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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,

5 v.

07 Crim. 220 (BSJ)

6 DAVID STOCKMAN, J. MICHAEL
7 STEPP, DAVID COSGROVE, P.A.S.J.
8 BARNABA,

Case 07-cv-00220-BSJ Document 40-6 Filed 04/24/2008 Page 1 of 13

9 Defendants.

10 New York, New York
11 January 11, 2008
12 3:35 p.m.

13 Before:

14 HON. BARBARA S. JONES,

District Judge

15 APPEARANCES

16 MICHAEL J. GARCIA,
17 United States Attorney for the
18 Southern District of New York

19 BY: HELEN CANTWELL,
20 BY: MARK BERGER,
21 BY: ANTHONY BARKOW,
22 Assistant United States Attorneys

23 MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, PC
24 Attorneys for Defendant Stockman

25 BY: JAMES STOVAL,
BY: ELKAN ABRAMOWITZ

SULLIVAN & CROMWELL, LLC
Attorneys for Defendant Stepp

BY: KAREN SEYMOUR
BY: DAVID SWARTS

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APPEARANCES (continued)

ARNOLD & PORTER, LLP
Attorneys for Defendant Cosgrove
BY: CRAIG A. STEWART
BY: KEN HASHIMOTO

Case 1:07-cr-00220-BSJ Document 40-6 Filed 04/24/2008 Page 2 of 13

ADRIENNE WISENBERG
SOLOMON WISENBERG
Attorneys for Defendant Barnaba

(In open court)

THE COURT: United States versus Stockman.

MS. CANTWELL: Helen Cantwell, Mark Berger and Anthony
Barkow appearing on behalf of the United States.

THE COURT:: I believe I have every one for
Mr. Stockman. Mr. Abramowitz?

MR. ABRAMOWITZ: Jodi Peikin isn't here today. James

81bPstoC

1 Stoval is going to be talking. And my partner Jonathan Sack,
2 S-A-C-K, is here.

3 THE COURT:: For defendant Stepp, Ms. Seymour.

4 MS. SEYMOUR: Good afternoon, your Honor.

5 THE COURT: For defendant Cosgrove, Mr. Stewart.

6 Case 1:07-cr-00220-BSJ Document 40-6 Filed 04/24/2008 Page 3 of 13

MR. STEWART: Good afternoon.

7 THE COURT: And for defendant Barnaba Adrienne
8 Wisenberg and Solomon Wisenberg.

9 MS. WISENBERG: Good afternoon.

10 MR. WISENBERG: Good afternoon.

11 THE COURT: Ms. Cantwell.

12 MS. CANTWELL: Yes, your Honor, if you don't mind I am
13 going to sit today.

14 THE COURT: It is okay with me.

15 MS. CANTWELL: I have provided to defense and the
16 Court a letter today summarizing where we are with discovery.
17 Obviously we made substantial progress. Nothing that the Court
18 needs to read right now.

19 Essentially the first page of the letter summarizes
20 the electronic practice, we provided 1.3 million documents
21 which constitutes ten million pages. On the second page,
22 although there is a lengthy list of additional custodians from
23 whom the government also received documents. And to the
24 defense the government intends to provide, as the Court will
25 see, these are, for the most part, very small productions, and

81bPstoC

1 we are in the process of scanning and producing these
2 electronically, which we have with all the information in this
3 case. I intend to be done with that no later than the end of
4 this month. Although hopefully far in advance of that.

5 As each of these items is in a little bit of a
6 [Case 1:07-cr-00220-BSJ Document 40-6 Filed 04/24/2008 Page 4 of 13](#)
7 different stage of production, some of them are in electronic
8 format and needs to be transmitted, some of them need to be
9 scanned into electronic format. The bottom line is, we should
be done as soon as possible.

10 Over the last months, since we appeared before the
11 Court, we worked out most, I'd like to say most, of the
12 technical problems we had. There are a few issues remaining
13 which I am not sure we need to get into today.

14 But suffice it to say, there has been good
15 communication and technical issues are being resolved. And the
16 defense has had much of the material described on page 1 for
17 some time. I know they then had to do their own technical
18 things to the material, so that obviously will impact the speed
19 of their review. And I will let them speak to that, to the
20 extent it is relevant.

21 THE COURT: I guess the question is, when do you think
22 discovery will be complete?

23 MS. CANTWELL: No later than the end of the month,
24 Judge.

25 THE COURT: The end of this month?

81bPstoC

1 MS. CANTWELL: Correct.

2 THE COURT: Okay, let my hear from the defense.

3 Mr. Stoval.

4 MR. STOVAL: Since the last conference we continued to
5 get electronic productions from the government in October,
6 November and December. So we didn't have all of the first
7 batch that is listed here until early December. And we had
8 those loaded on to our system by mid December. So we had those
9 millions, almost ten million pages loaded by mid December.

10 Since then, and even before then, we have started our
11 review and we made some progress. But we had to take that
12 batch of ten million documents and try to get it in a format
13 that would allow us to search across the various productions,
14 as the government's letter indicates. What we've gotten are
15 productions from various third parties. That information has
16 been organized or coded in different ways. And we had to take
17 that and try to put it in a form that would allow us to search
18 across those various productions.

19 That work, on our system, was finished last week.

20 So we have made some progress, but we still haven't
21 begun, haven't been able to really begin in earnest on that
22 mass 10 million pages, although we are in good shape now.

23 As the government points out, I haven't added those up
24 yet, thousands of documents to come.

25 I think, as a result, we are not in a position today

81bPstoC

1 to estimate for the Court when we think our review of the
2 discovery will be completed. All the estimates that we toss
3 around certainly are in the many, many months' range. But we
4 don't have a meaningful number today. We would be happy to
5 come back whenever is convenient for the Court to give your
6 Honor another progress report.

7 Just as a suggestion, maybe April or even May would
8 be. By that point we should certainly be in a better position
9 to estimate how much longer we will need.

10 THE COURT:: Counsel for the other defendants,
11 anything you want to add? Or comment on?

12 Mr. Wisenberg?

13 MR. WISENBERG: If I am not out of turn, if I may,
14 your Honor, thank you very much, your Honor. If I could just
15 briefly, for the record, talk a little bit about where we have
16 been and where Mr. Barnaba's team believes we are.

17 Mr. Barnaba's defense team began using the government
18 endorsed CACI discovery platform on June 28, 2007, as your
19 Honor knows. It was one day after it was first made available
20 by the government. As the Court is also aware, less than ten
21 percent of the government's production was available online at
22 that time. As late as the third and most recent status
23 conference on October 11, only about 15 percent of that
24 production, of the production was available online. The main
25 portion of the government's discovery documents, what we

81bPstoC

1 referred to in court as company documents, were not uploaded
2 online to the CACI system until in or about November of '07,
3 about seven months after the indictment was unsealed.

4 Mr. Barnaba's defense team started using the Epic web
5 based discovery platform on or about 11 -- November 19, 2007.
6 [Case 1:07-cr-00220-BSJ](#) [Document 40-6](#) [Filed 04/24/2008](#) [Page 7 of 13](#)
7 And at that last status conference, your Honor, the government
8 had said that the company documents would be up in three to
9 four weeks, and they came fairly close to that. I think it was
10 more like five weeks. They didn't promise it would be three to
11 four weeks. So that was done.

12 The Epic web based discovery platform contains
13 essentially the same documents that are available in the CACI
14 system. So basically by November 19, already the vast bulk of
15 the documents were available on the Epic system.

16 The Barnaba defense team estimates that we will
17 complete our review of the discovery documents, all the
18 discovery documents, by April 15 of 2008.

19 If you recall, your Honor, we pledged to you at the
20 last status conference that we'd have a full contract review
21 team in place. And we did. They have gone through about a
22 third of the documents that are relevant to Mr. Barnaba and Mr.
23 Barnaba's issues. If you will recall, we asked for a May or
24 June, the setting of a trial date. And if your Honor did set
25 one in May or June '08, a trial date, we are still asking for a
June '08 trial date. We would ask that if everybody could have

81bPstoC

1 review of the documents completed by April 15 of '08, the June
2 15 of '08 date will allow sufficient time for filing motions
3 and responses, and the resolution of the same.

4 Mr. Barnaba would like to note for the Court, as he
5 has in the past, he is still in limbo, still suffers the stigma
6 of these charges. The stigma severely limits his employment
7 potential, I believe, to afford the defense given the -- under
8 the insurance policies, the money may run out by the end of
9 2008. The charges have had a devastating impact on him and his
10 family. He is still presumed innocent and wants his day in
11 court.

12 Now, if the other defendants, just in terms of trying
13 to scope out possible time for a trial date, your Honor, if the
14 other defendants can't be ready by April 15.-- can't be ready
15 by June 15 --

16 THE COURT: You don't know whether you are making
17 motions yet or not, do you, Mr. Wisenberg?

18 MR. WISENBERG: I am assuming that we will be making
19 motions. That's why I said if we are done by April 15 we would
20 suggest June 15.

21 THE COURT: Suggest June 15 for motions?

22 MR. WISENBERG: For a trial date, your Honor. If
23 document review is done by April 15, we can be ready on June 15
24 is what I am representing to the Court. Mr. Barnaba can be
25 ready June 15.

81bPstoC

1 THE COURT:: It is premature to set a trial date, but
2 I am perfectly prepared to have another conference, as
3 suggested by co-counsel, in either April or May. By then it
4 sounds like you will certainly have finished review of
5 discovery.

Case 1:07-cr-00220-BSJ Document 40-6 Filed 04/24/2008 Page 9 of 13

6 Mr. Stoval, I did understand you to say that you
7 believe you would be finished with your review by April or May.

8 MR. STOVAL: No, your Honor, we would prefer the next
9 status conference in May. By then our most liberal estimates
10 don't put us close to being finished with our documents by May.
11 For one thing, your Honor, we haven't even gotten all the
12 documents yet.

13 THE COURT: No, I recognize that. We will have a
14 conference mid April and everybody can come in and tell me
15 where they are at. And you can tell me you finished your
16 review.

17 And if you know what motions you want to make, you can
18 tell me that too, Mr. Wisenberg.

19 But I can't are order the rest of your co-counsel to
20 be finished with their reviews by April 15, but I will have a
21 conference mid April.

22 Denise, give me a date.

23 THE DEPUTY CLERK: April 15 at 4 p.m.

24 THE COURT: That convenient for counsel, as far as you
25 know? Mr. Abramowitz?

81bPstoC

1 MR. ABRAMOWITZ: Let's assume it is, I don't have my
2 calendar, but I assume it is. If there is a problem, we will
3 let your chambers know.

4 THE COURT: Sure. And we can reschedule it if we have
5 to.

6 [Case 1:07-cr-00220-BSJ](#) [Document 40-6](#) [Filed 04/24/2008](#) [Page 10 of 13](#)
7 April 15 at 4 p.m. And at that point, Mr. Wisenberg,
8 you can confirm that you finished your review, tell me what
9 motions you want to make, and then I can get a progress report
from your co-counsel. All right?

10 MR. WISENBERG: Yes, your Honor.

11 THE COURT:: And it will also serve to confirm that
12 the government's completed discovery.

13 Ms. Cantwell, it might be wise also, and I would like
14 to know that you have completed discovery, you can send a
15 letter prior to April 15.

16 MS. CANTWELL: I was thinking the same thing, your
17 Honor.

18 THE COURT: Okay. I am going to exclude the time from
19 today through April 15 so that discovery can continue to be
20 made. And counsel can continue to review it and consult with
21 their clients. And I find then those interests outweigh the
22 interests of the defendants and the public in a speedy trial.

23 Are there any special or additional applications that
24 anyone wants to make this afternoon?

25 MR. WISENBERG: There are, your Honor, from Mr.

81bPstoC

1 Barnaba, on behalf of Mr. Barnaba.

2 THE COURT: Anything from the government? Any
3 other --

4 MS. CANTWELL: No, your Honor.

5 THE COURT: Any other applications from co-counsel?
6 Mr. Wisenberg? Case 1:07-cr-00220-BSJ Document 40-6 Filed 04/24/2008 Page 11 of 13

7 MR. WISENBERG: May we just object for the record to
8 the ends of justice exclusion?

9 THE COURT: You may.

10 MR. WISENBERG: And it would be for the same reason,
11 having to do with our understanding of the Second Circuit law,
12 the lack of diligence on the part of the government,
13 particularly with respect to the state of the documents and the
14 state of discovery at the time of, that the indictment was
15 returned. In addition to what happened since then. I won't
16 reargue it. I just want -- your Honor knows our position.

17 THE COURT: I do. If I haven't been clear before, I
18 find no lack of diligence on the government's part.

19 MR. WISENBERG: Your Honor, I believe that Mr. Barnaba
20 is going to be filing -- with the Court's permission, we would
21 like to file on April 3 a motion to sever and a
22 speedy-trial-related motion, with the Court's permission. I
23 know once before your Honor had asked that we file a letter
24 setting that out. I can -- we can represent to your Honor now
25 that we'd be ready to file one or both of those motions on

81bPstoC

1 April 3.

2 THE COURT: You can file them April 3, that's fine.

3 MR. WISENBERG: Thank you, your Honor.

4 THE COURT: I don't require a letter asking
5 permission. I don't know what I may have said about a letter
6 but you with can just file your motions.

7 MR. WISENBERG: Thank you, your Honor.

8 THE COURT: And, Ms. Cantwell, how much time do you
9 want to respond?

10 MS. CANTWELL: Your Honor, I will not be, presumably,
11 at work April 3. I know that Mr. Berger, who will be here, is
12 taking two weeks at the end of the month for a preplanned
13 vacation.

14 THE COURT: It is April 3. I think the government
15 ought to be able to respond within two weeks.

16 MS. CANTWELL: The 25th, Judge? Can we have till the
17 25th, Judge?

18 THE COURT: Okay, April 25.

19 MR. WISENBERG: Your Honor, may I raise one other
20 issue?

21 THE COURT: Sure.

22 MR. WISENBERG: Would it be possible, my understanding
23 is that I have no idea if the government is going to issue a
24 superseding indictment, but my understanding is, the government
25 continues to investigate the case, I don't know if they got a

81bPstoC

1 grand jury running, but one advantage of having a set trial
2 date, even if we are not going to go to trial, the issue is the
3 ability to issue Rule 17 subpoenas. Would the Court consider
4 setting a date even though you are telling the parties we are
5 not really going to trial on that date? We can issue any Rule
6 17 subpoenas that we feel would be necessary.

7 THE COURT: No. I really think it is too far in
8 advance. I don't know what the trial date would be here. I
9 will certainly consider that again in April. You can certainly
10 make that motion again in April.

11 MR. WISENBERG: Thank you, your Honor.

12 THE COURT: Anything else?

13 MS. CANTWELL: No, your Honor. I just ask, I probably
14 will be out from the beginning of February for six months, so
15 any correspondence should be directed to my attention, but also
16 to Mr. Barkow and Mr. Berger. And they will add their names to
17 the electronic court filings as well.

18 THE COURT: If the government stops responding we will
19 come after Mr. Berger and his companion.

20 Thank you.

21 MS. CANTWELL: Thank you, your Honor.

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