

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	§	
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	§	
V.	§	No. 07 CR 0220 BSJ
	§	
PAUL C. BARNABA,	§	<i>Electronically Filed</i>
<i>Defendant.</i>	§	
	§	

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**DEFENDANT’S REPLY TO GOVERNMENT’S RESPONSE  
TO SPEEDY TRIAL MOTION**

TO THE HONORABLE BARBARA S. JONES U.S. DISTRICT JUDGE  
FOR THE SOUTHERN DISTRICT OF NEW YORK:

Defendant Paul C. Barnaba filed his Motion To Dismiss Indictment With Prejudice Due to Government’s Violation of Constitutional and Statutory Speedy Trial Rights, or, in the Alternative, Motion To Set a Trial Date and Incorporated Memorandum of Authorities (“Speedy Trial Motion”) on April 3, 2008. The Government responded on April 24, 2008. Barnaba offers this brief reply.<sup>1</sup>

**1. Introduction.**

In his Speedy Trial Motion, Barnaba argued that this Court should dismiss the Indictment against him with prejudice, or in the alternative, immediately set

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<sup>1</sup> Barnaba does not intend to waive any issue by not responding to contentions fully addressed in his Speedy Trial Motion.

a trial date, due to the Government's unconscionable delay in providing discovery and preparing for trial. At the time of the filing of the motion, more than 13 months had passed since Barnaba was indicted, and at this filing, more than 14 months has passed. Still no trial date has been set, even though Barnaba, and now the Government, have announced ready for trial.

The Government's Response to Barnaba's Speedy Trial motion is most notable for what it ignores. First, the Government ignores its incorrect predictions, unfulfilled promises, misrepresentations, and negligent performance with respect to the delivery of discovery in this case. Second, the Government ignores or misconstrues key elements of Barnaba's Speedy Trial Motion. Third, the Government mischaracterizes Barnaba as "opportunistic."

## **2. The Government Ignores Its Own Performance.**

The Government's Response attempts to detail the difficulty the Government had, and the diligence it displayed, in handling the large amount of discovery in this case. This argument, however, ignores the Government's dismal performance in providing discovery. At the first status conference, the Government assured the Court that it would begin uploading millions of pages of non-company documents for the defense within two weeks. April 16, 2007 Status Conf. at 8. Instead, the Government waited 2½ months before providing a single electronic document. The first electronic discovery document was not made available until three months after the Indictment was

unsealed. To this day, the Government has never explained the reasons for this negligence.

To place the Government's negligence in its proper context, it must be noted that when the Government first promised an efficient web-based system, and warned of possible delays in uploading the company documents, it did not make an either-or proposition. Instead, it simultaneously and unequivocally told the Court that a roll-out of "millions of pages" of electronic discovery, involving non-company documents, would begin almost immediately. *Id.* This did not happen. The Government's Response completely ignores this failure.

The Government's Response also completely ignores the Government's attempt to mislead the Court in order to cover-up its non-performance. As the second status conference approached, the Government sent a letter to the Court making it seem as if the Government had been continuously providing discovery to the defense since the previous conference: "Since the last conference, the Government has been providing discovery to the defense electronically. This process is continuing and is not yet complete." *See* Endorsed Letter at Docket Entry 26. This letter was technically true, but fundamentally misleading. As noted above, the only electronic discovery provided by the Government was not turned over until June 27, 2007, a full three months after the Indictment was unsealed, and was provided all-at-once. Barnaba immediately informed the Court, via faxed letter, of the truth. The

Court either failed to focus on this issue, or simply did not see the Government's efforts to mislead it as worthy of inquiry. The Government's Response fails to mention this serious incident, which obviously bears heavily on the Government's conduct of discovery and on the Government's disrespect for Barnaba's Speedy Trial rights.

The Government's Response also ignores its abject failure, over a six-month period, to produce the company documents electronically, or to seriously monitor its contractors and subcontractors. At the first status conference, on April 16, 2007, the Government acknowledged that: "We have had some technical issues because the company [C&A] at least gave us materials with some sort of proprietary software that that vendor [EPIQ] wants to charge us a large chunk of change to unwind from. I think we have already solved that problem one way or the other, but there are going to be a lot of technical start-up issues." *Id.* at 4-5. The Government told the Court that it hoped to have the company documents up by the second status conference, but could not promise to do so. *Id.* at 8.

None of the company documents had been uploaded by the time of the second status conference. At that status conference, the Government did not inform the Court that it had in fact failed to "solve[ ] that problem" of unwinding from the proprietary software. Instead it blamed its delay in uploading the company documents on vague technical issues and C&A's

bankruptcy, which had purportedly caused the company documents to be taken off-line and archived. July 12, 2007 Status Conf. at 5-6.

By the third status conference, on October 11, 2007, the company documents were still not uploaded. The Government was forced to acknowledge that: "When we first hired CACI, the first thing the government did was give them the EPIQ database that the company had provided and said, Can you do this? Can you deal with this? They told us, Yes. They hired a subcontractor. The subcontractor apparently told them that they could fix the database, de-archive the data and get the data in a format that CACI could load it. That did not come to pass. It just wasn't technically possible without paying EPIQ a [fee] for some proprietary software or mechanism to get the data into a format where CACI could load it. So what the government decided to do instead was hire EPIQ to do that work for us." October 11, 2007 Status Conf. at 17.

In other words, no later than the first status conference, the Government made a decision to attempt to reverse engineer EPIQ's proprietary software. It did not tell the Court until six-months later that it had been unable to do so. The Government's Response completely fails to address this six-month delay, or the six-month period in which the Government apparently sat idly by, waiting to hear back from its vendor/contractors on their lack of progress, all the while telling the Court that the Government was

“doing the best we can.”<sup>2</sup> July 12, 2007 Status Conf. at 5; October 11, 2007 Status Conf. at 4.

Finally, the Government’s Response ignores a small, but telling, point. As noted in his Speedy Trial Motion, Barnaba provided documents to the Government in 2005. These were approximately 4500 copies of Collins & Aikman documents that Barnaba took with him when he left the company. Yet despite having had these documents in its possession for almost two years, the Government had not uploaded them onto the CACI system as of July 12, 2007, almost six months after the Indictment. Of course, Barnaba did not need these particular documents—he already had them. The point is that the Government was not diligently moving the discovery forward, despite its repeated assurances to the Court that it was doing everything it could. The Government apparently believed that by promising to provide a web-based discovery system, and by having the Defendants express a preference for such a system, it could take its time in producing discovery and bringing this matter to trial, irrespective of Barnaba’s constitutional and statutory Speedy Trial rights. The Government is incorrect.

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<sup>2</sup> As Barnaba noted in his Speedy Trial Motion, the company documents were not produced until almost eight months after the Indictment. Barnaba’s focus here, however, is on the six-month period in which the Government apparently sat and waited for its contractors or subcontractors to reverse engineer the company documents.

### **3. The Government Ignores or Misconstrues Barnaba's Arguments.**

According to the Government, "Barnaba's eighty-five page brief essentially makes the following three legal claims in support of his motion: first, that the District Court 'impermissibly granted ends-of-justice exceptions based on the volume of discovery, rather than the actual needs of the case'; second, that the district court's ends-of-justice exclusions were improper because the court 'ignor[ed] or excus[ed] the Government's blatant pre- and post-Indictment lack of diligence'; and third, that the Government's post-indictment delay has violated Barnaba's Sixth Amendment right to a speedy trial. (Barnaba Mot., at 42, 55, 65-80)."

This ignores other key elements of Barnaba's claim. First, Barnaba argued that the Court, by refusing to set a tentative trial date, by repeatedly and summarily granting nebulous *pro forma* extensions of time, and by failing to closely question Government attorneys or impose any deadlines on them, effectively ignored and circumvented the Speedy Trial Act's requirements, in violation of the Act itself and Second Circuit case law. The Government's Response largely ignores these points.

Second, Barnaba argued that the Court did not *consider* all of the required statutory factors when making its ends-of-justice findings, and in essence used its ends-of-justice findings as a calendar control device. The Government's Response largely ignores this point as well, by focusing on the Court's on-the-

record *findings*. Barnaba concedes that the Court's ends-of-justice extensions employed the required statutory language. But this is no substitute for the consideration of all required statutory factors, a consideration mandated by *Zedner v. United States*, 126 S.Ct. 1976, 1990 (2006).

Third, Barnaba argued that the Court appears to have treated Barnaba's stated preference to receive discovery through the Government's web-based system as a waiver of his right to complain about the pace of discovery under the Speedy Trial Act. The Government's Response mischaracterizes this argument as a claim by Barnaba that the Court formally found a waiver of Speedy Trial Act rights on his part. Government Response at 16-17, n.7. Barnaba made no such claim.

The Government also mischaracterizes Barnaba's argument regarding its pre-Indictment lack of diligence. According to the Government, "Failing to offer any legal authority for his position, Barnaba maintains that because the Government had not begun the web-based discovery process *pre*-Indictment, it acted without diligence." Government Response at 17, n.8. First, Barnaba offered statutory text and legislative history in support of his argument that pre-Indictment diligence is required under the Act. This constitutes legal authority. Second, Barnaba argued that the Government had been investigating the case for more than 18 months prior to the Indictment, had been working extensively with the documents, knew that the largest and most important set

of documents had been archived electronically by EPIQ and would need to be uploaded into CACI's system, and knew there would be issues with respect to electronic discovery.

According to the Government, "The Government has good reason not to enter into an expensive contract with a vendor before it knows for certain that an obligation to produce discovery will arise, that a preference for web-based discover will be agreed upon, and that preference is determined for a particular vendor." This may be true in the abstract, but it has no bearing on the instant case. AUSA Cantwell informed the Court in no uncertain terms at the first status conference, and again at the second status conference, that the Government was going to use the CACI web-based portal regardless of what the Defendants did. April 16, 2007 Status Conf. at 5; July 12, 2007 Status Conf. at 5-6 The Government had obviously already entered into various discussions with CACI and EPIQ as well, even if it had not yet inked a contract with CACI.

More importantly, the Government's Response ignores the Government's own role in "selling" its preferred discovery system, a system that was not ready. The Government touted and recommended web-based discovery from the beginning. While acknowledging that there would be some delays, it pledged to start uploading millions of documents within two weeks. It affirmatively declined to offer paper discovery and half-heartedly offered to

provide CDs, DVDs, hard drives, or a Concordance database “which has all sorts of technical issues with it,” while maintaining that: “It’s just not going to be over time the best way to do this.” April 16, 2007 Status Conf. at 5. The Government aggressively pushed a web-based discovery plan that failed to produce one electronic document for three months after Indictment and had only produced 12 percent of the totally available documents six months after Indictment. Had the Government exercised a modicum of pre-Indictment diligence, this debacle would not have occurred. That it did occur, and that the delay violates Barnaba’s Speedy Trial rights, is the true crux of the issue presented to this Court.

**4. The Government’s Characterization of Barnaba as “Opportunistic” is Inaccurate.**

Although its presentation on the *Barker* factors is unclear, the Government appears to argue that Barnaba somehow failed to timely assert his constitutional right to a Speedy Trial. Government Response at 19. In this vein, the Government categorizes Barnaba’s current assertion of his Speedy Trial rights as “opportunistic, at best.” The premise of this argument seems to be that Barnaba expressed a preference for electronic discovery all along, and that this somehow removes his constitutional speedy trial claim from consideration. Government Response at 19.

Nobody can truthfully say that Barnaba has not done everything in his power to get ready for trial and to protect his speedy trial rights. The Relevant Facts section of his Speedy Trial Motion makes his diligence clear. Barnaba is the only Defendant who made use of the Government's CACI system for reviewing electronic documents. Barnaba assembled his own contract attorney review team and had them ready and waiting to use the EPIQ system on day one. Barnaba told the Court that he would have document review completed by April 15, 2008, and beat that self-imposed deadline. Barnaba consistently prodded the Government to pick up the pace of discovery, and specifically invoked his speedy trial rights as early as July 2007. Barnaba objected to all substantial Speedy Trial Act "ends of justice" continuances from October 2007 forward. Barnaba has asked the Court to set a specific trial date at every status conference since October 2007. Barnaba has not merely invoked his constitutional and statutory speedy trial rights. He has proactively, concretely and vigorously endeavored to exercise those rights to the fullest.

Thus, in reality, it is the Government's argument that is opportunistic, at best, as it now attempts to argue that Barnaba somehow failed to assert his constitutional speedy trial claim, when the prosecutor herself lulled the Defendants with her assurances that everything possible was being done to assure timely discovery. Barnaba repeatedly asserted his right to a speedy trial at

the appropriate times. There is no doubt that his position has been abundantly clear from the start—he wants, and is entitled to, a speedy trial.

For these reasons, as well as the reasons stated in his Speedy Trial Motion, Barnaba requests that the Indictment against him be dismissed with prejudice, or in the alternative, that a trial date be set.

Respectfully submitted,

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SOLOMON L. WISENBERG  
ADRIENNE U. WISENBERG

Wisenberg & Wisenberg, PLLC  
1711 N Street NW; 2d Floor  
Washington, DC 20036  
Telephone: (202) 261-3649  
Facsimile: (202) 293-0701

*Attorneys for Paul C. Barnaba*

### **CERTIFICATE OF SERVICE**

On May 7, 2008, I served a copy of this Reply to Government's Response to Speedy Trial Motion on the attorneys for the United States, Assistant U.S. Attorneys Helen Cantwell, Anthony Barkow, and Marc Berger, and on counsel for the Codefendants by filing it electronically.

/S/

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SOLOMON L. WISENBERG

*Attorney for Paul Barnaba*