UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

PAUL C. BARNABA,

Defendant.

07 Cr. 0220 (BSJ)

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Defendant Paul C. Barnaba ("Barnaba") has moved to dismiss the indictment in the above-captioned case on the grounds that his rights to a speedy trial have been violated. For the reasons that follow, the Court finds that the pre-trial delay in the instant case has not resulted in a violation of Barnaba's statutory or constitutional rights to a speedy trial. Accordingly, Barnaba's motion is DENIED.

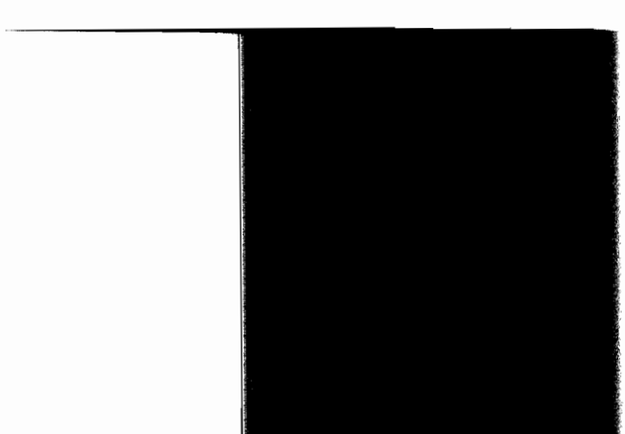
I. PROCEDURAL HISTORY

The Government indicted Barnaba on March 21, 2007. At the arraignment on March 26, 2007, Magistrate Judge Freeman excluded time until the first status conference without objection "in the interests of justice" to allow the parties to discuss discovery issues and to allow the Government to begin producing discovery. *See* Tr. 03/26/07 at 13. On April 5, 2007, the date anticipated for the initial status conference, the Court excluded time in the interests of justice pursuant to 18 § 3161(h)(8)(A) by memo-

endorsement until the new adjourn date for the first status conference, April 16, 2007, "to allow the defendants to be prepared for the first conference and to allow the Government to begin providing discovery to the defendants." (*See* Docket Entry 20).

At the first status conference on April 16, 2007, the Government advised the Court that the case involved "millions of documents" and that after consulting with each of the defense attorneys, it had had decided to produce the documents on a Web-based system. (Tr. 04/16/07 at 2-4). At the outset the Government acknowledged that "it is going to take time," noting that "there are going to be a lot of technical start-up issues," and that documents from Collins & Aikman (the "Company")—the largest source of documents—posed significant issues because of the storage format of those documents. (*Id.* at 4-6). The Government also made clear that it would offer the defendants alternative means of production stating, "I have told the defendants, each of them, if they want me to hand them all the DVDs and CDs or hard drives or my own concordance database which has all sorts of technical issues with it and do their own thing, be my guest. It's just going to be over time not the best way to do this." (*Id.* at 7-8).

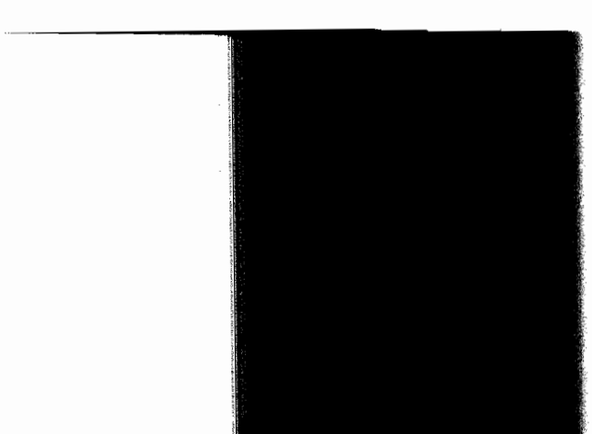
Nevertheless, each of the defendants appeared to agree that this was the means by which they wanted discovery produced.



Barnaba's counsel stated that "in principle," the internet system "sounds like a much better proposal than going with paper [discovery]." (*Id.* at 7). When the Court asked the Government if it knew when the entire production would be up on the web, the Government stated that it could not answer that question but was hopeful that the "problem with the company database would be solved by [the next status conference] and that [the website] will be up and running." (*Id.* at 8). Accordingly, at the end of the conference, the Court, without objections, excluded time under the interests of justice exception of the Speedy Trial Act until the next status conference so that discovery could be made. (*Id.* at 10).

The second status conference was held on July 12, 2007.[1] At that conference the Court asked the Government for a report as to the progress of discovery. The Government advised the Court that with respect to the electronic materials, "at last best estimate there are about seven million images." (07/12/07 Tr. at 4). The Government stated that it had hired an outside vendor, CACI, and was "in the process of loading onto that system all of the materials, but we are doing it obviously in stages so that we can get out productions." (*Id.*). The Government further

[1] The second conference was originally scheduled for June 29, 2007. It was adjourned four days until July 2 and time was not excluded. It was then adjourned until July 12, 2007 and the Court excluded time "to allow defendants to be prepared for trial and to allow the Government to continue to provide discovery to the defendants." (Docket Entry 26).

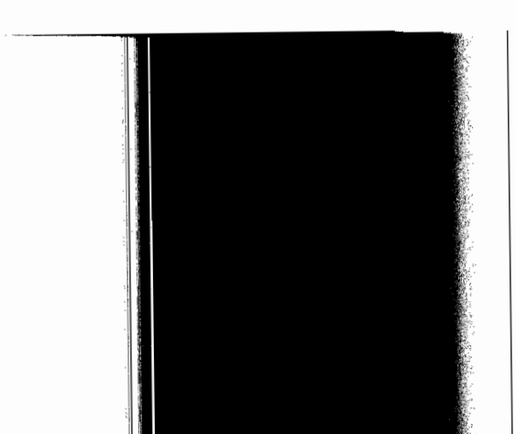


informed the Court that it was not near completion and had encountered some delays, primarily because "the very largest database [the Company's documents] has a number of technical difficulties." (*Id.*). Specifically, the Government noted that "the company has been in bankruptcy and... couldn't afford to keep everything online so they archived everything...this is what has caused the problems." (*Id.* at 6). The Government additionally stated that while it could not give the Court a date on which everything would be on the site, "We are obviously going to be working full-time to get these problems worked out." (*Id.* at 6).

The Court then asked to hear from the defendants. Stockman's counsel stated,

> "[The Government] is basically correct in summary. It has taken longer than everybody expected. We, in fact, have all decided to hire another vendor, EPIQ. Among other reasons, it actually provided a bunch of benefits as far as review and efficiencies for the defense. And we have been working with both EPIQ and CACI now to actually try to accomplish this transfer and try to do it in as expeditious a way as possible. We think probably that it won't be before four weeks, my guess is at a minimum, until this thing is up and running for both EPIQ and CACI... And then I guess once it is up and running in four to six weeks...we will obviously for the first time be looking through discovery...so we are hoping actually to set another status conference, I think we were thinking sometime in early October might be a good time."

(07/12/07 Tr. at 7).



Barnaba, however, stated that he had "a slightly different take on it." (*Id.*). Barnaba expressed frustration at the pace at which the discovery was progressing[2] and that the Government had decided to bring charges against him when it "for whatever reasons did not have its act together with respect to the documents." (Id. at 8). Barnaba requested that Court give the government a deadline of four weeks "to make sure that everything was up and running, not only on CACI, but that everything is up to the EPIQ system; and if they don't, some form of sanction imposed by the Court." (*Id.* at 10). The Court denied that request, noting that,

> "[T]he point of the website as I understand it, is to make this discovery the most efficiently, and it is certainly not the only way that discovery could have been made. The Government has offered to give you the databases on ... CDs and they have also offered to give you paper discovery. I wouldn't be surprised if you told me that you don't want that, that you want to wait for the website, but my impression is that everybody is working as fast as they can, and it is your choice to wait for the website...if you want the system, you may have to wait longer than you normally would wait, and I don't believe that anybody is dragging their feet here."

(07/12/07 Tr. at 11). The Court then set the next status conference for October 11, 2007 and excluded the time through that date under the "interests of justice" exception.

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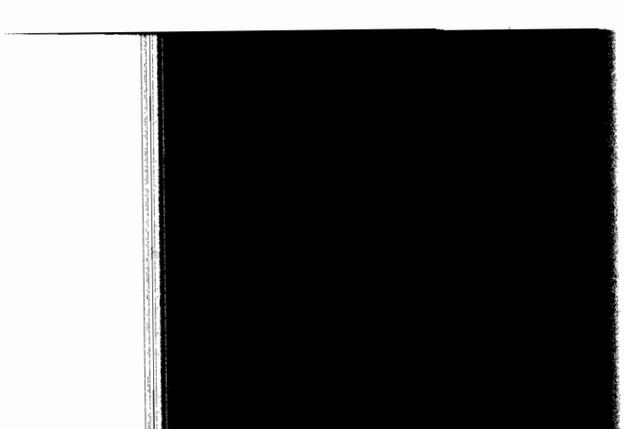
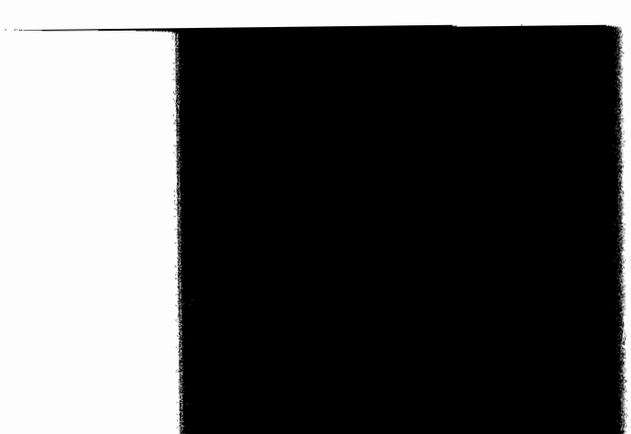
[2] Barnaba specifically complained that he "did not get one piece of electronic discovery until June 28. It wasn't made available to us until June 27...we have been working with it since we got access to it. There are approximately 455,000 pages on it, well under 10 percent [of the expected seven million pages]." 07/12/07 Tr. at 8.



At the October 11, 2007 conference, the Government reported, "We are certainly not as far along as I had hoped nor have the defense hoped, but I think we are in a position to report good progress." (10/11/07 Tr. at 4). Specifically, the Government informed the Court that the process of loading the documents onto the CACI system was continuing and that it hoped "to be completed with the vast majority of documents for which our vendor CACI is responsible...within three to four weeks." (*Id.* at 4-5). The Government also reported that "there was one major database left to be loaded, which is from the private equity firm Heartland that gave the government a tremendous amount of documents. They have that database. They have been processing it. I just don't have a fixed time as to exactly when it will be up and running." (*Id.* at 5).

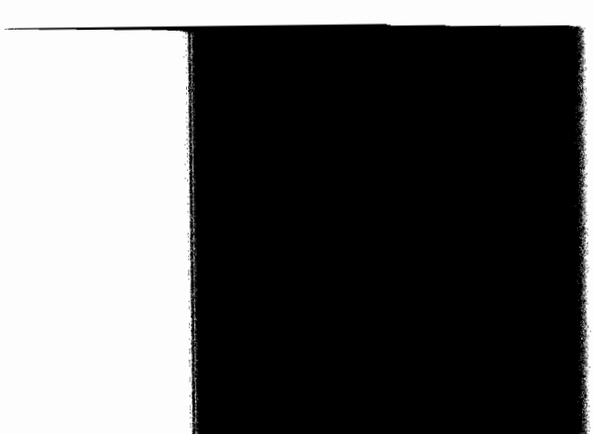
The Government explained that there had continued to be technical problems with the Company documents and that since the last status conference the Government had hired EPIQ, the vendor that the defense had hired (which was also the original vendor used to create the database of the Company documents) to process that data. (10/11/07 Tr. at 6). The Government reported that "EPIQ is processing the Company database successfully. They have begun to give back to CACI—and as of this morning they have given back two hundred thousand documents to be loaded onto CACI's website. In the meantime and simultaneously they are



giving that data to the defense." (*Id.*). The Government also explained that a portion of the delay was attributable to an unforeseen attorney-client privilege issue that had arisen with respect to the Company documents and which had needed to be resolved between the Company and its attorneys. (*Id.* at 6-7).

At this conference, Barnaba reiterated his frustrations. He reported that rather than wait for the discovery to be provided through EPIQ he had begun to use the CACI database. Barnaba also complained that he was "not offered a chance to look at hard copy documents," despite the fact that such offers were clearly discussed on the record at the prior two conferences. (*Id.* at 13; 04/16/07 Tr. at 7-8; 07/12/07 Tr. at 10). Barnaba then requested that the Court not make any further exclusions under the Speedy Trial Act for discovery delays and also asked that a trial date be set for May or June. (*Id.* at 15-16).

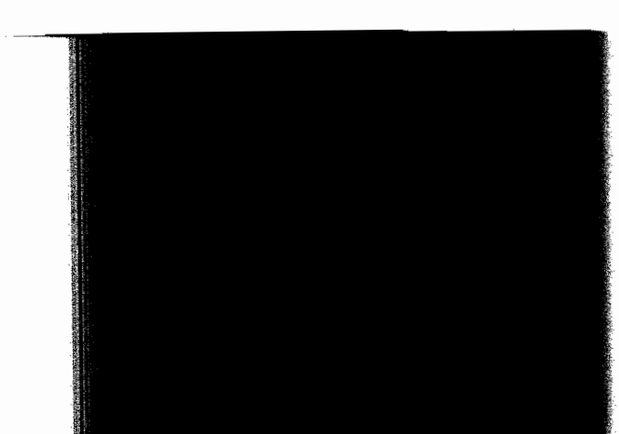
The Government responded, stating that it had offered Barnaba discovery in other formats and that if "Barnaba would like a box full of DVDs and CDs with all the Company's data in the mail, I will copy them tonight and send them to him. If he wants me to print off every piece of paper that we have here, that will take us a few weeks, we will do that. He hasn't asked me to do that." (*Id.* at 16-18). Indeed, Barnaba responded,



"Obviously, I would much prefer to have the EPIQ system than a disk on concordance or the hard copy." (*Id.* at 19).

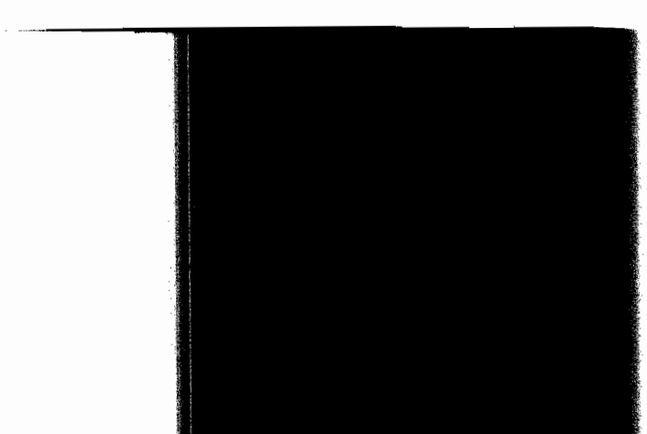
After listening to Barnaba's requests and the Government's response, the Court noted that it did not find the delay unreasonable and over Barnaba's objection excluded the time until the next status conference which was set for January 11, 2008 "because of the complexity of the discovery in the case and the need to be able to produce it in an efficient form for all counsel. And the explanations the Government has given for the various delays, I find that the necessity of getting it done, producing it in an efficient way to all counsel outweighs the interest of the defendants in this case—all of the defendants—and the public in a speedy trial." (*Id.* at 23). With respect to setting a trial date, the Court stated that it "would be unreasonable under the circumstances...I have no idea how long it is going to take defendants to review discovery so that they can actually after consultation with their clients figure out what motions they want to make. I think it is just too early to set a trial date at this point." (*Id.* at 24).

At the January 11, 2008 conference, while discovery had not been completed, the Government was able to report "substantial progress." (01/11/08 Tr. at 3). Specifically, ten million pages had been made available electronically. (*Id.* at 4). Further, the Government reported that most of the technical problems



hampering the internet-based system had been worked out. The Government also advised the Court that it believed that discovery would be completed by the end of that month. (*Id.* at 4-5). Stockman's counsel also confirmed that "ten million pages [had been] loaded since mid-December." (*Id.* at 5). Further, Stockman's counsel stated that he could not "estimate for the Court when we think our review of the discovery will be completed," and requested that the Court set a date in April or May for a status conference.

Barnaba's counsel reviewed the case's history with respect to discovery, and reiterated his frustration with the pace at which discovery had progressed. However, Barnaba acknowledged that "at the last status conference...the Government had said that the Company documents would be up in three to four weeks, and they came fairly close to that. I think it was more like five weeks. They didn't promise it would be three to four weeks. So that was done." (01/11/08 Tr. at 7). Barnaba then informed the Court that his "defense team estimates that we will be able to complete our review of the discovery documents, all of the discovery documents, by April 15 of 2008." (*Id.* at 7). Barnaba requested that the Court set a June 15, 2008 trial date. However, the Court denied this request, stating "It is premature to set a trial date, but I am perfectly prepared to have another conference, as suggested by co-counsel, in either April or May.



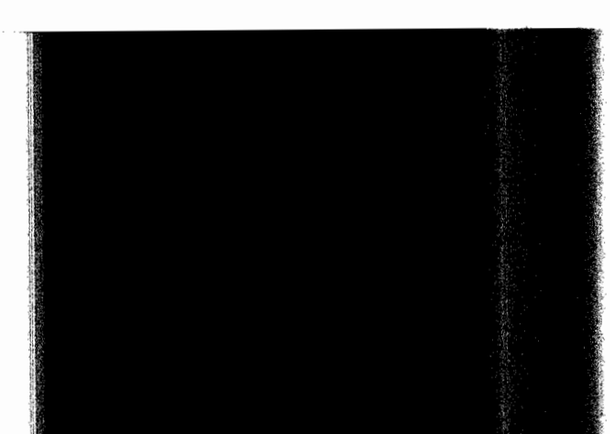
By then it sounds like you will certainly have finished review of discovery." (*Id.* at 9).

Accordingly, the Court set the next conference for April 15, 2008 and excluded the time in between under the interests of justice" exception "so that discovery can continue to be made." (*Id.* at 10). Barnaba objected to this exclusion, citing "the lack of diligence on the part of the Government, particularly with respect to the state of the documents and the state of discovery at the time...the indictment was returned. In addition to what has happened since then." (*Id.* at 11). The Court acknowledged Barnaba's position and stated, "If I haven't been clear before, I find no lack of diligence on the Government's part." (*Id.*). Barnaba's counsel again asked the Court to set a trial date in order to allow the defense to "issue any Rule 17 subpoenas that we feel would be necessary." (*Id.* at 13). The Court again denied this request stating, "I really think it is too far in advance. I don't know what the trial date would be here." (*Id.*).

II. SPEEDY TRIAL ACT

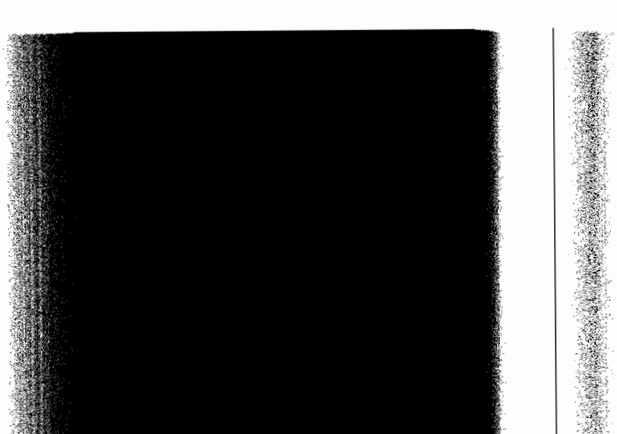
A. Applicable Law

The Speedy Trial Act provides, in relevant part, that the trial of a charge "shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date defendant has appeared before a



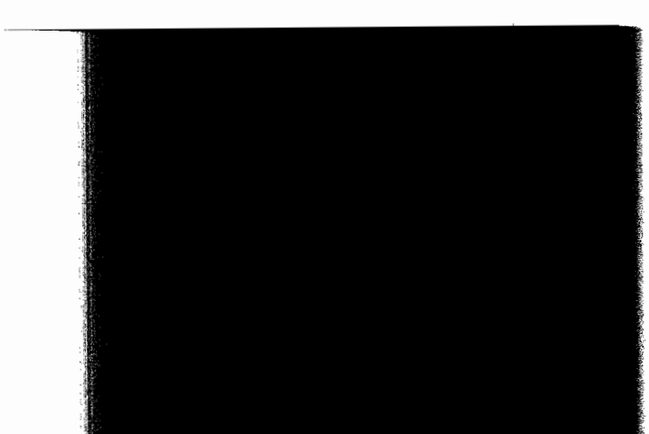
judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). The Act's 70 day period, however, is subject to the exclusions of time set forth in Section 3161(h), some of which are triggered automatically. *See* 18 U.S.C. § 3161(h)(1)-(7). One such automatic exclusion is for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F). This exclusion exempts all time between the filing of a motion and the point at which all submissions on the motion are made to the court, regardless of whether such time is reasonable. *See Henderson v. United States*, 476 U.S. 321, 330 (1986)). A similar provision excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(E). Because this 30-day limitation applies to pre-trial motions, *see, e.g. United States v. Bufalino*, 683 F.2d 639, 644-45 (2d Cir. 1982), once a motion is fully under advisement, the automatic exclusion of subsection 3161(h)(1)(j) lasts for a maximum of 30 days.

Beyond the automatic exclusions, the Speedy Trial Act also grants a district court discretion to exclude, prospectively, additional periods if the Court determines that "the ends of



justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *See* 18 U.S.C. § 3161(h)(8)(A). In determining whether such a continuance is appropriate following indictment, the statute directs the judge to consider: (a) whether the failure to grant the motion would make continuation of the proceeding impossible or result in a miscarriage of justice, (b) whether the case is so unusual or complex as to render it unreasonable to proceed within the time limits set by the Act, and (c) whether in a case that is not unusual or complex, denial of a continuance would deny the defendant reasonable time to obtain counsel or deny the defendant or the Government continuity of counsel or reasonable time necessary for effective preparation for trial. *See* 18 U.S.C. § 3161(h)(8)(B).

In order to exclude time under 18 U.S.C. § 3161(h)(8)(A), the district court must set forth "either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and defendant in a speedy trial." *Id.* Such exclusions may be granted "by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government." *Id.* Thus, the Speedy Trial Act "does not require the consent of the defendant or his counsel." *United States v. Asubonteng*, 895 F.2d 424, 427 (7th Cir. 1990).

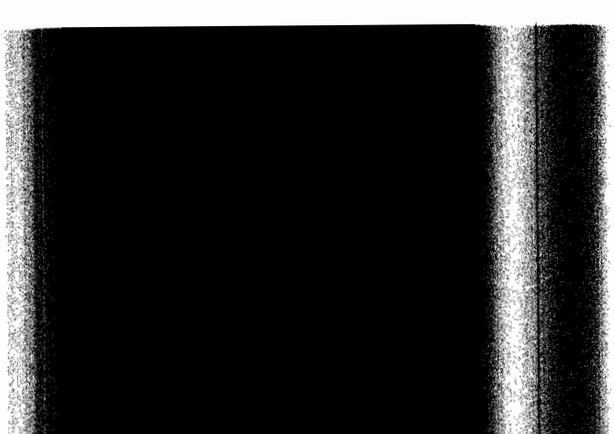


Cases with multiple defendants involve a single speedy trial "clock" calculated based on the 70-day deadline of the last joined defendant. *See* 18 U.S.C. § 3161(h)(7); *United States v. Piteo*, 726 F.2d 50, 52 (2d Cir. 1983). Excludable delays attributable to one defendant are charged to that single clock and apply to all co-defendants. *Piteo*, 726 F.2d at 52.

B. Discussion

Here, the Indictment was unsealed on March 26, 2007 and Barnaba made his first appearance on that day. Thus, computation of time under the Speedy Trial Act was triggered on March 26, 2007. *See* 18 U.S.C. § 3161(c)(1). However, as explained above, various "interests of justice" exclusions as well as time automatically excluded due to the pendency of motions in this case have resulted in only four days elapsing under the speedy trial clock.[3] Barnaba, however, contends that the extensions granted by the Court were invalid and, therefore, the time was not properly excluded. Specifically, Barnaba contends that the Court's end of justice exclusions were improper because the Court (1) did not consider the required statutory factors, (2) impermissibly interpreted Barnaba's

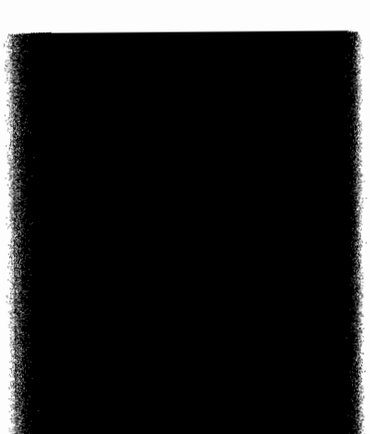
[3] In addition to the Court's exclusions, Barnaba has filed several motions that resulted in automatic exclusions of time computed under the Speedy Trial Act.[3] *See* 18 U.S.C. § 3161(h)(1)(F). On March 28, 2007, Barnaba filed a motion to admitted *pro hac vice* to this Court which as granted orally on April 16, 2007 and in writing on May 4, 2007. On July 17, 2007, Barnaba filed a motion to recuse AUSA Cantwell from this case. This motion resulted in exclusion of the period from July 17, 2007 through September 17, 2007. Lastly, Barnaba filed a motion to modify his bond conditions on December 5, 2007, which was granted on January 4, 2008.



choice of electronic rather than paper discovery as a waiver of his rights under the Speedy Trial Act, (3) ignored and/or failed to properly investigate "the Government's blatant pre- and post-Indictment lack of diligence." (Barnaba Br. at 42, 55, 65-80). Upon consideration, the Court finds that each of Barnaba's claims lack merit.

First, it is clear from the record that all of the exclusions of time were based on statutorily-authorized factors. Magistrate Judge Freeman's March 26, 2007 exclusion until the first status conference was based on the parties' need to discuss discovery issues and begin preparing discovery. The complex nature of the case, specifically, the development of infrastructure necessary to produce discovery required a lengthy discovery discussion, as stated by the Government, and therefore, Judge Freeman's exclusion was proper. *See* 18 U.S.C. § 3161(h)(8)(B)(ii). The April 5, 2007 exclusion until the new adjourn date for the first status conference was to allow "to allow the defendants to be prepared for the first conference and to allow the Government to begin providing discovery to the defendants" and was also entirely proper under the Act. *See* 18 U.S.C. § 3161(h)(8)(B)(iv).[4]

[4] 18 U.S.C. § 3161 (h)(8)(B)(iv) provides in pertinent part that in determining whether to grant a continuance a Court shall consider among other things, "[w]hether the failure to grant such a continuance... would deny counsel for the defendant or the attorney for the Government the reasonable time



At each of the next four status conferences—April 16, July 12, and October 11, 2007, and January 2008—the Court was informed about the voluminous nature of discovery and the technical complexities encountered in using the web based discovery system as outlined above. At the conclusion of each conference, the Court scheduled another conference within a reasonable amount of time and excluded the time in between under the "interests of justice" exception to the speedy trial act to allow the Government to continue working with the vendors until the discovery was complete.

In making these speedy trial clock exclusions, the Court considered the actual needs of the case which it categorized as "unique" in recognition of the volume of discovery and attendant issues surrounding discovery. It was clear from the outset that this case is unusual and exceedingly complex. In light of the volume of documents, it was necessary to produce them in an efficient way so that the defendants could adequately prepare for trial. Each of the defendants, including Barnaba, expressed a preference for having discovery produced through an internet based system. This evident need for the parties to create such a system and efficiently review the massive volume of discovery strongly supports the exclusions of time used to create that

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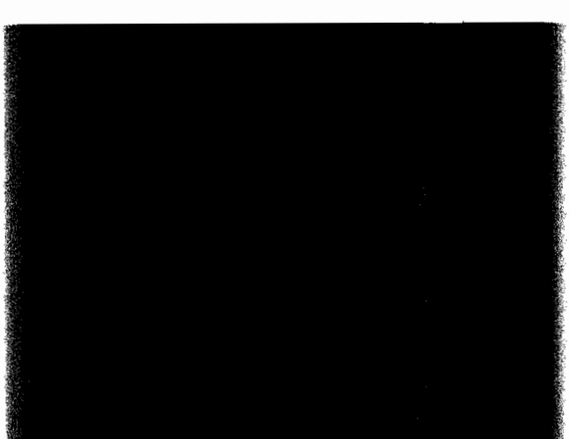
necessary for effective preparation, taking into account the exercise of due diligence."

[redacted]

system. Indeed, as of the April 17, 2008 conference, significant review by each of the defendants had occurred, certainly in significant part due to the efficiency of review using the computerized systems.

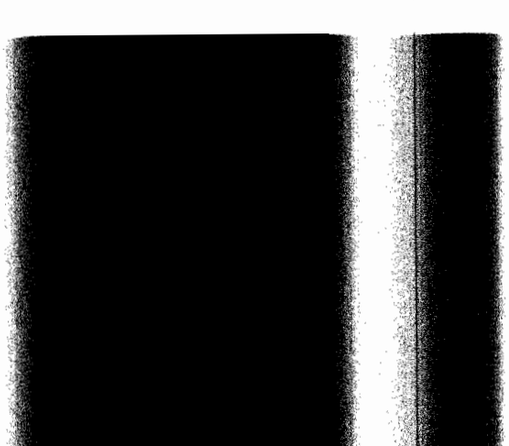
Second, this Court emphatically did not treat "Barnaba's stated preference to receive discovery through the Government's web-based system as a waiver of his right to complain about the pace of discovery under the Speedy Trial Act." (See Barnaba Reply Br. at 8. Rather, the Court excluded time under the Speedy Trial Act despite Barnaba's stated objections based on its belief that the complexity of the discovery in the case and the need to make an efficient production outweighed all of the defendants' (and the public's) interest in a speedy trial. At each conference, although Barnaba complained about the pace of discovery, he always maintained a preference for having the materials in the web-based electronic form rather than on DVDs or paper. In commenting on this, the Court was merely pointing out that Barnaba essentially agreed with the Court that an internet-based system was needed while lodging complaints about the length of time required to erect it. Thus, the Court noted that Barnaba's position somewhat compromised his speedy trial claim but the Court did not ever conclude that Barnaba had waived an objection to a Speedy Trial Act exclusion nor did it base its findings for an exclusion of time on any such waiver.



Accordingly, Barnaba's attempt to bring this case within the confines of the Supreme Court's decision in *United States v. Zedner*, 126 S.Ct. 1976 (2006), fails.

Third, the Court did not ignore or fail to investigate the Government's lack of diligence. The Court was provided with updates throughout the conferences about the progress that the Government was making in getting millions of pages of documents uploaded for electronic use by the defendants. The Court continually sought reports from the Government with respect to the efforts being made to deal with the technical delays. The Government informed the Court about the steps being taken to solve the technical issues and ultimately advised the Court that it had hired EPIQ to perform the necessary conversions needed to produce the Company documents. Based on the volume of discovery, the complexity of the case, the technological issues surrounding the establishment of the internet-based system and the amount of time necessary to erect the system, the Court did not find that there had been inordinate delay.

Nor does the record establish that the Court was misled in this respect or erred in its finding that the Government had been diligent. Significantly, as evidenced by the statistics submitted by the Government, the Government provided the vendor of the internet-based system with over four million documents before the first status conference and continued to provide the



vendor with documents on an ongoing basis. (*See* Opp., Ex. 1). As the Government notes in its opposition and as is made clear from its statistical report, time is needed for documents to be processed and scanned and made available on the system. (*See* Opp. at 8). For example, the report demonstrates that 3.3. million pages received by the vendor on April 16, 2007 took until July 11, 2007 to load onto the system and until September 27, 2007 to finish exporting those documents to the defendants' vendor. (Opp., Ex. 1).

Barnaba also contends that the Government should have begun the web-based discovery process pre-indictment. Specifically, Barnaba notes that "[u]pressured by statute of limitations constraints" the Government indicted the Defendants when it "either knew or should have known there was a high improbability that it could comport with the requirements of the Speedy Trial Act." However, the Government has explained that it does "not enter into an expensive contract with a vendor before it knows for certain that an obligation to produce discovery will arise, that a preference for web-based discovery will be agreed upon, and that a preference is determined for a particular vendor." (Opp. at 17, f.n. 8). The Court finds these considerations reasonable and the explanation sufficient to counter Barnaba's

argument that the Government did not act diligently pre-indictment.[5]

III. SIXTH AMENDMENT

A. Applicable Law

Where a defendant alleges that he was deprived of his Sixth Amendment right to a speedy trial, the Court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the extent of prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1971). The first of these considerations is actually a "double enquiry." *Doggett v. U.S.*, 505 U.S. 647, 651 (1992). In order to even trigger a Sixth Amendment analysis, the period between accusation and trial must cross the threshold dividing "ordinary" from "presumptively prejudicial" delay since "by definition [a defendant] cannot complain that the Government has denied him a 'speedy' trial if it has in fact, prosecuted his case with customary promptness." *Doggett v. United States*, 505 U.S. 647, 651-652 (1992); *See also Barker*, 407 U.S. at 530 ("The length of the delay is to some extent a triggering mechanism. Until there is some delay which

[5] In his Reply brief, Barnaba acknowledges that "this may be true in the abstract but it has no bearing in the instant case...[because the Government] informed the Court at the first status conference, that the Government was going to use the CACI web-based portal regardless of what the Defendants did." (Barnaba Reply Br. at 9). However, this argument ignores the fact that prior to the first conference the Government had been able to "consult with each of the defense attorneys about the situation that we have" and therefore, had been able to ascertain both its need to produce discovery and the defendants' preference for a web-based system.

is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."). There is no set definition of "presumptively prejudicial" and "[t]he length of the delay that will provoke such an inquiry is necessarily dependant upon the particular circumstances of the case." *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

If, the defendant makes the threshold showing— i.e. if in light of the nature and complexity of the case, the delay between accusation and trial is uncustomarily long- then the Court goes on to consider the remaining *Barker* factors to determine whether the delay infringed on the defendant's Sixth Amendment rights. *See United States v. Vassell*, 970 F.2d 1162, 1164 (2d Cir. 1992).

B. Discussion

As an initial matter, the Court does not believe that the eleven months it took for the Government to complete discovery in this case can be considered "presumptively prejudicial." In view of the particular circumstances of this case, specifically the voluminous amount of documents involved and the format upon which the documents were ultimately made available for use, the length of this delay is not extraordinary. Nonetheless, the Court has considered the remaining *Barker* factors and finds that they weigh heavily against a finding of a Sixth Amendment violation in this case.

With respect to the second *Barker* factor, there were clearly valid reasons for the delay which, as the Court has already noted, is largely attributable to the massive amount of discovery in this unusual and complex case and each of the defendants' desire, including Barnaba, to have the documents loaded into a web-based system that is easily searchable. Given the volume of documents—approximately ten million—it was necessary to produce the documents in an efficient way and the time used to implement the internet-based system was well spent, as it allows search capacity and organizational options that would have been impossible with hard-copy discovery

The third *Barker* factor—Barnaba's assertion of his right to a speedy trial— also does not weigh in his favor. Barnaba cited his speedy trial rights at a number of pretrial conferences. However, he did so even though the delay itself was benefiting him. Barnaba has consistently maintained a preference for electronic discovery. This requires an internet-based system, the creation of which is largely responsible for the pre-trial delay. As the Government noted at the first conference, it was, from the outset, prepared to make the CDs, DVDs, hardcopies and concordance files available to Barnaba. Yet, Barnaba never made such a demand.

The fourth and final *Barker* factor—prejudice resulting from the delay—also weighs against a finding of a Sixth Amendment

violation here. The Supreme Court in *Barker* identified three interests of a defendant that a court should consider when assessing prejudice: (i) prevention of oppressive pretrial incarceration; (ii) minimizing the anxiety and concern of the accused; and (iii) limiting the possibility that the defense will be impaired. 407 U.S. at 532. Here, Barnaba has not been incarcerated during the pre-trial period. Further, with respect to the anxiety experienced by Barnaba, there is nothing in the record to indicate that the pressures in this case exceed that which normally attend the initiation and pendency of criminal charges.[6] Most importantly, Barnaba has not demonstrated that his defense has been impaired by the pre-trial delay. Indeed, as noted throughout this opinion, the Court believes that the time spent producing discovery electronically has aided and will continue to aid Barnaba in preparing his defense.[7]

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[6] Barnaba contends that the pre-trial delay has impeded his ability to obtain gainful employment, subjected him to public scrutiny and civil lawsuits, and strained his personal life. (Barnaba Br. at 76). While the Court certainly acknowledges the hardships that Barnaba must endure as a result of the ongoing nature of this prosecution, nothing in this case indicates a level of anxiety which is not commensurate with being accused of criminal activity or which rises to the level of a constitutional violation. *See, e.g., Barker*, 407 U.S. at 534 (no violation of speedy-trial right even though defendant spent "ten months in jail before trial" and "was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety").

[7] At the April 17, 2008 conference, Barnaba reported that he had completed a three tier review of the discovery material using CACI and EPIQ. This progress certainly would not have been possible had Barnaba received ten million pages of paper to review.

IV. CONCLUSION

For these reasons, Barnaba's motion to dismiss the indictment in DENIED. The Court acknowledges that Barnaba has alternatively moved for the Court to set a trial date. The Court will address this request with all of the parties at the July 24, 2008 conference.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
July 24, 2008