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 1 UNITED STATES DISTRICT COURT
 1 SOUTHERN DISTRICT OF NEW YORK
 2 -----X
 2 UNITED STATES OF AMERICA,
 3 v. 07 CR 220 (BSJ)
 3
 4 DAVID A. STOCKMAN, J. MICHAEL
 4 STEPP, DAVID R. COSGROVE, PAUL
 5 C. BARNABA,
 5 Defendants.
 6 -----X
 6
 7 New York, N.Y.
 7 October 15, 2008
 8 5:00 p.m.
 8
 9

9 Before:
 10 HON. BARBARA S. JONES,
 10 District Judge
 11
 11

12 APPEARANCES
 12 MICHAEL J. GARCIA
 13 United States Attorney for the
 13 Southern District of New York
 14 MARC P. BERGER
 14 GURUANJAN S. SAHNI
 15 Assistant United States Attorney
 15
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 16 Attorneys for Defendant Stockman
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 19 Attorneys for Defendant Stepp
 19 KAREN PATTON SEYMOUR
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 21 ARNOLD & PORTER, LLP
 21 Attorneys for Defendant Cosgrove
 22 CRAIG A. STEWART
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 23 WISENBERG & WISENBERG, PLLC
 24 Attorneys for Defendant Barnaba
 24 SOLOMON LOUIS WISENBERG
 25

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 1 (In open court)
 2 THE COURT: All right, I understand that there's an
 3 agreement which I have in front of me with respect to a
 4 proposed revised briefing schedule. Everyone is in agreement
 5 on this?
 6 MR. BERGER: Yes, your Honor.
 7 MR. WISENBERG: Pardon me.
 8 THE COURT: Yes, Mr. Wisenberg, I know.
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9 MR. WISENBERG: We're not in agreement.
10 THE COURT: You're not in agreement, I understand, and
11 you have your continuing motion for a severance and for
12 dismissal under the Speedy Trial Act.
13 All right. So defendants' motions are due January 16.
14 I want to be sure I have this right. Government's opposition
15 February 12. Defendants' reply Friday, is that the 24?
16 MR. BERGER: I believe it's the 27th, your Honor.
17 THE COURT: 27. OK.
18 MR. BERGER: Yes.
19 THE COURT: I'll advise you with respect to oral
20 argument, unless March 2nd -- have you already looked at
21 March 2nd, Lauren? Is that a good day?
22 THE DEPUTY CLERK: Yes.
23 THE COURT: What time?
24 THE DEPUTY CLERK: It would have to be 4:30, there's a
25 trial starting.

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1 THE COURT: I'm not going to set that down. I likely
2 will have you come in for oral argument, but I'd rather see
3 what my schedule is and do it earlier in the day as opposed to
4 4:30.
5 Mr. Wisenberg, you have been notified that you have
6 been appointed to continue --
7 MR. WISENBERG: Right.
8 THE COURT: -- under the Criminal Justice Act.
9 MR. WISENBERG: Thank you, your Honor, which makes one
10 of the three points moot that I was going to talk about.
11 THE COURT: Great.
12 MR. WISENBERG: Thanks, your Honor.
13 THE COURT: With respect to Mr. Cosgrove, that
14 approval should be coming through in another day or two.
15 MR. STEWART: Thank you, your Honor.
16 THE COURT: The government, pursuant to my request,
17 has -- and I gather you all spoke about this in a conference
18 call -- agreed to produce 3500 material and a witness list, a
19 non-binding witness list two months before the trial, and an
20 exhibit list 45 days before the trial, which I think makes good
21 sense.
22 Now we come to, if I can keep to my own agenda,
23 Mr. Abramowitz's grueling prediction that it's going to take,
24 what is it, 70 to 80 weeks?
25 MR. ABRAMOWITZ: Yes, at the current rate we're going.

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1 And that's why I told Mr. Berger and Mr. Sahni outside that
2 although their proposal for the 3500 material is more than
3 reasonable in the ordinary case, this is not an ordinary case,
4 and that that's why we couldn't agree to the proposed schedule,
5 and urge that the basis for giving it in advance means that
6 there will be no prejudice perceived by the government for us
7 having it two months in advance of the trial. If that's so,
8 there really is no prejudice to the government of us having it
9 three months before the trial, four months before the trial or
10 even five months before the trial. I know you can't force them
11 to do it.
12 THE COURT: No. No. I wasn't going to say that.
13 what I was going to say is: I honestly don't know what it

14 takes to do the kind of investigation or discovery of
15 11 million pages of documents, so I am in no position.
16 MR. ABRAMOWITZ: 15.
17 THE COURT: How many?
18 MR. ABRAMOWITZ: 15. But who's counting? We're
19 counting, that's the problem.
20 THE COURT: So, I'm in no position to say, oh, come
21 on, defendants, you can be prepared. I don't know what the
22 government thinks. There have been other cases, civil and
23 criminal, in this court. There must be some comparisons we
24 could make. I haven't seen any arguments being made based on
25 that, so I don't know whether the government has any knowledge
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1 they can share about how feasible it is to get this done
2 quicker. The defendants are representing it's going to take
3 them over a year to finish their review.
4 Mr. Berger?
5 MR. BERGER: I don't know offhand. I'd be happy to
6 speak with some of my colleagues who have been in charge of
7 some of the larger white collar cases that involve document
8 productions at or nearly at, and, I believe in some cases, more
9 than this size and confer with counsel on that, but I don't
10 have an answer for the Court right now.
11 MR. ABRAMOWITZ: I have to say, that in my
12 experience --
13 THE COURT: Yes, Mr. Abramowitz.
14 MR. ABRAMOWITZ: -- I have not heard of a case with 15
15 million pages. Maybe there are others. And your Honor knows
16 us well enough that we're not grandstanding. This is a serious
17 problem. We've devoted an extraordinary amount of resources to
18 this, both financial and lawyer time. And this is the truth.
19 We are not joking. I can tell the Court -- and the government
20 will see this next week when -- and we had talked to you about
21 the fact that we are submitting something to them.
22 THE COURT: Yes, you mentioned that.
23 MR. ABRAMOWITZ: Well, there is no question in my
24 mind, having prepared this document, that there are documents
25 that we make reference to in that document that were not seen
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1 by anybody, could not have been seen by anybody, and that I
2 can't in good conscience represent to the Court that I could go
3 to trial when there are documents out there that no one has
4 seen that are helpful to the defense. And these numbers, we're
5 not making them up.
6 So, what I'm saying, that's why we made the argument
7 we made with the Davis Polk report, we're saying that -- first
8 of all, if the government is worried about tailoring testimony,
9 Mr. Stockman can testify at the SEC, so he's already on the
10 record. The issue of giving it to us now will save us time
11 because if you get the 3500 material, and I see they made
12 reference to document X, Y, Z and D, we can conceivably shorten
13 the areas that we're looking at which right now we're looking
14 at blindly. So that that's why I've been urging if we get the
15 Davis Polk report, we get those interviews, we see what
16 documents they've relied on, and it will significantly get us
17 done faster.
18 Absent that, I have to tell you that the numbers and

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19 the math that we put in this letter is absolutely accurate, and
20 I cannot stand up and tell you that we're ready to go to trial
21 until I feel that we've done everything we can do to find the
22 documents that will support our defense.

23 THE COURT: Mr. Berger?

24 MR. BERGER: The problem that we see is that it
25 appears that the defendant is essentially saying that he needs
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1 to look through all of the documents, 15 million, or whatever
2 they are. And by focusing them, whether it's in the 3500, on
3 certain documents, that doesn't solve the problem of getting
4 through a review of all the documents. It may pinpoint certain
5 documents, but if the process is, as represented in the letter,
6 to get through all 15 million pages or whatever it is, early
7 3500 production doesn't seem to short circuit that.

8 If I can just add, production of the audit committee
9 report, we've considered this. We were thinking of how to
10 respond to the letter that the production of the final report
11 will speed along discovery. As your Honor knows from the in
12 camera review, the report summarizes the audit committee's
13 conclusions of inappropriate conduct at the company, and it
14 sets forth the processes by which those conclusions were
15 reached, how the audit committee did its job, but it doesn't
16 provide a solution to the document review problem, because it
17 doesn't identify particular documents.

18 We were thinking about even going through the report
19 and providing counsel with search terms or names or specific
20 names of vendors that were in the report so they could narrowly
21 tailor their searches that were being done, and we reviewed the
22 report to do that. The report doesn't contain anywhere near
23 the level of detail that counsel believes it does. In fact,
24 the 65 page indictment contains much more detail than the 25
25 page or so audit committee report.

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1 what we're willing to do -- I mean, the report only
2 identifies three vendor names and five names of individuals
3 other than people on the audit committee. We're happy to make
4 a disclosure of those specific names of the vendors and the
5 people mentioned in the report, if they want to add those into
6 their searches, but the rest of it are summary and conclusions
7 which are not relevant and not going to be helpful in this
8 document review process.

9 THE COURT: You know, Mr. Abramowitz, for what it's
10 worth, when I reviewed it, because maybe I don't know what
11 these reports are supposed to look like, I was stunned at the
12 lack of detail. There aren't specifically identified
13 documents.

14 MR. ABRAMOWITZ: I mean to include -- when I said
15 Davis Polk report, I mean to include the interview memos, and
16 of all the people that were interviewed, and I can tell you
17 I've been told -- now I'm in an area that I'm not an expert
18 in -- but I've been told if we get to see what documents and
19 what issues were focused on in those interviews by Davis Polk,
20 we would be able to potentially limit the search terms. It's
21 not as if we're sitting down and reading the 15 million pages.
22 We have search terms for first level review. We may be able to
23 modify that. If the indictment was premised on interviews of

24 X, Y, and Z, and they were focusing on A, B, and C, it may be
25 that we will be able to limit the search terms. I can't
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1 guarantee it, but there's no harm in letting us have it.
2 we can't do anything dangerous to the government with
3 it. We can only try to shorten this discovery process. This
4 is not a game. There are no surprises. We know what the case
5 is about. They know what our defense is about. The issue is
6 trying to cut through this so we can try to limit the search
7 and limit the expense. This is really getting to be a
8 situation where even a wealthy defendant like Mr. Stockman
9 cannot afford to keep going like this. You can't have 21
10 lawyers working full time on this. It's impossible.

11 THE COURT: well, I'm not sure that considering all
12 the information you already have that the information that you
13 don't have at the moment is going to help you or shorten
14 anything. I just don't know, both because I'm not sure really
15 what your approach is and whether you'd be satisfied without
16 searching all 15 million, which I assume is what you're doing
17 anyway by these search terms.

18 MR. ABRAMOWITZ: It's the search terms. It's
19 modifying the search terms. I can't say that I know for sure
20 that if I saw the interview of the four cooperating witnesses
21 that I would be able to do that, but I have a feeling I can.

22 THE COURT: Right.

23 MR. ABRAMOWITZ: Because they will focus in time,
24 certain events, certain meetings, certain items that come out
25 in an interview that I think should be able to narrow our
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1 search to something reasonable. The Court should understand
2 that should the government not reconsider this case, we do want
3 to go to trial as quickly as possible, but I cannot say to you
4 that unless we get some way to get off the dime here, that
5 we're going to have any progress. We're not making this up.

6 THE COURT: No, no, I don't doubt it.

7 MR. ABRAMOWITZ: But I do really think if I saw
8 interview notes of X and said we had a meeting on February 3
9 and we had a meeting on March 3, I think we can narrow the
10 search. I just think we can. I'm not an expert in computer
11 searches, but I just think we'd be able to move faster. We're
12 certainly not going to move any slower. So that what I'm
13 urging is that we try an experiment. I told you the last time,
14 I don't think it can be a precedent for any other case, but I
15 think we need to try something to make this work.

16 THE COURT: well, I can only -- I see we have a new
17 assistant here today, Mr. Sahni? (Indicating) I can only ask
18 the government to go back and talk to people who may have had
19 cases like this, reach out for lawyers who may have left the
20 office and see if there are some solutions out there or some
21 comparisons that can be made because: One, I don't know what
22 it takes to search 15 million documents. Two, I don't know how
23 search terms work, especially when I'm told there's a first
24 level of review and then another level of review. I can't say
25 to the defendants at this moment that it won't take them 70 to

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1 80 weeks; and under that circumstance, then I have to look at
2 the government and say do you want to wait that long?
3 The ball is in your court, gentlemen. Unless I'm
4 convinced that 70 to 80 weeks is unreasonable, and no one is
5 telling me that, I think we would be in the situation of
6 waiting a very long time as Mr. Abramowitz is getting us off
7 the dime. The flip side is, of course, Mr. Abramowitz can't
8 guarantee that even if he's given these materials, he can do it
9 any faster. So you're not getting any deal here -- you're not
10 getting an agreement from Mr. Abramowitz that "I can do it six
11 months faster if you give me this." He's hopeful. I think a
12 little more thought has to go into this back at the U.S.
13 Attorney's office just because I'm unaware of there being this
14 length of time between indictment and the ability to get
15 through discovery and set a reasonable trial date. I mean, at
16 the moment I don't think it's overly long, but I haven't gone
17 back and compared it with other cases, and it might be helpful
18 to do that.
19 MR. BERGER: We will, Judge.
20 THE COURT: Mr. Abramowitz, I think that is about all
21 I can do tonight.
22 MR. ABRAMOWITZ: Well, I appreciate it. I know that,
23 and I appreciate it, and I appreciate Mr. Berger's response.
24 THE COURT: Other than that, is there anything else
25 you'd like to bring up before I turn to the other counsel?
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1 MR. ABRAMOWITZ: Karen? Me?
2 THE COURT: No. Are you done?
3 MR. ABRAMOWITZ: I'm done, but Ms. Seymour has
4 something.
5 THE COURT: Ms. Seymour?
6 MS. SEYMOUR: Yes, your Honor. Basically, to echo,
7 first off, the comments THAT Mr. Abramowitz made with respect
8 to discovery, I have a slightly different take on it, which is,
9 our challenge is we will be able to get through our first pass
10 of the documents by the first set trial date. I feel confident
11 in that. My concern is the gap in time, the two-month gap in
12 time between what would be generous in the ordinary case here
13 between the 3500 material witness list and the trial date when
14 you have a database of 15 million documents. Because while we
15 can formulate our searches now in a straightforward fashion,
16 what it really will turn on are the intricacies of the 3500
17 material. So if I can just reiterate, it's that gap that
18 scares me in a case like this; that we will then run new
19 searches, because we will be able to plow through the documents
20 on schedule, I believe, for defendant's dep, but it's running
21 the new searches, the responsive things, so that we will be
22 able to cross-examine the witnesses at trial which will be a
23 real challenge for us when we have 15 million documents with a
24 new search and it's unknown how many documents must be reviewed
25 in response. So if I can just, you know, ask the Court in
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1 considering that and the government is really who I guess I'm
2 addressing this point, but I think it's a real challenge for
3 us.
4 what I really wanted to address, your Honor, is just
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5 the expert discovery. I think we would benefit if we had dates
6 set. I discussed with Mr. Berger a date for the government's
7 expert discovery as February 27.
8 THE COURT: who are you putting on as an expert,
9 Mr. Berger?
10 MR. BERGER: we haven't made final decisions yet, your
11 Honor.
12 MS. SEYMOUR: We thought it would be helpful if we
13 fleshed that out in advance, and then the defense would be
14 prepared to provide expert discovery on March 20.
15 THE COURT: Is that agreeable to the government?
16 MR. BERGER: Yes.
17 THE COURT: Give me those dates again.
18 MS. SEYMOUR: It's February 27 for the government's
19 expert discovery, and March 20 for the defendant.
20 THE COURT: Now, by discovery, you mean they're going
21 to declare they have one and give you a report, is that what
22 we're talking about?
23 MS. SEYMOUR: That's what we're anticipating.
24 MR. BERGER: Yes, an expert notification letter.
25 THE COURT: Fair enough. What else Ms. Seymour?
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1 Anything else?
2 MS. SEYMOUR: That's all, your Honor. Thank you.
3 THE COURT: Mr. Stewart, anything?
4 MR. STEWART: Nothing further from us.
5 THE COURT: Mr. Wisenberg?
6 MR. WISENBERG: Yes, your Honor. For the record,
7 Mr. Barnaba has no problem with the government's suggestion of
8 two months on the 3500 material. I note parenthetically that
9 if your Honor set Barnaba's trial date for December 15, that
10 would be due today, but --
11 THE COURT: It's an interesting observation.
12 MR. WISENBERG: Thank you, your Honor. I wanted to
13 also -- as I understand, your Honor has essentially recognized
14 the continuing speedy trial and severance objection by Mr.
15 Barnaba.
16 THE COURT: Yes. And I gather you filed a new
17 severance motion either yesterday or today, and I have not
18 considered it yet.
19 MR. WISENBERG: And, of course, I don't mean to argue
20 that today, and I understand the government will have a chance
21 to respond to that. Again, we're just in the position with
22 these various scheduling orders and suggestions, we'll
23 obviously abide by them, but we don't want to do anything that
24 will be construed as agreeing to the current court setting.
25 THE COURT: I think your position is very clear,
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1 Mr. Wisenberg.
2 MR. WISENBERG: Just for your Honor's edification,
3 just to make clear, and it may already be clear, but your Honor
4 has asked before and Mr. Barnaba has -- we've responded on
5 behalf of Mr. Barnaba before about reasons why Mr. Barnaba is
6 ready and has been ready, but I want to make it clear that we
7 have employed in our searches through the material -- the vast
8 amount of material produced by the government the standard
9 search terminology. We're not looking at every document. As I
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10 understand, Mr. Abramowitz isn't claiming that they're having
 11 to look at every document. It's just that in the case of
 12 Mr. Barnaba, he's only charged with rebate related things, so
 13 it's a much smaller field. As your Honor will recall, we had
 14 our second and third level review team in right off the bat and
 15 even before the materials were on the system. So I just wanted
 16 to make that clear for the record, and, of course, even though
 17 we are ready and have been ready for trial, we continue to
 18 avail ourselves of searches through the new discovery as it
 19 comes in.

20 THE COURT: OK. Thank you.

21 MR. WISENBERG: Thank you, your Honor.

22 THE COURT: Is there anything else? Mr. Berger?

23 Mr. Abramowitz? Any counsel?

24 MR. BERGER: Just as to the severance motion, we've
 25 read the motion. We don't believe that any facts are alleged

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1 that really were not as part of the last motion other than the
 2 fact that a trial date is now set which we believe militates
 3 against severance. We're happy to file a written response
 4 but --

5 THE COURT: Why don't I review it first, and then I'll
 6 send out an order if I want a written response.

7 MR. BERGER: OK, your Honor.

8 THE COURT: OK? Anything else? We need another
 9 conference?

10 MR. ABRAMOWITZ: Do we?

11 THE COURT: I don't know. Unless the government might
 12 have some new proposals, in which case you probably won't need
 13 me. You can talk to each other.

14 MR. BERGER: Why don't we follow up on the Court's
 15 directive and we'll confer with defense counsel, and if we need
 16 to schedule a conference later, we can write a letter and
 17 schedule it with your Honor's deputy.

18 THE COURT: Otherwise, obviously the submission of the
 19 motions on January 16 will stem the Speedy Trial Act, and I
 20 suppose continuing to review discovery stays it anyway.

21 MR. BERGER: And the pending motion filed by

22 Mr. Barnaba for severance also.

23 THE COURT: That's true too. So, in any event, for
 24 the record, I find that because of both the complexity and
 25 volume of discovery, as well as some of the other motions that

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1 have been filed, all of which need to be reviewed, those
 2 interests outweigh the interests of the government and all of
 3 the defendants in a speedy trial. So I'm going to exclude the
 4 time from today through January 16 when motions will be
 5 submitted. All right. And then if anyone wants or needs a
 6 conference, they'll let me know.

7 Mr. Wisenberg?

8 MR. WISENBERG: Just for the record, if the Court
 9 would note our objection to the exclusion to the extent that
 10 it's based on ends of justice or complexity, and to the extent
 11 it's based on motions that are just letter motions. We
 12 understand the motions that are filed on pacer would, at least
 13 for a period, toll the speedy trial.

14 THE COURT: I'm not relying heavily on the letter

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15 motions. I think it's pretty clear until defense counsel are
16 able to review to their satisfaction the discovery in the case,
17 we have a situation where that interest outweighs the interest
18 of the defendants and the public in a speedy trial, and I note
19 your objection.

20 MR. WISENBERG: Thank you, your Honor. I'll simply
21 note for the record, I think there's a distinction between the
22 inherit complexity in a case, U.S. v. Stockman, which is to me
23 an accounting fraud case and complexity caused by the fact that
24 there are very many documents and the way in which they were
25 produced.

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1 THE COURT: All right. Anything else?
2 MR. BERGER: Nothing your Honor.
3 (Adjourned)
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