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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

07-CR-220 (BSJ)

DAVID STOCKMAN, J. MICHAEL
STEPP, DAVID COSGROVE, PAUL
BARNABA,

Defendants.

Conference

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New York, N. Y.
July 24, 2008
3:06 p. m.

Before:

HON. BARBARA S. JONES,

District Judge

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APPEARANCES

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Southern District of New York

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1 (In open court)
 2 (Case called)
 3 THE CLERK: Government ready?
 4 MR. BERGER: Yes. Marc Berger and Joshua Klein for
 5 the government. Good afternoon, your Honor.
 6 THE COURT: Good afternoon.
 7 MR. KLEIN: Good afternoon, your Honor.
 8 THE COURT: Good afternoon, Mr. Klein.
 9 MR. ABRAMOWITZ: Defendant Stockman is ready. Good
 10 afternoon, your Honor. Elkan Abramowitz, Jodi Peikin, James
 11 Stovall and Kate Spota for the defendant Stockman.
 12 THE COURT: Good afternoon.
 13 MS. SEYMOUR: Good afternoon, your Honor. Karen
 14 Seymour, Stacey Friedman and David Swartz for defendant Steppe.
 15 THE COURT: Good afternoon.
 16 MR. STEWART: Good afternoon, your Honor. Craig
 17 Stewart and Monique Gaylor for the defendant David Cosgrove.
 18 THE COURT: All right.
 19 MR. WISENBERG: Good afternoon, your Honor. Sol and
 20 Adrienne Wisenberg on behalf of defendant Paul Barnaba.
 21 THE COURT: I want to thank you all for rearranging
 22 your schedules, particularly the Wisenbergs. I understand you
 23 had some conflicts. But as you probably have learned, a former
 24 chief judge of ours has passed away and his funeral was this
 25 morning, so we switched a lot of things to the afternoon.

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1 All right. I've read all of your submissions.
 2 Mr. Wisenberg, I have denied the motion to dismiss the
 3 indictment under the Speedy Trial Act. You should have the
 4 opinion on ECF later today, I believe.
 5 And what I'd like to do is go through the various
 6 issues that have been raised since our last conference and try
 7 to set today a trial date. I'm hoping it will be easier
 8 because I think the government has substantially produced

9 discovery at this point.

10 Why don't we start with the discovery production
11 issues, and then I can go to the various requests,
12 Mr. Abramowitz, that you've made for further discovery.

13 MR. ABRAMOWITZ: Yes, your Honor. I want to start by
14 saying to your Honor that at the last conference I told you --
15 I tried to give you a progress report of where we were as far
16 as the discovery was concerned, and at that point it was a
17 fairly pessimistic prediction as to how long this discovery
18 process is going to take. I'm sad to say that we're in even
19 more pessimistic a situation today than we were at our April
20 conference, and that's largely because there have been delays
21 that have been catalogued in the letters. I don't have to
22 repeat it. And I'm not here to assess blame on anybody, except
23 to tell the Court that in my experience, as both a prosecutor
24 and as a defense lawyer, I have never been involved in a case
25 that had 11 million documents, now going to be 12½, I think, by

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1 all accounts.

2 THE COURT: I think we can all hope never to be
3 involved in one again.

4 MR. ABRAMOWITZ: Absolutely correct. And the fact of
5 the matter is that we are nowhere near ready to even pick a
6 trial date. I know you want to, but I -- we are not even --
7 we're not even prepared to say to you that we can give you --
8 agree to a motion schedule unless we figure out a way to
9 jumpstart the discovery process, because we've had 29 to 32
10 lawyers reviewing these documents for the last several months,
11 six months at least, maybe even a little longer, and we're not
12 a third done to get anywhere near the -- through the discovery.
13 And, having said that, we now have to, because of the glitches
14 that have occurred that Mr. Stewart's letter in particular
15 catalogued, and that the government acknowledges -- and as I
16 said, we're not here to assess blame -- the fact of the matter
17 is, we have to go back. That was only a first-level review.
18 We have to go back and try to pick up again and re-review some
19 of the items that we had reviewed the first time. So that we
20 are really -- we've taken one step forward and six steps back.
21 And 16 months after the indictment, being only a third done
22 with the discovery is, in my experience, absolutely unheard of.

23 Now that's why I think I want to press -- I know
24 you've read our letters, and I know that the government appears
25 to have acceded to some of our requests. The bottom line here

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1 is, your Honor, we have to figure out a way to make this case
2 move that may not be a way that your Honor might do it in
3 another case or that the government would handle in a different
4 way in another case. We need -- we need to get the materials
5 and the relatively limited materials that we're talking about
6 in our letter in order to shorten this discovery process, maybe
7 by the time of the next conference, pick -- set up a motion
8 schedule and a trial date. But we -- we need the materials
9 that we're asking, in particular, the Davis Polk memos of the
10 witnesses. Now Mr. Berger has said that he would give us all
11 the witness memos that do not relate to prospective government
12 witnesses. The fact of the matter is, there are 77
13 interviews -- 77 memos, or 77 interviews. If the government

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14 said, we're going to -- we'll give you 70 of them and we're
15 holding back seven, my argument would be different. But I have
16 a feeling that the government would -- is taking a position
17 that many of the people that were interviewed, most of the
18 people that were interviewed are prospective government
19 witnesses and we will not give you that.

20 THE COURT: Just for my sake, we're talking about
21 2005.

22 MR. ABRAMOWITZ: The 2005 Davis Polk investigation.

23 THE COURT: Okay.

24 MR. ABRAMOWITZ: We're asking that we get that
25 material, that we get the Davis Polk material now. And I'll

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1 tell you why we -- why that will help in the process of moving
2 this case along. If we get those interviews, we -- and the
3 government has agreed to give us the binders. The binders tell
4 us what documents Davis Polk relied on for their report.

5 THE COURT: And you can find them, you believe? I
6 mean, you've got the binders.

7 MR. ABRAMOWITZ: We don't have them yet.

8 THE COURT: When you get them.

9 MR. ABRAMOWITZ: We assume -- we assume that the
10 binders contain all the documents that Davis Polk found in its
11 investigation and turned over to the government. That will be
12 a step forward. There's no question that that's a step
13 forward. The interview memos are needed for us to -- and they
14 are material to our defense because we -- one of our defenses
15 is that Davis Polk was misled by a particular individual, Bryce
16 Cote, whose name is mentioned in the letter. And he's the one
17 that gave false information that we say, as part of our
18 defense, caused the bankruptcy, not David Stockman's and the
19 other defendants' conduct, which is what is alleged in the
20 indictment. We believe that we will be able to demonstrate, by
21 seeing who he spoke to and what he said and who -- and who then
22 the Davis Polk people spoke to thereafter to see this process,
23 this whole process move forward, that we will be able to
24 demonstrate, we believe, is our defense, that that's what's
25 caused the bankruptcy. Cote caused the bankruptcy, not

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1 Stockman, nor any of the -- not any of the conduct that is
2 alleged in the indictment. So we -- and we also think, if we
3 had these documents now, we would be able to speed along the
4 review of the documents, we could at least modify our search
5 terms so we're not going back and using blind search terms. We
6 think they're relevant, but we think they may be more focused
7 once we see what people were saying.

8 Now let me tell you why it's important. Mr. Berger
9 says, well, you're going to get the binders, the binders will
10 tell you the documents. But then in another part of the
11 letter, it says, the documents are not going to give you the
12 answer, it's what people said about the documents that are
13 going to give you the answer. We need to know what the people
14 said about the documents in order to disprove the allegation
15 that we had any kind of fraudulent intent. And it's not -- And
16 let me just spend a second on that. This is not a standard
17 securities fraud case. This is an unusual one, not only in the
18 size and the scope of the documents, that certainly makes it

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19 unusual, but most of the time, cases deal with established
20 fraudulent acts and the defense is, generally, I didn't know
21 about it or I didn't do it. This case deals more often than
22 not with situations where the facts are there and the facts
23 happened, but where our -- our defense is, there is no crime
24 here, that the accounting principles that are enunciated in the
25 indictment and the accounts re -- the factoring principles that

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1 are enunciated in the indictment, the disclosure principles
2 that are discussed in the indictment and the particular
3 transaction called the Joan Transaction, we -- our defense is,
4 those were perfectly legitimate transactions and that the fraud
5 that's alleged is essentially saying that the accounting
6 standards that were used were not the correct ones. We need to
7 know -- and I think it's also part of our request for a bill of
8 particulars -- what is the accounting standard that the
9 government is alleging we violated. It is ambiguous for the
10 reasons set forth in the letter as to -- excuse me, Mr. Berger
11 says it's in the indictment. It's not in the indictment in any
12 coherent way. It says, the rebates were contingent; it says in
13 some other place that they were contractual. We need to know
14 whether it's one or -- one or the other makes a difference.
15 And the bill of particulars would help us focus in, what is the
16 accounting theory that the government is saying we violated.

17 Secondly, on the accounts receivable issue, it appears
18 to us that the contract with GECC, the factoring contract, has
19 provisions that the government alleges we may not have
20 followed. That does not necessarily mean it's a fraud. So we
21 need to know -- Breach of contract does not necessarily amount
22 to a fraud. We need to know from a bill of particulars point
23 of view what provisions in the contract is the government
24 alleging amount to the breach, of which amounts to fraud. If
25 we get those bills of particulars and some of the others, your

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1 Honor -- I don't want to spend the entire day today on
2 everything that we wrote in the letter -- the bill of
3 particulars will set forth the government's theories on the
4 most important aspect of the case. Once we have those
5 theories, we are better able to make a motion to dismiss either
6 all or part of the indictment, therefore, shorten any potential
7 trial if granted. We need to see the documents which the
8 government concedes will explain the theories that are in the
9 Davis Polk report so that we can -- we can try to make an
10 argument with you that there's a legal grounds to dismiss this
11 case and, if not, then to shorten the trial if your Honor feels
12 that the arguments that we could raise in pretrial motions do
13 so.

14 Now we don't have to go into all the citations that
15 the government cites. They take the standard boilerplate
16 response: You're asking for 3500 material, it's not material
17 to the defense. The fact of the matter is, these are material
18 to our defense. The Davis Polk interviews are material to our
19 defense, because one of the aspects of this is that everything
20 that was done in this case was wide open, openly done, there
21 were no secret meetings and no secret transactions, and the
22 government says that the people that knew there was something
23 wrong acted surreptitiously, but it didn't matter if they

24 didn't -- if people were doing the same acts if they didn't
25 know there was something wrong with it. We say that we want to
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1 know what people said David Stockman knew, or didn't know, and
2 if we can demonstrate that David Stockman didn't know the kinds
3 of things that Mr. Berger is talking about in his letter, we
4 will -- that is a defense, and it is material to our defense to
5 know that 77 people may have said David Stockman didn't know
6 anything about this.

7 Now if we have that in advance of trial, we will be
8 able to mount our defense both legally and factually. If we're
9 not able to do this, your Honor, the predictions as to how long
10 this is going to take for us to continue this review with the
11 expense entailed -- and I'll get to that in a minute -- is just
12 going to be absolutely outrageous because if you -- you could
13 do the math yourself. Months have gone by, we're a third done.
14 I'm putting 29 to 32 people at various times. That's unheard
15 of in any criminal case that I'm aware of. We need to
16 short-circuit this, and the way to short-circuit it is to grant
17 our request to give us the Davis Polk memos and the Davis Polk
18 report. I just see -- we can argue and we can say, I'll sign a
19 document saying it's not a precedent in another case, we can
20 call it Bush v. Gore, I don't care. I think that we need to
21 get off the --

22 THE COURT: Let's not do that.

23 MR. ABRAMOWITZ: As long as I'm Bush. We have to do
24 something. We can't go with the standard answers here. The
25 government is willing, it says, to give us this material as
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1 3500 material in advance of trial. If they're willing to do it
2 in advance of trial, why not now. If we get it now, we can
3 deal with some of these issues and stop spending the kind of
4 money that we're spending.

5 Now let me tell you about the money for a moment, your
6 Honor, because it's getting to be a very serious problem. The
7 insurance money, we are informed, is going to run out in a
8 matter of weeks; not months, weeks, for all of us. And it's
9 not only the -- it's not only the defendants on trial that have
10 been expending the insurance money; all the witnesses that have
11 been called in are getting re -- are getting their legal fees
12 reimbursed. Once the insurance is gone, we can't afford --
13 even some of the defendants who have more money than others
14 cannot afford to continue on the same pace that we've been
15 going as far as what this is costing. It can't be done. We
16 will not be able to say that we can have 29 lawyers look at
17 something. We just can't do it.

18 And the fact of the matter is, we also hear that the
19 government's talking about superseding and talking about --
20 with a handful of other people about superseding. I urge your
21 Honor that if that is -- if that is true, the government -- we
22 can't stop the government from charging anybody they want to
23 charge, but we would ask your Honor not to permit additional
24 defendants to be added on to this case at this time under these
25 circumstances, after 16 months have gone by and where nothing

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1 has happened in the case that we are aware of in that 16
2 months, and to say now that they're going to supersede, might
3 supersede, I think, would be something that would absolutely
4 affect our defense at this point.

5 I should tell your Honor that one of the -- one of the
6 advantages of having all of these documents and having the
7 review is that we have been finding documents that are
8 exculpatory, indeed exculpatory, and I have told --

9 THE COURT: Are you talking about just in the
10 production, period?

11 MR. ABRAMOWITZ: In the production, period. And my
12 guess is, your Honor, without knowing -- I'd love to check
13 it -- my guess is that these are documents that Davis Polk is
14 not aware of, was not aware of, or the charges, I think, would
15 not have been drafted the way they have been. I've informed
16 Mr. Berger that, because of these documents, we are asking the
17 government to reconsider this case, and I told him that we are
18 planning to prepare a white paper, which will be done, we
19 believe, in September -- the third week in September is our
20 target date to get it done -- on every aspect of the case, and
21 that we're going to ask the Southern District, and if we don't
22 get any results there, we're going to ask Washington to
23 re-review this case. And I say that -- we mentioned this in
24 the letter, because another automobile parts manufacturer,
25 Delphi, has very similar accounting issues and, in fact, with

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1 much greater numbers and much more severe conduct, and that
2 case was declined in Washington, and we would therefore ask
3 that there be some consistency in Washington if we don't get
4 the satisfaction from the Southern District.

5 So having said all that, we could shorten this case
6 for every defendant, make it a manageable case if your Honor
7 granted the request to give us the Davis Polk reports and the
8 other material that we are asking for in the letter. Forget
9 the cases, forget whether it's 3500, forget whether it's
10 Rule 16, forget whether it's Brady, and we do think it is Brady
11 and we do think that the government is taking a very narrow
12 view of what their responsibilities under Brady are in a
13 situation where we believe inconsistent statements were made,
14 and in the Wells submissions to the SEC and in these
15 interviews, we believe that that -- these are the kinds of
16 documents that we could use under Brady, under Rule 16, or even
17 3500. It doesn't matter. You don't have to expend that
18 analysis. You have to figure out a way and fashion a relief
19 for this case that will get us off the dime.

20 THE COURT: All right. Does any other counsel for the
21 defendants wish to speak?

22 MR. WISENBERG: Your Honor, not specifically on the
23 discovery-related issues.

24 THE COURT: Right.

25 MR. WISENBERG: But on other issues.

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1 THE COURT: Okay. Why don't we stick with the
2 discovery.

3 Mr. Berger?

4 MR. BERGER: Yes, your Honor. First, since we filed

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5 the letter on Tuesday, I do have one discovery update, which I
6 wanted to advise the Court. We actually just learned about it
7 prior to the conference so I haven't even had an opportunity to
8 advise counsel. CACI has finished their reconciliation of what
9 is on the database and what the documents -- I should say the
10 Bates stamp numbered pages that are missing from the database,
11 and it appears that there are approximately 34,000 pages, not
12 documents, that are missing from the company, from the company
13 database. They have already contacted EPIQ about getting these
14 documents on the system. It's my understanding that these
15 pages have already been processed such that they will be
16 searchable right when they're put on the system. So I don't
17 expect this time -- I don't expect this to take a long time. I
18 am scheduling a call either later on today or tomorrow morning
19 with CACI and EPIQ to try to work through and get a precise
20 timetable of when these 34,000 or so documents will be
21 available to the defendants on their EPIQ database.

22 That said, as we laid out in the letter, your Honor,
23 we are making certain disclosures at this time which we feel
24 that we are not required to do, but in light of some of the
25 issues that have been presented with respect to the discovery

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1 and some of counsel's requests, we're hoping that this will
2 provide a more focused -- more focused searches for the
3 defendants in the discovery process.

4 THE COURT: And Mr. Berger, I think that's a very
5 positive move on the government's part to look at this case and
6 the circumstances of this case and to agree to hand over
7 documents and other information that you wouldn't ordinarily
8 do, because it is extraordinary here, and we can't go on
9 forever in discovery.

10 MR. BERGER: It's understood, your Honor. And we hope
11 we don't go on forever in discovery. And hope that we can set
12 a trial date today, I should add.

13 But to respond to some of Mr. Abramowitz's arguments,
14 to simply forget about the 3500 rules, I'm talking about now
15 the remainder of the DPW interview notes, which --

16 THE COURT: Now do they have everything from 2003?

17 MR. BERGER: Yes.

18 THE COURT: With respect to interview memos?

19 MR. BERGER: Upon receiving the four remaining
20 interview memos, they will have everything from 2003 that's in
21 our possession and that we are aware of.

22 THE COURT: Okay. So we're talking about interview
23 memos, DPW interview memos from the 2005 --

24 MR. BERGER: Correct. And to be specific, I think the
25 argument at this point is over only the prospective government

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1 witness interview memoranda from 2005.

2 THE COURT: You're willing to give over the others?

3 MR. BERGER: We're willing to give over the ones that
4 we do not believe will be government witnesses. And the
5 initial culling, for lack of a better word, of which are going
6 to be government witnesses and which won't, is going to be done
7 in good faith. We're not going to take a more expansive view
8 than we need. However, this will be a witness-intensive case
9 so the number of the witnesses, it's going to be a large

10 number. I don't have -- we're going to go through that
11 calculation in the next few days as to how many we intend to
12 withhold and how many of those 77 -- there are actually more
13 than 77 memoranda. There are approximately 77 different
14 witnesses that were interviewed, but some witnesses were
15 interviewed on more than one occasion, generating multiple
16 memoranda for one particular witness. But we're going to go
17 through that analysis in the next few days and then we're going
18 to give over the ones that are not prospective government
19 witnesses. Saying that they need all of the -- all of the
20 interview memoranda is really just an end run around getting to
21 see the government's case before they're entitled to it.

22 Mr. Abramowitz says this is an atypical securities
23 fraud case. Judge, it's not, in the sense that, it's often the
24 case in securities fraud cases that you have fraudulent
25 transactions that are entered into and they're papered to make

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1 it look like legitimate transactions, but when you talk to the
2 witnesses behind those transactions, you -- it reveals that
3 there is actually an improper and fraudulent basis for the
4 transactions. And that's what's going on here. And it's the
5 government's position that to give over these prospective
6 witness memoranda at this time and simply forget about 3500
7 rule and forget about the cases is just not warranted under the
8 facts of this securities fraud case, which may be atypical in
9 the sense of the size of the document production and some of
10 the issues that have occurred along the way, but not with
11 respect to the charges, Judge.

12 And, you know, part of the argument that was made was
13 that, you know, they need all of the DPW interview memoranda
14 because they may contain statements that David Stockman didn't
15 know the fraud was going on. First, your Honor, whether that
16 is Brady or not, the opinion of somebody that says, I don't
17 think David Stockman knew what was going on, may not constitute
18 Brady. And we would argue that it doesn't. However, if there
19 was a memo that said that, we would turn that memo over in an
20 abundance of caution. Those memos have been reviewed, and to
21 the extent, if there is that in there, we would turn it over,
22 but there is not.

23 THE COURT: Can I just ask this. I mean, I'm making
24 an assumption which I hope is correct, and if it is, then I
25 know what's going on here. I assume that the report, the

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1 binder, the memoranda from the 2005 DPW investigation, are
2 consistent, in the government's view, with their theory of the
3 case.

4 MR. BERGER: The final report is consistent with the
5 government's case, yes. The interview memoranda, for the most
6 part, are consistent with the government's case. And I say
7 that because, put it this way, we don't think there's anything
8 exculpatory or that rises to the level of Brady material in
9 those memoranda. And the E&Y analysis essentially just
10 provides the foundation for the conclusions reached in the E&Y
11 final report, which is consistent with the government's case,
12 yes. So short answer, Judge...

13 THE COURT: And you're withholding from the 2005 audit
14 committee investigation done by DPW, at this point you're down

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15 to, for lack of a better term: The interview memoranda, you're
16 going to give over the nonprospective government witnesses; you
17 don't want to give over the prospective government witnesses.
18 Is there anything else you're withholding from the 2005?

19 MR. BERGER: We're withholding the final report.

20 THE COURT: Oh, so binders as opposed to the final
21 report. Okay.

22 MR. BERGER: We're withholding the final report, the
23 interview memoranda of prospective government witnesses and the
24 notations and work product of the Ernst & Young accountants who
25 did the forensic review.

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1 THE COURT: And that's not part of the general
2 discovery, Ernst & Young documents?

3 MR. BERGER: The Ernst & Young binders are part of the
4 general discovery. What would happen is, certain portions of
5 those binders were redacted. So --

6 THE COURT: By the government?

7 MR. BERGER: By Davis Polk. And what was -- what is
8 contained in those redacted portions of the Ernst & Young
9 binders are E&Y work product, their calculations, computations,
10 conclusions, handwritten analysis, and portions of the Davis
11 Polk interview memoranda, which, it's my understanding, were
12 included in certain analyses of the individual rebates. So for
13 example, a portion of an interview memo was taken, snipped and
14 then put in the book, and that was then redacted out because
15 those would be witness statements.

16 THE COURT: And you have those.

17 MR. BERGER: We actually do not have hard copy. I
18 believe those are available on electronic copy, yes, or we have
19 access to them, I can -- I should say, Judge. Davis Polk has
20 those. I don't know that we have the actual hard copy of them.

21 THE COURT: All right. So I'm not really looking at
22 this because of the legal analysis it might entail because of
23 control and possession, but I just want to figure this out. So
24 those redacted portions that you just described to me, you
25 haven't accessed them or looked at them or anything else?

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1 MR. BERGER: No.

2 MR. ABRAMOWITZ: No what?

3 MR. BERGER: No, we have not looked at them. We have
4 been told that the redactions were done by Davis Polk. The
5 redactions consist of Ernst & Young work product and the
6 portions of interview memoranda that were contained in the 2005
7 reports.

8 THE COURT: Okay.

9 MR. BERGER: And they were redacted on the basis of
10 Ernst & Young work product.

11 THE COURT: Well, I mean, if they were turned over to
12 the government, there is no privilege.

13 MR. BERGER: Well, the basis for not -- for us not
14 turning those over at this point are that they contain -- what
15 they are are witness statements of Ernst & Young witnesses who
16 may testify, and they're 3500 for those accountants, and/or
17 3500 material for prospective government witnesses or other
18 company employees who were interviewed.

19 THE COURT: So obviously you will be getting them, if

20 you don't have them right now.
21 MR. BERGER: Yes. I believe we have them in -- in
22 electronic copy, but the -- what we have in hard copy are the
23 redacted portion, the redacted binders, which were turned over
24 to the defendants. I don't believe that we have the unredacted
25 full set of binders --

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1 THE COURT: All right.
2 MR. BERGER: -- that Davis Polk has.
3 THE COURT: Okay. Mr. Abramowitz?
4 MR. ABRAMOWITZ: The relevance, though, your Honor, is
5 that it's the witness statements that explain the theories that
6 Ernst & Young relied on to determine what the violation is
7 here.

8 THE COURT: Right.
9 MR. ABRAMOWITZ: Let me just be very clear. This is
10 not a case of fraudulent transactions. It is a question of --
11 the rebates are real, the tooling receivables are real.
12 They're not phony. The issue is the timing and the accounting
13 judgment that was used, in what quarter the rebates would be
14 recorded and whether the request for the advance payments from
15 GECC were timely or not. There is no question in this case, as
16 there are in many other cases, of whether these transactions
17 are real. The money is real, the rebates are real, there was
18 real tools and real -- real rebates. The issue is the
19 accounting principles that were involved. And what did --

20 THE COURT: Mr. -- I'm sorry. Let me just interrupt
21 for a minute. I mean, I read the indictment a couple of times,
22 and obviously, the witnesses say what the government appears to
23 be saying or alleging and what the grand jury is alleging in
24 that, yes, there were transactions, but there were side letters
25 that were used and, I mean, if this is true, it's fraudulent

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1 transactions.
2 MR. ABRAMOWITZ: No, that's not -- that's not totally
3 accurate. It depends on what the accounting theory is. A side
4 letter sounds like a terrible thing. Two letters sound like a
5 terrible thing. But if the accounting principle permits it,
6 permits that kind of recognition --

7 THE COURT: Well, let's talk about accounting
8 practices.
9 MR. ABRAMOWITZ: Wait. So that's why it goes in with
10 the bill of particulars.

11 THE COURT: Right.
12 MR. ABRAMOWITZ: Your Honor, we need the explanations
13 that the witnesses were giving to the side letters, we need the
14 explanations that Ernst & Young knew about it. We need --
15 These rebates were all available to the regular auditors. They
16 sought -- and there was a management review and a restatement
17 by management before the Davis Polk bit came along.

18 THE COURT: Right.
19 MR. ABRAMOWITZ: The point of the matter is, we
20 believe that we can demonstrate that the Davis Polk
21 investigation itself was manipulated, and because it was
22 manipulated, it had led to the notion that these defendants
23 caused the bankruptcy, and they didn't. That's why this case
24 is different. That's why we need to know the theories, the

25 accounting theories that the government's relying on, the
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1 contractual theories that the government's relying on, as well
2 as what these witnesses said to try to demonstrate, as part of
3 our defense, that what was told to Davis Polk was absolutely
4 false, and if -- if that was false, the whole house of cards
5 fall down. That's why we're asking, your Honor. We can spend
6 another year doing this. We're asking your Honor to figure out
7 a way in this particular case to short-circuit it.

8 I would -- I do want to say this, your Honor.

9 THE COURT: Okay.

10 MR. ABRAMOWITZ: I would urge you not to fix a trial
11 date today. We are nowhere near ready to say that we could --
12 we're ready to try this case. And even if you arbitrarily put
13 it a year from now, it won't make -- it's not a realistic --
14 it's not a realistic judgment on your Honor's part. It
15 wouldn't be, because we're in no position to say that we've got
16 a handle on what we're doing here, so I couldn't -- I really
17 urge you not to do that.

18 I would ask that you give us the right to file a reply
19 to the government's letter after we see what the government is
20 giving us, because I have a feeling that the 77 witnesses, too
21 many of them are going to be labeled prospective government
22 witnesses and what we will be getting are materials that are
23 not utterly useful, and I want to be able to reply, especially
24 the distinction that the government used in the Stein case --
25 that's the KPMG case -- we urge your Honor to think that this

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1 case is more like that than any other case. And so we would
2 ask for a chance to reply. But I don't want to fix a date
3 until we get the material that the government has agreed to
4 give us.

5 THE COURT: All right. Let me just focus on this
6 accounting principles thing for a moment. Certainly generally
7 accepted accounting principles are mentioned in the indictment.
8 Are there any specific accounting principles you're pointing
9 to, Mr. Berger?

10 MR. BERGER: There are the general accounting
11 principles and there's a subset of the general accounting
12 principles that are set forth in literature under EITF, which
13 is the Emerging Issues Task Force.

14 THE COURT: Right.

15 MR. BERGER: Set forth certain principles regarding
16 the timing of when rebates can be recognized.

17 THE COURT: Well, are you going to be proving this in
18 your case?

19 MR. BERGER: This is going to be part of the case,
20 your Honor, but it's our position at this point that there is
21 sufficient notice as to the principles under GAAP and under
22 this EITF which are violated.

23 THE COURT: Yes. I mean, in the Evers case, for
24 instance, there were no specific GAAP provisions that were
25 proven to have been violated, it became an issue on appeal, but

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1 what the Second Circuit said was, if you misstate your
2 company's financial condition, that violates GAAP. And I'm
3 summarizing, probably inelegantly.

4 So I'm just trying to figure out, are you just relying
5 on the general notion that a misstatement of the company's
6 financial picture is the violation here or, frankly, if there
7 are specific accounting provisions that you believe they
8 violated, I think you should tell them what they are.

9 MR. BERGER: I think the short answer, Judge, it may
10 be a combination of both of those scenarios.

11 THE COURT: Well, that's fine. I think the first one
12 probably covers almost every case. But if you're also relying
13 on specific provisions, they should know.

14 MR. BERGER: Okay.

15 THE COURT: Okay?

16 Let's do the bill of particulars for a minute, since
17 we're sort of in that area. You also asked for two other
18 items, Mr. Abramowitz, besides wanting to know what accounting
19 theories the government was relying on. One I think was you
20 wanted -- the government characterized it as your request to
21 restate, I guess, in essence, the rebate issue; in other words,
22 for you to do the computations and for them to do the
23 computations for you and restate how, you know, the financial
24 statements should have looked. And I think that's what you
25 asked for in your bill of particulars.

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1 MR. ABRAMOWITZ: Yes, we did, your Honor.

2 THE COURT: Okay. That one, I'm not sure I understand
3 the rationale for.

4 MR. ABRAMOWITZ: Apropos of your Honor's reference to
5 the Evers case and the general financial picture --

6 THE COURT: Yes.

7 MR. ABRAMOWITZ: -- we will hopefully, if the
8 government did that, under whatever, they tell us the theory
9 and then they recalculate it, we will be able to demonstrate
10 it's absolutely immaterial, these numbers are absolutely
11 immaterial to the financial statements.

12 THE COURT: Right. But you can do that without any
13 further particulars from the government, as long as --

14 MR. ABRAMOWITZ: Once I know the theories. If they
15 tell us what the theory is, we can attempt to do that, yes.
16 But we may not be able to -- we may not -- we have to -- The
17 problem is, your Honor, we need to see their answer first and
18 maybe have another session.

19 THE COURT: Well, that's fine. I think we probably
20 need to have more sessions. I can't rule on everything today.
21 I may want to take a look at some of the documents, which I
22 know the government's offered to give to me in camera.

23 MR. ABRAMOWITZ: Right.

24 THE COURT: I think, frankly, Mr. Abramowitz, your
25 appeal to me in order to try to manage the case is the

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1 stronger, certainly the stronger of the arguments that you've
2 been making. I can't know that there's no Brady, but I'd be
3 very surprised if there's Brady, and they're obviously
4 susceptible, what's material to the defense is susceptible to
5 lots of interpretations. And I haven't seen the documents for

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6 my interpretation, if you will.
7 Why don't we do this: I'd like to have another
8 conference in two weeks, and what I'd like -- No?
9 MR. ABRAMOWITZ: I'm not going to be here.
10 THE COURT: Okay. Well, then let's back up a little.
11 Mr. Berger, when are you going to be able to provide what
12 you've already agreed to provide?
13 MR. BERGER: The documents are in the process of being
14 copied.
15 THE COURT: Okay.
16 MR. BERGER: I think by the middle of next week. Can
17 we just say by the end of next week they'll have them?
18 THE COURT: Okay. And that's going to include
19 whatever number of interview memoranda that you believe are the
20 memoranda of nongovernment witnesses?
21 MR. BERGER: Correct. And also the materials
22 contained in the binders prepared by Davis Polk & Wardwell.
23 THE COURT: Okay. Now you wanted to do a reply after
24 you saw all this, Mr. Abramowitz?
25 MR. ABRAMOWITZ: Yes. I'll be -- I'm going to be away
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1 for the next two weeks but -- so I -- if everyone else is
2 convenient, the end of August is fine at some point.
3 THE COURT: You're not back the week of the 18th?
4 Or maybe -- the week of the 25th?
5 MR. ABRAMOWITZ: I am going to be back that week.
6 I'll be back before that, but I'll be available --
7 THE COURT: I'm sorry, Mr. Berger, when did you say
8 you're going to produce all this?
9 MR. BERGER: They'll have them by the end of next week
10 and most likely even earlier than that; by the middle of next
11 week, I should imagine.
12 THE COURT: Okay. You're going to need to look at
13 it --
14 MR. ABRAMOWITZ: Yes.
15 THE COURT: -- before you can reply. Are you also
16 going to be able to -- and Mr. Berger, I'm not trying to add
17 extra elements to the government's proof. But if there are
18 specific accounting provisions that you're going to be proving,
19 I think they ought to know what they are.
20 MR. BERGER: Understood, your Honor.
21 THE COURT: And I don't know that they're in the
22 indictment. I don't recall seeing them.
23 MR. BERGER: There are not provisions in the
24 indictment.
25 THE COURT: Okay. Let's give those over and that will
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1 help, also, or it may help, hopefully, in terms of some of the
2 other requests.
3 MR. BERGER: Yes, your Honor.
4 THE COURT: And you'll give them over by the end of
5 next week.
6 MR. BERGER: Certainly.
7 THE COURT: Okay.
8 Yes.
9 MR. ABRAMOWITZ: At the risk of being a little
10 pushy --

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11 THE COURT: Now you're saying that?
12 MR. ABRAMOWITZ: Yes. The same request would be made
13 for the accounts receivable issue, the contractual provisions
14 that they relied on.
15 THE COURT: Now that one, again, let me ask you this:
16 We're talking about GECC, right?
17 MR. ABRAMOWITZ: Yes.
18 THE COURT: We're talking about a contractor who the
19 government says there are only three relevant pages. I don't
20 want to overstate it, but essentially that's how I read your
21 letter, right, Mr. Berger?
22 MR. BERGER: I was pointing that out. It's a 117-page
23 contract, and the three pages of most relevance to this issue,
24 yes, are contained in about three pages.
25 THE COURT: All right. Are you going to be pulling
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1 breach of contract, are you going to be pulling provisions from
2 elsewhere other than those three pages to prove breach, or is
3 it the section you referred to in your letter?
4 MR. BERGER: Well, I don't want to limit myself to
5 those three pages, but I think we're limited to the contract
6 itself.
7 THE COURT: Well, then --
8 MR. BERGER: The most --
9 THE COURT: Look, it may well be that that's really
10 it, those three pages, but a good defense lawyer isn't going to
11 want to hear, but there may be some breach of some provision
12 somewhere else. Do you know right now, or do you want to think
13 about this one?
14 MR. BERGER: If we can get back to you on that, Judge.
15 THE COURT: All right. Because that also makes life
16 easier.
17 MR. ABRAMOWITZ: It does; it really will.
18 THE COURT: What's the title of these three pages
19 again, this section?
20 MR. BERGER: I believe it's called Eligible
21 Receivables, but -- it's something to that effect.
22 THE COURT: All right. Well, certainly those three
23 pages are relevant, and you're going to let us know if there's
24 any other provisions. Look, there may be a general provision
25 in there that you would also want to rely on. But if -- and if
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1 there's some other substantive area in that contract, they
2 ought to know about it, okay?
3 Yes.
4 MR. BERGER: I mean, at the risk of being pushy, the
5 contract itself, I mean, this is not a thousand-page contract.
6 THE COURT: Right. No, we're not talking about --
7 Look, they're going to read it. The question is, what do they
8 have to be on notice of.
9 MR. BERGER: Well, and that's one thing, but I don't
10 want to limit our proof to certain provisions of the contract
11 because we commit now and say, here's what you need to focus
12 on.
13 THE COURT: Well, if you decide that you can't say
14 they're not breaching any other provision, come and give me an
15 example of what you're talking about next time.

16 MR. BERGER: Okay.
17 THE COURT: Okay? Because it seems to me, look, as I
18 said, there may be some general provision, like Article 1,
19 page 1, we agree to deal with each other in good faith. You
20 may want to put that before the jury, I don't know. But if
21 that's what we're talking about, that's one thing. If we're
22 talking about another area where they talked about what makes a
23 receivable eligible, that's different.
24 MR. BERGER: Understood.
25 THE COURT: Okay?
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1 MR. ABRAMOWITZ: Thank you, your Honor.
2 THE COURT: So when do you think you can get your
3 reply in, Mr. Abramowitz?
4 MR. ABRAMOWITZ: I think we can -- Assuming we get the
5 material next week, I think the week of the 18th we'll have a
6 reply.
7 THE COURT: All right. Then why don't --
8 MR. BERGER: Judge, I don't know if this is possible,
9 but if we could push and get the material to the defendants
10 earlier in the week, I'm just wondering if we can move the
11 schedule along even quicker, but if that's not possible, it's
12 just an option. We could push to get it to them by Tuesday of
13 next week.
14 THE COURT: Okay.
15 MR. ABRAMOWITZ: The problem is, I won't be here, nor
16 will Mr. Stovall be here, and in this regard, the more relevant
17 person is Mr. Stovall.
18 THE COURT: All right. We're going into vacations. I
19 understand that. So if you can get your reply in by
20 August 18th, is anybody available then to come in here the
21 week of the 25th? Yes.
22 MR. ABRAMOWITZ: Yes.
23 THE COURT: Okay.
24 MS. SEYMOUR: I'm not, your Honor. I could have a
25 colleague cover for us, if that's necessary.
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1 THE COURT: All right. Thank you, Ms. Seymour.
2 How about Monday, the 25th?
3 THE CLERK: Your Honor, 10:00.
4 MR. ABRAMOWITZ: Can I say a tentative yes? I don't
5 have a calendar. I didn't print out my calendar.
6 THE COURT: If it turns out 10:00 on the 25th
7 doesn't work out for any counsel, including the government,
8 call each other and get back to us with an agreed-upon date and
9 time. I'm here the entire week, and there's almost no time I'm
10 not available, okay? I don't have a trial.
11 MR. WISENBERG: I'm sorry, your Honor. Actually, you
12 haven't set the date yet, but --
13 THE COURT: Yes, I am. I'm setting August 25th at
14 10 a.m. If that turns out to be inconvenient because someone's
15 not going to be here and they don't know it now, deal with each
16 other, get back to me with a date, another date or a different
17 time, and any day that week is fine with me and I don't have a
18 trial. So I'll make myself available whatever time you come up
19 with.
20 MR. WISENBERG: If I can, if we can just let your

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21 Honor know, the insurance company money will definitely be gone
22 by then. Our client doesn't have any other resources. We
23 would just request that whatever date it is, if your Honor can
24 set it later in the day, because if it's at 10:00, we have to
25 spend the night here, and that's a hotel room that --

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1 THE COURT: Sure. Especially with a Monday.
2 2:00? Will that do?
3 MR. WISENBERG: Thank you, your Honor.
4 THE COURT: All right. 2:00 on the 25th.
5 Mr. Abramowitz -- and maybe you could think about this
6 in your reply -- I'm not at all persuaded about the relevance
7 of -- and I'm sorry, what's the name of this --
8 MR. ABRAMOWITZ: Cote.
9 THE COURT: Cote. Of his efforts to taint the
10 investigation. I mean, false statements are false statements,
11 and the government's not, I don't believe, alleging that your
12 client -- they're not trying to prove your client caused the
13 bankruptcy; they're trying to prove that they, speaking to all
14 of you, made false statements, essentially.
15 MR. ABRAMOWITZ: It's an integral part -- If you read
16 the indictment, and I urge you to reread it, the theme of the
17 indictment, the motive for all of the activities that it is
18 alleged that David Stockman participated in was --
19 THE COURT: Well, to avoid bankruptcy, yes.
20 MR. ABRAMOWITZ: -- was to avoid bankruptcy. This
21 will demonstrate, we believe, that what caused the bankruptcy
22 had a totally intervening cause. There was no sense of
23 bankruptcy at all, except for the false information that was
24 given by Cote, who was the CFO. He's the one that, we hope to
25 demonstrate, set the process in motion.

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1 THE COURT: So you're trying to prove that your client
2 was not trying to avoid bankruptcy because there was no sense
3 of a bankruptcy occurring?
4 MR. ABRAMOWITZ: Yes.
5 THE COURT: Well, in that regard the government's
6 allegations really don't relate to bankruptcy, they relate to
7 expanding costs, reduced revenue.
8 MR. ABRAMOWITZ: That they're all part of the same --
9 THE COURT: They're not calling it bankruptcy.
10 MR. ABRAMOWITZ: They actually -- in the indictment,
11 they do say it. But if you want, we can articulate that for
12 you.
13 THE COURT: I don't understand it. And at the moment
14 I'm not persuaded. So if that's an area that you're --
15 MR. ABRAMOWITZ: We will try again.
16 THE COURT: And I need to understand it if I'm going
17 to review documents.
18 MR. ABRAMOWITZ: Yes. And we will try again in the
19 reply.
20 THE COURT: Okay.
21 MR. ABRAMOWITZ: We do have an indication, your
22 Honor -- and we'll put this in the reply -- from the attorney's
23 notes as to how important the information that Cote was giving
24 was towards -- was relevant towards the bankruptcy and how
25 false that was. But we already have -- we found that already.

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1 But we'll lay it out in a little bit more detail in the reply,
2 and we can argue it.

3 THE COURT: Yes. Again, I'm finding it difficult to
4 make the links to make it relevant.

5 What other little issues, are there any other issues
6 we sort of haven't talked about?

7 I mean, I guess I think what you're saying,
8 Mr. Abramowitz, is that with respect to your sort of suggestion
9 that the government should somehow restate when these rebates
10 actually occurred, you'll await the rest of the information.

11 MR. ABRAMOWITZ: We have to await the government. The
12 reason -- I just want to make this is clear so the government
13 understands. Why we need to have them come down to theory is
14 that they use the word contingent and they use the word
15 contractual responsibility for the refundability. And they
16 quote a comment on the part of my client in stating what the
17 government's theory is. If -- if they say that that is
18 correct, that Stockman's analysis of what it is that the
19 government is urging, that is an answer to the bill of
20 particulars, and we can deal with that. But the use of the
21 word contingency and the use of the word contractual
22 responsibility on refundability is part of what we're trying to
23 find out is the government's theory in the accounting
24 principle.

25 THE COURT: All right. Well, as a general comment
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1 too, I have to say that, having read the indictment at least
2 twice, possibly more, I think I understand their theory, but
3 maybe there is a level of specificity that you're trying to get
4 at here?

5 MR. ABRAMOWITZ: There is; there's specifics.

6 THE COURT: That's what you're talking about?

7 MR. ABRAMOWITZ: It's absolutely the difference
8 between contingency and contractual responsibility for
9 refundability. That is the difference.

10 THE COURT: All right. Well, I don't think you
11 specifically asked the question.

12 MR. ABRAMOWITZ: It's in the letter. But we'll do it
13 in the reply, if your Honor --

14 THE COURT: All right. Well, let me ask Mr. Berger,
15 do you know what Mr. Abramowitz is talking about?

16 MR. BERGER: Yes, your Honor, and to clarify, what
17 your Honor had asked us to do and what obviously we agreed to
18 do was to set forth the accounting principles. The government
19 does not believe it needs to set forth in writing its
20 accounting theory of the case. There's sufficient notice in
21 the indictment. We can point the defendants towards the
22 guiding principles, but to -- to articulate and limit us into a
23 specific theory at this time, we don't think is warranted.

24 MR. ABRAMOWITZ: But that is precisely what the bill
25 of particulars is supposed to tell us, the theory of the

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1 government's case. We are entitled to know and defend against

2 what the theory -- what the accounting principles are.
3 THE COURT: Why don't we take a look at what
4 additional or specific accounting principles Mr. Berger is
5 talking about.
6 MR. ABRAMOWITZ: Correct, and then we'll deal with it
7 in the reply, but that's precisely why we think it has to be in
8 the bill of particulars. We're not -- this is not a situation
9 where we're asking for their evidence on that point. We want
10 to know what their theory is, and once we know what that theory
11 is, we either can defend against it or move to dismiss on that
12 theory, based upon other literature in the accounting field.
13 MR. BERGER: I just wanted to add that the reference
14 to the -- Mr. Stockman's statement about the different
15 accounting theories was in no way a representation by the
16 government that we are adopting that theory that we quoted in
17 the letter. The purpose of those quotes were to reflect just
18 how great Mr. Stockman's understanding of the different
19 accounting theories are; therefore, undermining his request for
20 a bill of particulars.
21 THE COURT: I understood you to mean that.
22 Okay. All right. Then 2 p.m. on August 25th.
23 I almost hesitate to bring this up, but what do we do
24 when the insurance money runs out?
25 MR. ABRAMOWITZ: Well, your Honor, I think the
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1 situation with the defendants is different.
2 THE COURT: Right.
3 MR. ABRAMOWITZ: I think Mr. Stockman is wealthier
4 than the other defendants but not in any way able to fund or
5 come near what this has cost so far. So that as wealthy as he
6 is, I think we're okay for a while, at least, but I'm not sure
7 that's the case with the other defendants.
8 MR. STEWART: Your Honor, may I?
9 THE COURT: Yes, Mr. Stewart.
10 MR. STEWART: What Mr. Abramowitz said is right, and
11 our client falls squarely into the camp of someone who is not
12 wealthy enough to continue having us represent him as it
13 stands, and that will be true as soon as the insurance money
14 runs out. So I don't -- I'm not sure your Honor needs to do
15 anything today, but...
16 THE COURT: No, I'm not, but I wanted to broach the
17 subject.
18 MR. STEWART: But maybe that we are back in front of
19 you on his behalf asking that he receive appointed counsel
20 because he simply would not have the money to retain private
21 counsel, given the scope and scale of this case, to defend it.
22 And so I think actually, your Honor's hesitation is
23 understandable, but I think it's fortuitous that the issue has
24 come up because, really, I think within a week, there won't be
25 any more insurance money to cover the cost of defense.
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1 THE COURT: Okay. And that means continuing discovery
2 as well as lawyers.
3 MR. STEWART: Exactly. All of the above.
4 THE COURT: All right. Mr. Wisenberg, I think you've
5 spoken on this issue before. But I'm happy to hear you again.
6 MR. WISENBERG: No, your Honor. I'll have a few

7 things to say about that as part of my presentation on the
8 severance issue, but...
9 THE COURT: All right. Anyone else?
10 Then let me hear from you, Mr. Wisenberg.
11 MR. WISENBERG: Thank you, your Honor.
12 THE COURT: I should preface your remarks by saying,
13 I've read your severance motion. I think that you pretty much
14 concede that the fact that your client may have a minor role is
15 not going to get him a severance. So I'm assuming that the thrust
16 of your argument is that he shouldn't be delayed because of
17 everyone else because you're telling me you're ready, is that
18 right? You're ready for trial?
19 MR. WISENBERG: And not just that we're ready, your
20 Honor, but that if we have to wait another six months or a
21 year, then the speedy trial implications are even greater. And
22 actually, what I was going to do today, your Honor, was fairly
23 briefly and more in the nature of an update on the severance
24 issue, if I may.
25 THE COURT: I was going to tell you that, knowing the
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1 thrust of your argument, I was going to reserve decision on the
2 severance issue. Do you want to give us a little more time and
3 then supplement it in writing?
4 MR. WISENBERG: If I could, I could do that, your
5 Honor. What I have to say today is very brief.
6 THE COURT: Okay.
7 MR. WISENBERG: If I may.
8 THE COURT: Go ahead.
9 MR. WISENBERG: Our goal today was to have your
10 Honor -- and our goal today is to have your Honor set a trial
11 date and grant a severance for Mr. Barnaba, and despite what
12 Mr. Abramowitz said that he doesn't want a trial date set, he
13 probably wouldn't mind one set for Mr. Barnaba if your Honor
14 granted a severance. I simply want --
15 THE COURT: That would take care of his discovery
16 problems.
17 MR. WISENBERG: I simply wanted to point out that it
18 has been 16 months since the indictment, the government
19 announced -- has announced ready for quite some time, as your
20 Honor knows, we've announced ready, and one of the -- the
21 primary reason that we didn't join in any of the discovery
22 letters by the defense is, we didn't want to be in a position
23 to have the government say that we're trying to have it both
24 ways, complaining about discovery issues and demanding
25 severance and a new trial.
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1 THE COURT: Well, Mr. Wisenberg, let me just ask you
2 this: Are you unaffected by the various issues that have come
3 up, the glitches?
4 MR. WISENBERG: Basically, your Honor, here's our
5 position on that. Mr. Barnaba, as you know, is facing an
6 extremely limited area in terms of the indictment of the
7 charges. We have been looking at documents for over a year
8 now. If you recall, your Honor, we were the only defendant who
9 decided to go in and look at them when they were on the CACI
10 system.
11 THE COURT: So you're telling me you're not affected

12 by that.

13 MR. WISENBERG: We're really not affected. Our view
14 is that, we may very well end up, depending on what your
15 Honor -- what happens in the next few weeks, end up making a
16 Brady motion or some kind of discovery motion, but we are -- we
17 are not, for the most part, affected by that. Our view is, at
18 some point, if your Honor grants severance, the government is
19 going to -- has a duty to provide Brady and to -- and some kind
20 of a duty, given this case, probably to pinpoint Brady, but
21 more importantly, that we'll get an exhibit list. And I really
22 don't think we're going to see much in the way of this new
23 discovery that's going to affect Mr. Barnaba, because one thing
24 your Honor may not realize is that Mr. Barnaba took, when he
25 left, copies of many things from his computer, 4500 documents

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1 that are the PB documents that we have had and his predecessor
2 counsel have had for three years and the SEC and the government
3 has had them. Those are fairly important key documents as they
4 relate to Mr. Barnaba. And of course, we've been looking at
5 the other documents for a year. Our position is, Mr. Barnaba
6 is innocent, and he's not particularly worried about any new
7 documents that may come up, and we know the government will
8 give those to us.

9 So that was one of the things I wanted to say today.
10 If your Honor had a question about that.

11 THE COURT: Okay.

12 MR. WISENBERG: The other is simply to update your
13 Honor on the situation, which is, obviously your Honor has read
14 our motion and our reply and Mr. Barnaba's affidavit. I
15 would -- I would simply point out, I think at the time of the
16 affidavit he had about 16,000 in savings. He has no savings
17 now. I think we predicted that he might have to dip into his
18 401(k). He has dipped into his 401(k). He was out of work for
19 the remainder of April, May and June. He actually does have a
20 temporary job right now, a 90-day assignment that will be over
21 after 90 days.

22 The third layer of insurance, we were notified that as
23 of June 6, invoices submitted to the third layer carrier on
24 June 6th, that exhausted.

25 And fourth and final layer carrier has informed us

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1 that -- basically, not to assume there's going to be any money
2 after invoices submitted on July 31st, which is basically
3 seven days from today.

4 So absolutely through no fault of their own, the
5 codefendants are even less ready now than they were at the time
6 that we -- for reasons that Mr. Abramowitz talked about, even
7 less ready to go to trial. I'd say it will be at least another
8 year. The government -- again, irrespective of who's at fault,
9 the government is producing more documents. We are hearing
10 that there's a possible -- according to Mr. Abramowitz's
11 letter, there's a possible superseding indictment coming,
12 coming down. Assuming -- I can't imagine they would do it, but
13 assuming that's true and assuming that the government would
14 actually -- or that more people are going to be indicted,
15 assuming that they put in a superseding indictment, which I
16 can't imagine they would, but that would be even more of a

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17 delay if Mr. Barnaba was joined with any more people.
18 So our -- he basically has consistently told your
19 Honor that he would like a speedy trial. He can't fathom
20 waiting another six months or a year for one. And we would --
21 and we would beseech your Honor to please grant the motion to
22 sever and set a trial date.
23 THE COURT: All right. I'm going to reserve decision.
24 MR. WISENBERG: Thank you.
25 THE COURT: Mr. Berger, I meant to ask you this
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1 earlier: Are there plans for a superseder in this case?
2 MR. BERGER: Your Honor, we're still considering
3 whether we're going to supersede in this case. That said, your
4 Honor, we understand that many months have gone by, it's been a
5 continuing investigation. If we do supersede, I imagine there
6 will be a motion or motions for severance, and your Honor may
7 be inclined to grant those motions. And if that's the
8 situation, we may not oppose in that particular situation.
9 THE COURT: Okay.
10 MR. BERGER: One more thing, your Honor, just back to
11 the bill of particulars.
12 THE COURT: Right.
13 MR. BERGER: I may have misspoke just on the
14 accounting theory. I just wanted to be clear. Our position is
15 that -- not that we don't need to set forth a theory; our
16 position is that the theory is clear in the indictment and that
17 we don't need to provide a bill of particulars.
18 THE COURT: Right. If there are specific provisions
19 in GAAP, that's what we're talking about.
20 MR. BERGER: Yes.
21 THE COURT: Okay. All right. Anything else?
22 MR. BERGER: I think there is a statutory exclusion of
23 time as a result of the motions that have been briefed and will
24 continue to be briefed from now at least until the next
25 conference.

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1 THE COURT: That's right.
2 MR. ABRAMOWITZ: No objection.
3 THE COURT: Okay.
4 MR. WISENBERG: Your Honor, I think you --
5 THE COURT: That's a bad technique. No objection.
6 It's irrelevant whether you object or not. That may have
7 spurred Mr. Wisenberg now under the Speedy Trial Act.
8 But in any event, I had another thought. Mr. Berger,
9 why don't you give me -- and I'm afraid to ask this too. How
10 voluminous are the 2005 DPW documents that you're not giving to
11 the defense?
12 MR. BERGER: Well, I can tell you that the entirety of
13 the 2005 interview memoranda are in two inch-and-a-half
14 binders. So what we're not giving to the defense will be less
15 than that. But I don't know how much less than that.
16 THE COURT: Okay. So you can provide those to me --
17 MR. BERGER: Yes, Judge.
18 THE COURT: -- once you've made the cut? And --
19 MR. BERGER: Yes.
20 THE COURT: And you're also not giving them the final
21 report?

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22 MR. BERGER: And we'll provide that to you as well.
23 THE COURT: All right. And I don't know why, but I'm
24 fixated on the Ernst & Winney work product. There's no
25 privilege issue here, right? It was redacted by Davis Polk,
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1 but you believe you have this in your control, or access? I'm
2 not trying to tie you down.
3 MR. BERGER: We have access to it.
4 THE COURT: Is this discoverable?
5 MR. BERGER: We have access to it. There is still an
6 audit committee privilege, though. I don't know if that's
7 being asserted with respect to that material, and I'll clarify
8 that.
9 THE COURT: You don't have to do this by
10 August 25th, but would you try to figure out what legal
11 status this information has?
12 MR. BERGER: Certainly, Judge. But I can say that
13 much of the material that was redacted out are statements of
14 potential witnesses and, therefore, we would deem as 3500
15 material.
16 THE COURT: Well, I just want to know whether we are
17 or not dealing with a privilege. Apparently we're not. I
18 mean, you have access to all of it and so there's no privilege.
19 MR. BERGER: Well, there was a limited waiver of
20 privilege to give the materials to the government.
21 THE COURT: Ah, okay.
22 MR. BERGER: So we may be dealing with privilege, but
23 initially we're dealing with 3500. There may be a layer of
24 privilege that's out there as well, and I don't know if that's
25 being asserted.

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1 THE COURT: All right. Well, just because it's out
2 there and they've begun to talk about it -- and again, you
3 don't have to do this by the 25th -- I'd just like some sort
4 of description of this and what the status of this information
5 is.
6 MR. BERGER: We'll get that done.
7 THE COURT: Okay? All right.
8 Unless there's something else then?
9 All right. See everybody on the 25th.
10 ALL COUNSEL: Thank you.

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