 2:00 p.m.

10 Before:

11 HON. ANDREW L. CARTER, JR.  
12 District Judge

13 APPEARANCES

14 PREET BHARARA  
15 United States Attorney for the  
16 Southern District of New York  
17 BY: CHRISTOPHER FREY  
18 Assistant United States Attorney

17 DAVID PATTON  
18 ANNALISA MIRON  
19 Attorneys for Defendant

19 GIBSON DUNN  
20 Attorneys for Facebook  
21 BY: ALEXANDER SOUTHWELL  
22 MATTHEW BENJAMIN  
23  
24  
25

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1 (Case called)

2 (In open court)

3 MR. FREY: Good afternoon, your Honor. Christopher  
4 Frey for the government.

5 THE COURT: Good afternoon.

6 MR. PATTON: Good afternoon, your Honor. David  
7 Patton, and at counsel table is Annalisa Miron, for Mr. Ceglia,  
8 who is joining us by telephone.

9 THE COURT: Good afternoon. Good afternoon,  
10 Mr. Ceglia.

11 THE DEFENDANT: Good afternoon, your Honor.

12 MR. SOUTHWELL: Good afternoon, your Honor. Just to  
13 introduce myself, Alexander Southwell from Gibson Dunn on  
14 behalf of Facebook and Mark Zuckerberg. My colleague Matthew  
15 Benjamin is here as well.

16 THE COURT: Good afternoon.

17 I have before me two issues I need to deal with today.  
18 First is the defense's request for a bill of particulars, and  
19 second is the defense request for certain information to be  
20 obtained through subpoena.

21 First, dealing with the bill of particulars, let me  
22 just get clarification here. It doesn't seem to me that there  
23 is a dispute, but maybe there is, regarding what or which  
24 contract is the real contract here, but maybe there is a  
25 dispute. Let me just get some information from the parties.

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1           In the production, how many contracts have been  
2 produced that are dated April 28, 2003? I guess even before  
3 getting there, the real contract is dated April 28, 2003, is  
4 that correct?

5           MR. FREY: That's the government's contention, yes,  
6 your Honor.

7           THE COURT: OK. And it seemed to me that perhaps  
8 there were at least two contracts with that date. There was a  
9 work for hire contract and a street -- street something  
10 contract that were also dated that date. In the government's  
11 response they pointed to some documents that were Bates stamped  
12 39 and 40. Does that clear this issue up? Is that what the  
13 government is claiming is the real contract here?

14           MR. FREY: Yes, your Honor, that's what the government  
15 is claiming is the actual contract between Mark Zuckerberg and  
16 Mr. Ceglia.

17           THE COURT: And that's the contract Bates stamped page  
18 39 and 40?

19           MR. FREY: Yes, your Honor.

20           THE COURT: Which contract is it? Is that the street?

21           MR. FREY: The street fax contract.

22           THE COURT: All right. The street fax. Does that  
23 clarify it? Seems to me that clarifies that issue.

24           MR. PATTON: It does.

25           THE COURT: So that's been clarified, so the issue of

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1 bill of particulars of that is moot.

2 The second request seems to be likely moot. Now that  
3 the defense knows clearly which contract the government claims  
4 is the real contract, the defense can determine what has been  
5 allegedly forged or altered.

6 So, number one we have dealt with. Number two has  
7 been dealt with.

8 MR. PATTON: Your Honor, if I could. I think number  
9 two has been dealt with, but -- and the government can correct  
10 me if I'm wrong -- I think they have essentially responded as  
11 we expected, which is they're saying that page 2 of the  
12 contract that Mr. Ceglia is alleged to have sued upon was a  
13 copy of what the government alleges was the real contract, and  
14 it was page 1 that was doctored in some way and attached to it.

15 That doesn't necessarily follow from the government  
16 saying that what they've identified as what they claim to be  
17 the real contract is the real contract. I am sorry if this is  
18 sounding a bit twisted.

19 Number two is not resolved purely by the government's  
20 response to number one. I think they have responded in other  
21 places that do resolve it, and that they are essentially saying  
22 we're saying that Ceglia doctored page 1 and attached it to  
23 what we claim was the real page 2.

24 THE COURT: OK. Does the government have anything to  
25 add to this?

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1 MR. FREY: I don't have anything to add, your Honor.

2 THE COURT: OK. So number two has been dealt with,  
3 it's moot.

4 Number three: Identify the e-mails involving Ceglia  
5 and/or Zuckerberg that the government claims are inauthentic.  
6 I am going to deny that request.

7 Number four: Whereas the government states in the  
8 indictment that Ceglia also destroyed evidence that was  
9 inconsistent with his theory in the civil suit, identify the  
10 evidence the government alleges that Ceglia destroyed.

11 I am inclined to deny that request as well, but let me  
12 just get a sense, is the government in a position to do that?  
13 Does the government have that information currently?

14 MR. FREY: To the extent we have it, your Honor, it's  
15 been provided to the defense. It consists largely of our  
16 forensic expert and the report that was generated and produced  
17 to defense counsel with respect to alterations or deletions of  
18 material.

19 THE COURT: Defense counsel?

20 MR. PATTON: And that's fine. If the government's  
21 response is: What we know of at this point is what is  
22 contained in the government's computer forensic expert  
23 report -- which is the Curtis Rose report -- then that's fine  
24 and that answers it. But I do think we would be entitled to  
25 know if at this point they are alleging that some other

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1 evidence was destroyed. We would need to have that information  
2 to be able to prepare any sort of defense of evidence being  
3 destroyed.

4 THE COURT: OK. It seems that the government has  
5 answered that question to the best of its ability now. I think  
6 it would be inappropriate for me to ask the government to  
7 become Miss Cleo or some other psychic and try to determine  
8 what other evidence might have been --

9 In terms of the evidence they have identified thus  
10 far, they have given that information. There may be other  
11 evidence that is in their possession that they have yet to cull  
12 through and go through and make determinations. I am not  
13 prepared to force the government to do that now. Obviously,  
14 the government will need to turn this information over on an  
15 ongoing basis to the extent they continue to get more  
16 information regarding the materials that they feel have been  
17 altered.

18 MR. PATTON: And, your Honor, to be clear, we're not  
19 asking for them to look into the future, but I do think we are  
20 entitled to if they have some other allegation of destruction  
21 of evidence that they know now that they are going to be  
22 relying on -- not that it might be contained in the voluminous  
23 amounts of materials that exist -- but just that when they make  
24 that allegation in the indictment, what are they referring to?  
25 At this point if it's contained in the expert report, then so

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1 be it, fine. But if they are referring to something that we  
2 haven't been told about, that they know about right now, I  
3 think we ought to be able to investigate that.

4 THE COURT: Does the government have anything to say?

5 MR. FREY: Your Honor, all I can say is to the extent  
6 we know about it, we have provided the underlying materials to  
7 defense counsel. Again, it consists largely of the forensic  
8 expert's analysis.

9 MR. PATTON: I'm worried about that qualifier.

10 MR. FREY: I don't mean anything by the qualifier. As  
11 I stand here today it consists of the forensic analysis.

12 THE COURT: All right. So, I will deny that request.

13 Number five: Whom does the government claim Ceglia  
14 intended to deceive as part of the fraudulent scheme alleged?

15 I think that the government has made that clear in the  
16 indictment, so I'm going to deny that request.

17 Number six: To the extent that the government is  
18 relying on the theory that corrupting the judicial process  
19 constitutes fraud, what communications to the court were  
20 fraudulent?

21 I will deny that request.

22 Number seven: If the government intends to rely on  
23 settlement discussions to prove the alleged fraudulent scheme,  
24 identify the instances in which Ceglia engaged or attempted to  
25 engage in settlement discussions.

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1 I am taking this request to mean that the defense is  
2 asking for dates of settlement discussions? Is that what you  
3 are talking about, dates and potential locations of settlement  
4 discussions?

5 MR. PATTON: Correct, your Honor.

6 THE COURT: OK. I feel that that is appropriate, and  
7 I am inclined to grant that request. Anything from the  
8 government on that?

9 MR. FREY: I would just say, your Honor, I think  
10 Mr. Ceglia is probably in the better position of the parties in  
11 this matter to know the answer to that question. I understand  
12 that your Honor is inclined to grant it, and that's fine. I  
13 don't know that there will be anything for the government to  
14 produce in response to that.

15 THE COURT: OK. Well, I guess the first question  
16 might be then, since this request is stated in the conditional,  
17 at this point does the government intend to rely on settlement  
18 discussions?

19 MR. FREY: The government does not currently intend to  
20 rely on settlement discussions.

21 THE COURT: OK. So it seems to me at this point that  
22 this is perhaps moot now. What's defense counsel's position on  
23 that?

24 MR. PATTON: That's fine, your Honor. Obviously if  
25 the government changes its mind, we would like to know about



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1 it.

2 THE COURT: OK. So I will deny that.

3 Regarding the documents produced on December 24, 2012,  
4 identify the source of the documents produced, the location  
5 from which they were retrieved, and the manner in which the  
6 documents were obtained via search warrant, subpoena or some  
7 other manner.

8 Just let me get a little bit more elucidation from the  
9 defense as to why you need this information.

10 MR. PATTON: Your Honor, largely to -- and to be  
11 clear, I think for much of it at this point we now do have that  
12 information.

13 But that information may either have direct relevance  
14 to guilt or innocence in terms of the government's proof in the  
15 case, that is, where some document was found might be relevant  
16 to the case. Secondly, it might be relevant to opposing some  
17 sort of Fourth Amendment challenge.

18 THE COURT: OK. And I think in your submission you  
19 mentioned something else about some other sort of forensic  
20 computer analysis of this information. Is this relevant to  
21 that as well, or no?

22 MR. PATTON: I'm not sure I'm following the question.

23 THE COURT: OK. I thought that there was also a  
24 request -- obviously if some of these documents -- again, I'm  
25 not sure what was in the December 24, 2012 regarding your

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1 earlier request -- that if some of these documents were  
2 retrieved via computer or something of the like, or that sort  
3 of information, that the defense indicated that it might intend  
4 to have someone conduct some sort of forensic analysis related  
5 to that recovery of that material.

6 MR. PATTON: Correct, your Honor, and that certainly  
7 also relates to some of the subpoena issues.

8 THE COURT: OK. So I'm inclined to grant that  
9 request. Anything from the government on that?

10 MR. FREY: Your Honor, I will just note that the  
11 government believes it has adequately described to defense  
12 counsel where various materials were obtained from in our cover  
13 letter with the production of discovery in December of 2012.  
14 We set forth where documents had been obtained by. There was  
15 one search warrant in this case. A copy had been provided to  
16 defense counsel.

17 You know, in the reply briefing on the bill of  
18 particulars motion, defense counsel takes issue with certain  
19 documents, and that consists largely of background materials  
20 concerning Facebook, which just on their face it's clear they  
21 are public source documents, a chapter from a book, a newspaper  
22 article. There is nothing hidden with respect to where those  
23 materials came from. The government believes that defense  
24 counsel knows quite well where everything that has been  
25 produced came from, and they are in a position to determine

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1 whether there are motions to be made or otherwise.

2 MR. PATTON: So, your Honor, if I could use that just  
3 as an example, because this is one of the items.

4 THE COURT: OK. I guess before you address this, as I  
5 indicated, I'm inclined to grant this request to the extent  
6 this material has not already been turned over, but I will give  
7 you an opportunity --

8 MR. PATTON: Then I will quit while I'm ahead.

9 THE COURT: So I will grant request number eight to  
10 the extent that material has not been turned over, regarding  
11 the location and the sources of these documents.

12 All right. So that deals with everything. I think  
13 that resolves everything with the bill of particulars. Now  
14 let's move on to the issue of the subpoenas. I know the  
15 parties have requested oral argument regarding this. I will  
16 give the parties a brief opportunity to address the court in  
17 that regard.

18 OK. Since this is the defense subpoena, I will start  
19 with defense counsel and give you a few minutes to go ahead and  
20 address me.

21 MR. PATTON: Thank you, your Honor. I won't go into  
22 great detail; I'll save things for whatever questions the court  
23 may have. But as a general proposition, if these subpoenas  
24 were denied certainly in whole but at least in part, we would  
25 have a trial where at root the case is about whether or not two

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1 people signed a particular contract, what contract did they  
2 sign.

3           The government has produced and has access to almost  
4 all -- I'm not aware of what they don't have access to -- of  
5 one of those party's computers, bank records, internet  
6 searches, vast quantities of information, based on all sorts of  
7 electronic media that they've gathered. On the flip side, we  
8 have nothing.

9           It strikes me as just fundamentally unfair that we  
10 would go to trial, where the issue is what happened between  
11 these two people, and we have this mountain of electronic  
12 evidence on one side and nothing on the other.

13           At the very least we should have access to those  
14 things that have already been gathered. It would not be  
15 burdensome. We are not asking necessarily at least at the  
16 outset to do a remarkable amount of digging.

17           We already know that a large quantity of  
18 Mr. Zuckerberg's electronic media has been gathered and has  
19 been stored and exists because of prior litigation. So, we are  
20 not asking them to do some extraordinary search or hunt for  
21 that material at least. Obviously, we may be unaware of  
22 additional material that exists from '03, '04. But at the very  
23 least we can start with that material.

24           And, similarly, we could start with finding out how  
25 Harvard backs up its servers. We have already demonstrated

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1 that which backup day you collect from can affect the material  
2 that's on there; not all backup dates necessarily contain  
3 everything prior to that date. And we don't know how Harvard  
4 backs up its servers. We don't know whether they do it on a  
5 daily basis, on a weekly basis, on a monthly basis. We would  
6 like to have that information, and we would like to, using that  
7 information, get a much better, more accurate, snapshot or  
8 collection of Mr. Zuckerberg's e-mails.

9 It's fairly remarkable that the backup that was  
10 selected by both Facebook and the government to retrieve from  
11 Harvard is from late November, when the e-mails that the  
12 government is claiming are inauthentic actually largely  
13 post-date that date. And there are other circumstances that  
14 exist. There are other communications that exist post that  
15 backup date that would be remarkably relevant to the matters at  
16 hand here. So, at the very least we should be looking at those  
17 materials.

18 As for other materials related to bank records and  
19 telephone records, I admit that we're not on as strong a  
20 footing for getting those materials, but they are relevant.

21 The government and Facebook have repeatedly claimed  
22 that, look, you know these e-mails are wrong or unauthentic, or  
23 you know this is the correct version of the contract because it  
24 either comports or doesn't comport with some objective fact  
25 that we know about, that can either be verified through

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1 canceled checks or bank records.

2 We don't have the same ability to examine those  
3 records to see whether or not they comport with the e-mails  
4 that are widely accepted to be true versus the ones that are  
5 contested. That information is highly relevant to us just in  
6 the same way that it's highly relevant to the government and  
7 Facebook and the way they are planning to use it at trial.

8 THE COURT: OK. Let me hear from the government, and  
9 I will give counsel for Facebook an opportunity to address me.

10 Let me just let the parties know that in terms of the  
11 legal standard here that I am applying the standard articulated  
12 by the Supreme Court in Nixon, not the Tucker standard that was  
13 articulated by Judge Scheindlin.

14 It should be noted that Judge Scheindlin in  
15 articulating that Tucker test cabined that test to apply only  
16 where the production is requested on the eve of trial and the  
17 defendant has an articulable suspicion that the documents may  
18 be material to the defense.

19 So, I'm going to go under the Supreme Court standard  
20 articulated in Nixon that the 17(c) subpoena must demonstrate  
21 the relevancy, admissibility and specificity of its request.

22 I guess I should have indicated that before I gave  
23 defense counsel an opportunity to make his presentation. I  
24 will give defense counsel an opportunity to supplement it now  
25 if there is anything you would like to add in regards to that.

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1 MR. PATTON: Your Honor, particularly with respect to  
2 the eve of trial issue, this is material that would have to be  
3 examined by experts for it to be meaningful. So to seek this  
4 material on the eve of trial frankly either does us no good or  
5 it results in a last minute adjournment of proceedings.

6 Nothing is going to change between now and the eve of  
7 trial in terms of our knowledge about whether or not this  
8 material is relevant. So, I do think that we are in a  
9 fundamentally position than BOP phone calls.

10 Frankly, I think we are in a stronger position than  
11 Tucker, because there is an argument to be made, and arguments  
12 have been made about whether that subpoenaing material from the  
13 government, as opposed to a situation here where we are  
14 subpoenaing material that is clearly from a nongovernment  
15 actor, not remotely related to law enforcement or the  
16 government. And I do think Judge Scheindlin's reasoning as  
17 well as several other courts that we cited in our papers makes  
18 a lot of sense.

19 Nixon is an entirely different circumstance; it's the  
20 government seeking material; it's the government seeking it  
21 from the President of the United States. There are sound  
22 reasons why when the defense is seeking to gather information  
23 not from the government -- which I mean the government briefs  
24 almost respond as though we have subpoenaed the government for  
25 this material. There is no reason that Rule 17 -- which was

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1 based on the Federal Rules of Civil Procedure, which do not  
2 contain restricting language that is discussed in Nixon --  
3 there is no reason to limit what the defense should be able to  
4 gather that is clearly material to the defense, and it would  
5 not be onerous on the party that we are seeking material from.

6 THE COURT: OK, thank you. Let me hear from the  
7 government.

8 MR. FREY: Your Honor, obviously the government agrees  
9 with the court that the Nixon standard is the appropriate  
10 standard to be applied here.

11 First, with respect to the point that defense counsel  
12 makes about the unfairness of it all, I think Judge Scheindlin  
13 said it best in Tucker that a criminal prosecution is in no  
14 sense a symmetrical proceeding, that for better or worse due  
15 process demand only that a criminal defendant receive a  
16 constitutionally adequate defense and that the parties in a  
17 criminal prosecution be equally matched.

18 The fact of the matter is that the subpoenas here  
19 largely are overbroad, they are burdensome, and the government  
20 has real concerns with respect to the requests that have the  
21 potential to unduly or inappropriately harass not a prospective  
22 witness but a witness that the government 100 percent knows  
23 will be calling to testify at this trial, and that is with  
24 respect to Mark Zuckerberg.

25 With respect to -- and I will start first with the



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1 Harvard subpoena -- with respect to the e-mails, first of all,  
2 the government has no objection to a subpoena to Harvard that  
3 requests the protocols for backup. We noted that in our  
4 opposition, and that strikes the government as perfectly fine.  
5 It's not something that's currently in the government's  
6 possession, and that's why it wasn't produced to defense  
7 counsel in discovery. But that seems appropriate.

8 I take issue, however, with defense counsel's  
9 assertion that the government selected dates by which it  
10 received e-mails from Harvard. Those were the dates that the  
11 captures were done by Harvard at various points in time based  
12 on various events in history, based on their retention policy,  
13 based on litigation requests in other matters, and that is, as  
14 the government understands it, what Harvard has in its  
15 possession, or it had at the time that the government made its  
16 request to Harvard University.

17 Now, of the three dates that the government received  
18 captures from Harvard, the government reviewed that material  
19 and produced what it believed it was obligated to produce  
20 pursuant to Rule 16. There is a larger set of material that is  
21 still relevant to this case and that the government intends to  
22 produce closer in time to trial, because it contains either  
23 3500 material for Mr. Zuckerberg, or potential Giglio/Jencks  
24 cross-examination material, but that's not appropriate at this  
25 point.

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1           And the request as drafted is really nothing more than  
2 a fishing expedition that is likely to reveal material that  
3 could be potentially embarrassing to Mr. Zuckerberg or to  
4 others, quite frankly, who are involved in those e-mail  
5 communications.

6           So at this point the government sees no reason why  
7 defense counsel or the defendant would be entitled to a full  
8 set of Mr. Zuckerberg's e-mails from any account that he used  
9 during the relevant time period. We believe that the defense  
10 has everything that it needs at this stage and will be  
11 receiving more, consistent with our obligations as we move  
12 forward.

13           With respect to the request for disciplinary records,  
14 again that strikes the government as nothing more than a  
15 fishing expedition for potential Giglio and cross-examination  
16 material, nothing that at this point in time can be articulated  
17 as relevant.

18           Now, with respect to Mr. Zuckerberg himself and to  
19 Facebook -- counsel for those parties are here today and I am  
20 sure will address this further -- but obviously the government  
21 has concern with the potential for undue harassment of  
22 Mr. Zuckerberg as a potential witness in this trial. The  
23 requests for all computer, cell phones, electronic media, again  
24 without further specificity or limitation as to relevance, in  
25 the government's view it does not meet the standard articulated

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1 in Nixon, and it would be nothing more than a fishing  
2 expedition. The same is true for the bank records that have  
3 been requested as well.

4 Unless the court has any further questions, the  
5 government will rest on its written submission in this regard.

6 THE COURT: OK, thank you. Let me hear from counsel  
7 for Facebook.

8 MR. SOUTHWELL: Thank you, your Honor.

9 Largely for the reasons that we laid out in our  
10 papers, we would ask the court to reject the sweepingly  
11 overbroad and unreasonable subpoenas that are sought against  
12 our client Mark Zuckerberg and Facebook. They lack  
13 specificity, they lack relevance, and they lack admissibility  
14 under Nixon or frankly even under the lower standard, and they  
15 really only serve to further harass our clients who are the  
16 victims here and are entitled to respect under the relevant  
17 statutory authorities here.

18 Quite clearly to seek every computer, cell phone,  
19 electronic source device that Mr. Zuckerberg or every employee  
20 of Facebook used during 2003 and 2004 is really by definition a  
21 fishing expedition.

22 There is certainly a corpus of material that we think  
23 would meet that standard, and that which we have offered to  
24 voluntary produce without the need for a subpoena, and we have  
25 laid that out at pages 6 and 7 of our letter of June 30, 2014.

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1 And I think that would be an appropriate basis that we would  
2 offer voluntarily that really covers everything.

3 Just to be clear about that, your Honor, to echo what  
4 AUSA Frey said, in the context of the civil case, and pursuant  
5 to our discovery obligations there, we forensically preserved  
6 any data that Harvard held related to Mr. Zuckerberg's e-mail  
7 accounts. So whatever data Harvard had, we have a forensic  
8 copy of it. And that was the subject of deposition questioning  
9 by civil counsel for Mr. Ceglia.

10 So the record has been established that whatever  
11 Harvard has has been preserved. Moreover, whatever that  
12 preserved body of electronic evidence is has been searched for  
13 any correspondence between Ceglia or anybody that was known to  
14 be working with him and Zuckerberg, and that has been produced  
15 in the civil case. So, all of that has been developed, quite  
16 frankly, in the civil case, and we are prepared to produce it.

17 I don't know actually what the government has turned  
18 over, but we are prepared to turn over the correspondence  
19 between our client and Mr. Ceglia and the others, as we laid  
20 out in the letter, and we think that that is an appropriate  
21 resolution.

22 I think that it is notable that Mr. Patton says he  
23 would like to look at these materials, and he doesn't specify  
24 these materials. He is asking for the entire computer, the  
25 entire contents of the e-mail accounts, including all manner of

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1 rank, inadmissible, irrelevant material. That's not proper,  
2 because he is not entitled to look at those materials under  
3 Rule 17(c)(3).

4 But we are willing to offer the materials that we  
5 think are relevant and admissible as we have laid out. We  
6 think that that is the appropriate response, and we would ask  
7 your Honor reject the requests for the subpoenas and allow us  
8 to voluntarily produce the materials spelled out.

9 THE COURT: OK, thank you.

10 MR. PATTON: Your Honor, may I be heard?

11 THE COURT: Sure.

12 MR. PATTON: Particularly with respect to Harvard, we  
13 didn't get into the objecting -- this afternoon we haven't  
14 gotten into objecting to the government's standing to raise  
15 these issues. We continue to take that position, as we set it  
16 forth in our papers.

17 But particularly with respect to Harvard it's relevant  
18 here because a subpoena hasn't even been issued; Harvard hasn't  
19 been heard on this. And I think it's just black and white that  
20 the government does not have standing to object at this point  
21 to Harvard producing this material.

22 If this is truly the entirety of what Harvard has, I  
23 mean it just strikes me as remarkable -- and maybe I'm wrong  
24 about this -- but it strikes me as remarkable that there is a  
25 backup date in November 2003 and not one again until 2010.

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1 I think we ought to hear from Harvard about their  
2 backup policies. Maybe, frankly, once that material is  
3 produced about what their policies are and how often they back  
4 up, we will have a better sense of what is at issue here. But  
5 I don't think the government is in a position to object to this  
6 on behalf of Harvard.

7 THE COURT: OK, thank you.

8 MR. SOUTHWELL: Your Honor, could I just very briefly  
9 respond to that point? Just to make the record clear, there  
10 was a civil deposition which spelled out -- and there are civil  
11 declarations filed in this case -- that spell out the dates of  
12 the backups that Harvard represented they possess that has any  
13 data related to Mark Zuckerberg.

14 It's hardly a surprise that an educational institution  
15 does not keep backups in the way that a Fortune 100 company  
16 does. They have represented that these are the only backups.  
17 That is in sworn declarations in the civil case. It was the  
18 subject of cross-examination during deposition. So the record  
19 is clear in that regard.

20 But certainly we also have no objection to Harvard  
21 producing policies related to that. We do believe we have  
22 standing, and I would submit that the government has standing  
23 as it relates to an effort to harass our client who is entitled  
24 to standing as the crime victim here and as a main government  
25 witness in the case.

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1 THE COURT: Thank you. I find that the government  
2 does have standing to object to these subpoenas. Let's go one  
3 by one.

4 Let's talk about Harvard University. The first  
5 request, the first subpoena is the contents of any and all  
6 e-mail communications for the years 2003 and 2004 for accounts  
7 registered to Mark Elliot Zuckerberg, including but not limited  
8 to the account mzuckerb@fas.harvard.edu. I am denying that  
9 request as too broad.

10 Go to the number three request under the Harvard  
11 University subpoena, because it relates directly to number one:  
12 Any and all backup copies of the e-mail communications  
13 requested in item one above, whether maintained on-site or  
14 off-site. I will also deny that as too broad.

15 Then number two: Any and all documents setting forth  
16 Harvard University's policies and protocols relating to backing  
17 up, storing and maintaining the contents of e-mail  
18 communications for Harvard email addresses from 2003 to the  
19 present. I will grant that and allow that subpoena to go  
20 forward.

21 Number four: Any and all documents relating to  
22 disciplinary proceedings relating to Mark Zuckerberg's  
23 unauthorized access to Harvard's computer systems, or Mark  
24 Zuckerberg's violation of any Harvard policies or rules  
25 relating to computer usage and/or student privacy. I will deny

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1 that request. That very well may be appropriate later, but I  
2 am denying that request.

3 I believe that covers the requests for Harvard, but  
4 defense counsel can correct me if I'm wrong. Is there another  
5 subpoena request regarding Harvard?

6 MR. PATTON: Your Honor, I believe that covers it. I  
7 guess I would just ask that once we do have the policies and  
8 procedures about backup, I assume the court's order does not  
9 preclude some further request based on what we learn from that  
10 information.

11 THE COURT: That's correct.

12 MR. PATTON: And perhaps a narrowing of what we have  
13 requested here.

14 THE COURT: That's correct.

15 OK. Regarding Facebook and Mark Zuckerberg, request  
16 number one: Any and all agreements, draft agreements, or  
17 copies thereof, in any format or media, including electronic or  
18 paper, between Facebook/Mark Zuckerberg and Paul Ceglia, or  
19 between companies managed or owned in whole or in part by  
20 either Facebook/Zuckerberg or Ceglia.

21 This appears to be appropriate to me, and from what  
22 I've heard from the parties it seems to indicate I think that  
23 Facebook claims that Ceglia already has these documents. I  
24 think that's basically where we are. Is that correct?

25 MR. SOUTHWELL: Well, your Honor, I don't know what



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1 Mr. Patton on behalf of Mr. Ceglia in the criminal case has. I  
2 do know that in the civil case what existed with respect to  
3 written agreements has been produced, and the written agreement  
4 is the street fax contract, which says nothing about Facebook.  
5 That was recovered off of Mr. Ceglia's computer, and that is  
6 what was produced.

7 I guess I would just ask your Honor -- because I think  
8 that the language that is included in these subpoenas is in and  
9 of itself overbroad -- I would ask your Honor to deny the  
10 subpoenas, allow us to voluntarily produce the material that we  
11 spelled out.

12 I am happy to work with Mr. Patton and explain to him  
13 what we are providing to him, what exists, what doesn't exist.  
14 I am just troubled by the scope of some of the language in the  
15 subpoena, and I think that it would be much more efficient for  
16 us to simply turn over what we've -- and I am happy to explain  
17 it to Mr. Patton, and it may be that it's new material to them.  
18 I don't know. And that would be a more effective way to  
19 proceed, rather than have to go through specific language  
20 which, you know, there may be problematic aspects.

21 THE COURT: Mr. Patton, anything on that?

22 MR. PATTON: Your Honor, obviously we are happy to  
23 receive the material that Facebook offered to produce in its  
24 response. When they provided that response, they dropped  
25 footnotes that essentially said but Ceglia already has all of

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1 this material.

2 So, I mean I'm happy to see what documents are  
3 contained in that production and to have further discussions  
4 and perhaps narrow our requests based on what is produced to  
5 us. I am happy to do that.

6 It sounds like that would certainly not cover, for  
7 instance, material that's on the 28 devices that were examined  
8 and that are held by either Facebook or a third party that were  
9 examined by Facebook's expert in a civil matter, which, you  
10 know, I think that that material would contain highly relevant  
11 information for this case that we're still going to be seeking  
12 from Facebook, from Mark Zuckerberg.

13 So I am happy to sort of see what we get and see if  
14 that resolves this, and approach the court after we have done  
15 that.

16 THE COURT: OK, let's do this then: Let's have  
17 Facebook voluntarily turn over the information that it  
18 indicated that it was willing to turn over. I will deny that  
19 subpoena request number one without prejudice, and see where we  
20 are once the defense has that information.

21 Number two: Any and all written correspondence or  
22 communication, or copies thereof, in any format or media,  
23 including electronic or paper, between Facebook/Zuckerberg and  
24 Ceglia, or between companies managed or owned in whole or in  
25 part by either Facebook/Zuckerberg or Ceglia.

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1           It seems to me we should probably do the same thing  
2 regard request two that we did for number one, but let me hear  
3 from the parties if they have a different view of things.

4           MR. SOUTHWELL: Yes, agreed. I am happy again to work  
5 with Mr. Patton and explain. He mentioned these 28 other  
6 assets. Those were in fact searched, and there is nothing on  
7 those materials, and that was made clear in the civil case.

8           To be clear, our view is that Mr. Ceglia is aware of  
9 this. I don't know whether Mr. Patton is aware of it, and so I  
10 am happy to work with Mr. Patton to make sure he is aware, and  
11 hopefully there won't be any issues, and if there are, we know  
12 where to find the judge.

13           THE COURT: Mr. Patton?

14           MR. PATTON: Your Honor, I know -- and I certainly  
15 don't know the civil case as well as Mr. Southwell -- I know  
16 from some of the civil materials that at least that was the  
17 statement made in the deposition by Mr. McGowan, that he had  
18 examined those. But it's not clear to me what -- I know they  
19 used search terms, but it's not entirely clear to me what  
20 search terms were used. I know that at one point in the  
21 deposition there was a claim that some of the material that we  
22 are talking about now, communications between Ceglia and  
23 Zuckerberg and other people associated with the companies, was  
24 outside the purview of what they were looking for.

25           So I don't know if they have done additional searches;

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1 I don't know what those terms have been. Again, I am happy to  
2 have further discussions with them to fill in some of that  
3 information and then take it from there.

4 THE COURT: OK, that's fine. So we will do the same  
5 thing: Number two is denied without prejudice, and Facebook  
6 will voluntarily turn over the information that they indicated  
7 in their submission, and counsel for Mr. Ceglia and counsel for  
8 Facebook should get together and try to work things out.

9 Let's move to number five under that: Forensically  
10 sound copies of any and all contents of e-mail accounts  
11 registered to or regularly used by Facebook/Zuckerberg during  
12 the years 2003 and 2004.

13 I am going to deny that; that's too broad.

14 Number three: Forensically sound copies of the  
15 content of any and all computers, electronic storage devices,  
16 and other electronic media devices owned or regularly used by  
17 Facebook/Zuckerberg during the years 2003 and 2004.

18 Number four: Forensically sound copies of the  
19 contents of any and all cell phones owned or regularly used by  
20 Facebook/Zuckerberg during the years 2003 and 2004.

21 I am going to deny that as well. That is also too  
22 broad.

23 I think that resolves everything dealing with the  
24 subpoenas. Have I left anything out, defense counsel?

25 MR. PATTON: I don't believe your Honor addressed the

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1 bank account.

2 THE COURT: OK. And the request for the bank account  
3 is also denied as too broad. Is there anything else, defense  
4 counsel, regarding the subpoenas?

5 MR. PATTON: Not at this time, your Honor.

6 THE COURT: OK. It seems to me that at this point  
7 where we are is the parties are still engaged in going  
8 through -- the defense is still engaged in going through the  
9 large volume of electronic materials in this case and going  
10 through review of these materials with their client.

11 So it seems to me that perhaps what we should do is  
12 adjourn this matter and have another status date in about 45  
13 days or so and see where we are with the discovery that's been  
14 produced, and see if there are anymore issues regarding any  
15 requests by the defense. I will hear from the parties. Any  
16 different take on things?

17 MR. PATTON: I think that's exactly what we were  
18 discussing before your Honor came out, so I think that makes  
19 sense.

20 THE COURT: Are counsel around the first week of  
21 September?

22 MR. PATTON: Yes, your Honor.

23 MR. FREY: Yes, your Honor.

24 DEPUTY COURT CLERK: Friday, September the 5th at  
25 12:30?

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1 MR. PATTON: That's fine with us.

2 THE COURT: Does that work for everyone?

3 MR. FREY: Yes, your Honor.

4 THE COURT: Now, it seems to me that counsel for --  
5 well, what are the parties' position? It seems to me it's not  
6 necessarily necessary to have counsel for Facebook here, at  
7 least to order that at this time. If in the interim between  
8 now and September 5 it's determined that that will be  
9 appropriate, I guess counsel can send me a letter and file that  
10 letter electronically. But do counsel have any position on  
11 that?

12 MR. PATTON: No, your Honor.

13 MR. FREY: No, your Honor.

14 THE COURT: OK.

15 MR. SOUTHWELL: Your Honor, one last thing, if I could  
16 just request that pursuant to the CVRA 18 U.S.C. 3771 that we  
17 be given notice of any subpoenas or applications that relate to  
18 our clients' rights. So, for example, Harvard, if that issue  
19 is raised again, I think we have a right under 3771 to be heard  
20 on those issues, so I would simply request to be notified so  
21 that we can appear if necessary.

22 THE COURT: Does anyone have any position on that?

23 MR. PATTON: No, your Honor. I will just say that in  
24 terms of how we went about it in this setting, had the court  
25 signed those subpoenas, they would have been served, Facebook

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1 could have moved to quash, so there wouldn't be any sort of  
2 surreptitious subpoenaing. But, of course, I'm happy to keep  
3 everybody in the loop.

4 THE COURT: OK, so we will do that.

5 In the past I have certainly excluded time under the  
6 Speedy Trial Act. I think it's appropriate to continue to do  
7 that. We have a trial date in this case, I believe it's  
8 November the 17th. Is that right?

9 MR. FREY: That's correct, your Honor.

10 THE COURT: It seems to me that it's appropriate to  
11 exclude time under the Speedy Trial Act from today's date until  
12 November 17 because the defense will need that time to continue  
13 to prepare for trial. This is a complex case due to the volume  
14 and the nature of the electronic discovery in this case.

15 I find it's in the interests of Mr. Ceglia and in the  
16 interests of justice to exclude time under the Speedy Trial Act  
17 from today's date until November 17.

18 I further find that Mr. Ceglia's interest and the  
19 interests of justice outweigh the public's interest in a speedy  
20 trial, and I will enter an order to that effect.

21 So, again, we have excluded time from today's date  
22 until November 17 under the Speedy Trial Act, and we will  
23 adjourn this matter until September 5 at 12:30.

24 Anything else from the government today?

25 MR. FREY: No, your Honor. Thank you.

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1 THE COURT: Anything else from the defense?

2 MR. PATTON: No, your Honor. Thank you.

3 THE COURT: Anything else from Facebook?

4 MR. SOUTHWELL: No, thank you.

5 THE COURT: Thank you.

6 Mr. Ceglia, did you hear everything that happened  
7 here?

8 THE DEFENDANT: I did, your Honor. Thank you.

9 THE COURT: OK, have a good day.

10 (Adjourned to September 5, 2014 at 12:30 p.m.)

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