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March 27, 2015

Honorable Vernon S. Broderick, U.S.D.J.
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, New York 10007

Via Email

Re: *United States v. Ceglia*
Case No.: 12-cr-876

Dear Judge Broderick:

We have conferred with Ms. Echenberg and Mr. Wilson about what progress can be made in this case in advance of trial notwithstanding Mr. Ceglia's absence. We were hopeful that the prosecution and defense could reach an agreement, at least as to some matters, but that was not the case. It is our understanding that the Government will propose that all matters be held in abeyance under the "fugitive disentitlement doctrine." Consequently, the prosecution and defense are unable to report to the Court jointly, as we had hoped.

Your Honor has ordered that if the defense proposes to make further pretrial motions they be preceded by a letter to the Court, not to exceed three pages, stating the nature of the motions and the bases for them. This letter is also for that purpose.

Defense's Position

The defense is of the view that important progress can be made in this case that will allow the case to reach trial with the least possible delay once Mr. Ceglia either surrenders or is apprehended.[1]/

The defense requests that the Court permit it to present three applications to the Court relating to the outstanding Rule 17 subpoena and for the issuance of two other subpoenas.

[1] We have just received the Government's letter to Your Honor requesting that all pretrial proceedings stop based on fugitive disentitlement grounds, this letter does not address that argument other than to say that the invocation of that doctrine is a matter within the discretion of the Court. *See e.g., Esposito v. I.N.S.*, 987 F.2d 108, 110 (2d Cir. 1993) (the fugitive disentitlement doctrine "is invoked at our discretion ... and we do not find sufficient reason to apply it in the present case.") *Id.* We request the opportunity to respond to the substance of the Government's argument on that issue, either when the defendant actually moves for discovery or independently.

1) Subpoena to Facebook and Zuckerberg: The Court previously ordered the issuance of subpoenas to Mark Zuckerberg and Facebook, Inc. The subpoenaed materials were ordered produced by March 16, but production was ordered to be held in abeyance when concern was raised by the witnesses' counsel that the undersigned might use the materials in connection with the representation of one of the defendants in the pending civil suit by Facebook, Inc. against Mr. Ceglia's civil lawyers in *Facebook, Inc. v. DLA Piper LLP (US),* which is pending in the New York Supreme Court. Although the subpoenaed materials will be subject to the Amended Protective Order entered in this case and cannot be used in the civil case without an order of this Court, the documents were nonetheless ordered to be withheld for the time being.

Defense counsel has proposed to "wall off" the undersigned so that Mr. Fogg alone may review the documents at this time because they are believed to contain evidence of other versions of contracts between Messrs. Zuckerberg and Ceglia which were prepared by Mr. Zuckerberg that will support the authenticity of the "Work for Hire Contract." These documents will not be disclosed to the undersigned while the *DLA Piper* litigation is pending or I continue to represent any defendant in that case. When Mr. Ceglia is no longer absent, he can consent to my continuing to being walled off from the documents or, if he does not consent, the undersigned will, if required, withdraw. In any event, these documents are too important to Mr. Ceglia's defense to be kept from Mr. Fogg.[2]/

The defense wishes to request the release of the subpoenaed documents to Mr. Fogg exclusively.

2) Emails on Harvard Backup. The defense believes that Mark Zuckerberg's emails on the Harvard Faculty of Arts and Sciences ("FAS") stored emails for the period from January 1, 2003 until July 1, 2004 exist and that they will disclose the true contractual relationship between Zuckerberg and Ceglia. In the underlying civil action, the production of emails was carefully circumscribed to include only emails between Zuckerberg and Ceglia "and/or other persons associated with StreetFax that were captured from Zuckerberg's Harvard email account." The wording excluded emails between Zuckerberg and others who worked on coding for Zuckerberg's and Ceglia's project. This same deficiency was corrected in the subpoena Your Honor authorized be issued to Facebook and Zuckerberg, but it has never been corrected with regard to Zuckerberg's Harvard emails.

Further, the limitation to emails "captured from Zuckerberg's Harvard email account," was unduly limiting because the search by which the emails were "captured" resulted from a search of key terms provided by Facebook and Zuckerberg. This problem became evident when an email was produced in this case which disclosed the existence of other contract documents, resulting in the issuance of the document subpoenas to Harvard and Zuckerberg that are now being held in abeyance pursuant to the Court's Order. The email production should include all emails and attachments on the Harvard storage or back-up media like those described in the

[2] The defense continues to be of the view that the Amended Protective Order provides ample security that the subpoenaed documents will not be disclosed except as provided therein.

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subpoenas to Zuckerberg and Facebook.

We are prepared to support this motion with evidence that when produced in the civil case, Zuckerberg's email production was devoid of *all* emails for the period from March 2003 until June 2003, the period when the contract was negotiated and Zuckerberg's and Ceglia's activity was most intense. Similarly, there is an absence of email production after November 1, 2003, another period of intense activity in the development of Facebook. It is incomprehensible and suspicious that relevant emails during these periods do not exist, and even more highly suspicious that evidence shows that Zuckerberg accessed his Harvard student account in October 2010, after the complaint had been filed, when he was able to delete emails from his account.

For these reasons we respectfully request leave to make an application to the Court for a Rule 17 subpoena for the production of relevant Zuckerberg emails that remain on the back-up or storage media at Harvard from the period January 1, 2003, to June 1, 2004.

3) Zuckerberg's Computer Hard Drives. Zuckerberg's computer hard drives for the relevant period exist and have been preserved since the lawsuit against Zuckerberg and Facebook that was brought by the Winkelvoss Twins in the District of Massachusetts (*ConnecU LLC v. Zuckerberg*, Case No. 1:04:11923 (DPW)). Evidence produced in Ceglia's civil action, upon which the Government relies, was developed by the Stroz Friedberg forensic analysts based upon search terms provided to them by Facebook and Zuckerberg's lawyers, Gibson-Dunn, and that search, too, was limited to the extent that relevant evidence was not recovered from the hard drives. The defense wishes to have the media searched in this criminal case using search terms calculated to produce– rather than conceal – relevant evidence, much like the Rule 17 subpoena previously approved by the Court.

We respectfully request leave to make this application to the Court.

At the conclusion of the hearing on March 24, 2015, Your Honor asked counsel to consider what the defense and prosecution can accomplish in Mr. Ceglia's absence. T. 26:19-25. We respectfully submit that the above can not only be accomplished in the defendant's absence, but they are important tools to expose the truth and will not be a burden to the Government at all.

Thank you for Your Honor's attention and consideration.

Respectfully yours,

s/ Gil D. Messina
Gil D. Messina

GDM/hs

cc: Robert Ross Fogg, Esq.
Janis Echenberg, AUSA
Alexander Wilson, AUSA
All Via Email

U.S. Department of Justice

United States Attorney
Southern District of New York

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March 27, 2015

BY ECF and E-MAIL

The Honorable Vernon S. Broderick
United States District Judge
Southern District of New York
United States Courthouse
40 Foley Square
New York, New York 10007

Re: United States v. Paul Ceglia,
12 Cr. 876 (VSB)

Dear Judge Broderick:

Pursuant to the Court's request at the conference in this matter on March 24, 2015, the parties have conferred regarding Mr. Fogg's proposals seeking (i) the production of materials by Facebook and Mark Zuckerberg pursuant to Federal Rule of Criminal Procedure 17 ("Rule 17") and (ii) the continuation of discovery to the defendant pursuant to Federal Rule of Criminal Procedure 16 ("Rule 16"). Although the parties were in agreement that the trial should be adjourned *sine die*, as ordered by the Court earlier today, the parties' views differ on how to proceed with regard to ongoing Rule 16 discovery to the defendant and the pending Rule 17 subpoenas. It is the Government's view that both should be held in abeyance as a result of the defendant's flight from prosecution three weeks ago.[1] Defense counsel have informed the Government that they believe certain discovery should proceed in the defendant's absence and we understand they will be submitting a separate letter to the Court today setting forth their position.

Continued Rule 16 discovery to the defendant is inappropriate because it will reward Ceglia's flouting of the judicial process while unreasonably drawing on the resources of the Government and the authority of the Court. The fugitive disentitlement doctrine provides trial courts the authority to refuse to grant relief to defendants, like Ceglia, who flee from justice. *United States v. Mann*, No. S4 00 CR. 632 (WHP), 2003 WL 1213288, at *1 (S.D.N.Y. Mar. 17, 2003) (internal citations omitted) (noting the four rationales of the fugitive disentitlement doctrine: "1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flight from

[1] To date, the Government has produced voluminous discovery in compliance with its Rule 16 obligations, including hundreds of relevant documents and emails as well as forensic analyses of the defendant's electronic media and the contract at issue.

justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by the defendant's escape."); *United States v. Gayatrinath*, No. 02 CR. 673 (RMB), 2011 WL 873154, at *3 (S.D.N.Y. Mar. 11, 2011); *United States v. Gorcyca*, No. 08-CR-9 (FB), 2008 WL 4610297, at *2 (E.D.N.Y. Oct. 16, 2008) (citing *United States v. Awadalla*, 357 F.3d 243, 245 (2d Cir. 2004)). Under the fugitive disentitlement doctrine, a defendant may not call upon the resources of the Government and the Court, while remaining outside the Court's reach. *United States v. Stanzione*, 391 F. Supp. 1201, 1202 (S.D.N.Y. 1975) (denying a motion to dismiss while the defendant was a fugitive because "until [defendant] is willing to submit [defendant's] case for complete adjudication— win or lose— [defendant] should not be permitted to call upon the resources of the court") (internal citation omitted).

Allowing the defendant to obtain Rule 16 discovery and demand compliance with Rule 17 subpoenas while he remains a fugitive will reward the defendant's flight. While the defendant remains beyond the reach of the Court, his defense team would be permitted to continue to gather and evaluate the evidence against him, allowing Ceglia to ultimately decide whether to return or not based on his view of his chances of acquittal.[2] The Second Circuit has condemned this type of "heads I win, tails you'll never find me" posture. *See Gao v. Gonzales*, 481 F.3d 173, 175, 177 (2d Cir. 2007), *cert. denied*, 128 S.Ct. 959 (2008); *see also Gorcyca*, 2008 WL 4610297, at *2 ("Gorcyca's refusal to return to the jurisdiction prejudices the government because it must expend time and resources executing an arrest warrant and initiating extradition proceedings. In attempting to litigate his criminal case by mail from Canada, Gorcyca is trying to secure a favorable decision without risking the consequences of an unfavorable decision."). While the Government has not found any cases directly addressing the continuance of Rule 16 or Rule 17 discovery after a defendant has fled, the decision in *United States v. Nabepanha*, 200 F.R.D. 480 (S.D. Fla. 2001) is instructive. There, considering a request for discovery from a defendant who fled before being charged, the district court found that:

> [t]o accept Defendant's position that the fugitive disentitlement doctrine does not apply to a discovery request in a criminal matter by a fugitive is to invite all criminals to flee . . . This would allow the fugitive to preview or test the strength of the government's evidence without being subject to the court's jurisdiction. If the evidence is weak, the fugitive could elect to return . . . If the government's evidence is strong, the fugitive could simply remain outside the reach of the court. The fugitive would receive potential benefits while risking nothing, thereby obtaining an advantage.

[2] To the extent defense counsel may seek to assert that they will not communicate this evidence to the defendant if he contacts them, such a position is not viable and may run afoul of their attorney-client obligations. Any communication with the defendant will necessarily implicate their view of the case as informed by the evidence, and barring defense counsel from communicating altogether with their own client is similarly unfeasible.

Id., 200 F.R.D. at 483-84 The Court should likewise prevent the defendant here from continuing to obtain discovery until he is willing to return and face that evidence at trial.

Allowing the defendant to continue to enforce the Rule 17 subpoenas would similarly run counter to the principles underlying the fugitive disentitlement doctrine because, in doing so, he would be using the Court's own authority to compel action by third parties while simultaneously rejecting the Court's authority himself. If the defendant will not submit to the Court's judgment, he cannot rightly be permitted to call upon its authority when he believes it will benefit him. Nor does it matter how important defense counsel believes the materials in question are to the defense.[3] Even if Ceglia had a viable argument for full dismissal of the Indictment, he would not be entitled to seek such a dismissal while a fugitive. *Stanzione*, 391 F. Supp. at 1202 (denying fugitive defendant's motion to dismiss with leave to file again when defendant returns to jurisdiction because "defendant is willing to enjoy the benefits of a legal victory, but is not at all prepared to accept the consequences of an adverse holding."); *Gorcyca*, 2008 WL 4610297, at *1 (same).

In addition to the general principles of fugitive disentitlement, requiring the Government to continue to produce Rule 16 discovery here could jeopardize the Government's ongoing search for the defendant. Rule 16 discovery obligations will arise as the Government identifies documents it will use at trial to prove the defendant's intentional flight from justice – either as consciousness of guilt on the present charges or as direct evidence of additional bail jumping

[3] There is no basis upon which to conclude that the production of material from Facebook or Mr. Zuckerberg will include any exculpatory evidence or additional contract, as defense counsel has suggested. Ceglia has always maintained that *Ceglia* prepared the terms of the contract at issue. *See e.g.*, Declaration of Paul Ceglia, dated June 12, 2011, *Ceglia v. Zuckerberg and Facebook*, 10 Civ. 569 (RJA) (WDNY), Docket No. 65. His more recent assertion, that there is "another contract" that Mr. Zuckerberg sent to Ceglia, is in opposition to his long-held position, and makes no sense in the context of the evidence in this case. Although Ceglia now claims that Mr. Zuckerberg's reference in an email to having sent Ceglia "the contract with all the penalty provisions," somehow implies the existence of another contract, both Ceglia's (fraudulent) version of the contract (the "Work-For-Hire" contract), which references Facebook, and the true contract found on Ceglia's computer and sent by Ceglia to his then-lawyer (the "StreetFax" contract), which does not reference Facebook, contain penalty provisions. Accordingly, there is no basis whatsoever to believe that the email in question refers to yet another contract. And indeed, Facebook's counsel have asserted on numerous occasions, including in response to the defendant's request for a Rule 17 subpoena, that "there is no other contract between Mr. Zuckerberg and Ceglia." Facebook Br. dated January 7, 2015 at 3. Finally, it is plain that the defendant himself does not share his counsel's unsupported view that the materials subpoenaed from Facebook would somehow "demonstrate Mr. Ceglia's innocence," (Fogg March 19 Ltr. at 3), because he chose to flee a mere 10 days before such evidence was to be produced. The defendant's decision to flee from justice rather than await disclosure of the subpoenaed materials strongly suggests his knowledge that those materials would not demonstrate his innocence.

charges – or documents that are material to the defense on those issues. Production of such materials could expose the details of its ongoing investigation into the whereabouts of Ceglia and his family, and could thwart the Government's efforts to apprehend him.[4]

Accordingly, the Government respectfully requests that the Court order that the production to the defendant of ongoing Rule 16 discovery and the Facebook and Zuckerberg Rule 17 subpoena responses be held in abeyance until Ceglia's return to the jurisdiction.

Respectfully submitted,

PREET BHARARA
United States Attorney

By: *_____/s/ Janis Echenberg_____*
Janis M. Echenberg / Alexander J. Wilson
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cc: Robert Ross Fogg, Esq.
Gil Messina, Esq.

[4] The Government further notes that one of Ceglia's lawyers, Gil Messina, has a potential conflict that cannot be addressed while Ceglia remains a fugitive. Mr. Fogg's suggestion that he be treated as a "Wall Attorney," while his criminal co-counsel is prevented from "receiving, viewing or otherwise coming to know what is produced pursuant to the Rule 17 subpoenas," is problematic at best. In addition, such a procedure has not and cannot be approved by Ceglia, who might well object to having his two lawyers separately prepare his case without being able to discuss the evidence or any case strategy that turns on the contents of that evidence.