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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

New York, N.Y.

v.

07 Cr. 220 (BSJ)

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

Case 1:07-cr-00220-BSJ Document 40-4 Filed 04/24/2008 Page 1 of 12

Defendants.

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July 12, 2007
1:10 p.m.

Before:

HON. BARBARA S. JONES,

District Judge

APPEARANCES

MICHAEL J. GARCIA

United States Attorney for the
Southern District of New York

BY: HELEN V. CANTWELL

Assistant United States Attorney

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JODI PEIKIN

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Attorneys for Defendant Stepp

BY: KAREN SEYMOUR

DAVID SWARTS

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1 (Case called; all counsel present)

2 THE COURT: I understand that all of the defendants
3 have waived their presence for today's conference, which is
4 fine with me. I do have letters, as I had requested, from
5 Mr. Abramowitz and Mr. Stewart, I believe, with respect to
6 their clients.

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7 I would just take a representation now from
8 Ms. Seymour. Your client knew he could be here today and
9 nonetheless decided he didn't want to show up?

10 MS. SEYMOUR: That's correct, your Honor, and a letter
11 has been submitted. I am not sure why it isn't before you.

12 THE COURT: It just didn't reach my file.

13 MS. CANTWELL: I got it.

14 THE COURT: And Mr. Wisenberg, Ms. Wisenberg?

15 MR. WISENBERG: Same for us, your Honor. We submitted
16 a letter as well quite a while ago.

17 THE COURT: Probably us. All right. Thank you.

18 I think, likely, the next conference may be the same
19 type of conference, so you don't have to submit another letter.
20 I guess we will know when we want the defendants here, okay?

21 Ms. Cantwell, do you want to give me a report as to
22 progress?

23 MS. CANTWELL: I will, Judge. As I predicted at the
24 first conference, there have been delays in terms of the way in
25 which we are going to prepare discovery in this case. As I

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1 think I mentioned the last time, there are several million
2 documents in this case. In further review of the electronic
3 materials, I think at last best estimate there are about seven
4 million images.

5 What we have done is we have hired an outside vendor,
6 as I said we would, and we have been in the process of loading
7 on to that system all of the materials that we have gotten, but
8 we are doing it obviously in stages so that we can get out
9 productions. And I can't say that we are near completion,
10 because the very largest database has a number of technical
11 difficulties, most of which I do not understand.

12 THE COURT: That's the company?

13 MS. CANTWELL: That's the company's documents, which I
14 think I said at the last conference I thought already at that
15 point I knew it would be a problem. It is still a problem.
16 However, in the meantime, as the defense, I think, said that
17 they would, they have hired their own vendor, which happens to
18 be the original vendor who processed the company's database.
19 So in the end, I think, by doing that, that company is going to
20 be able to expedite the processing of the data, and so that the
21 majority of the documents will, as quickly as we can make them
22 available to the defense, be available.

23 But this is a process that has taken a long time.
24 There are a lot of technical issues. But we are doing the best
25 that we can. And with this amount of material, I think from

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1 the government's perspective, it is better to spend the time
2 now to make sure that it is done well rather than having a
3 situation where we are not keeping control of the documents and
4 I am just giving them disks, because I got all this stuff disk
5 by disk by disk. I would rather be in a position where the
6 government can give them the productions after the data has
7 been processed on to this web-based system, and then they are
8 free to use the web-based system, which I think at least one
9 defendant is already doing, the system that we are providing.
10 They have chosen, in addition to that, to hire their own
11 company and will just give the data from our company, which is
12 CACI, to their company, which is EPIQ, and that process is
13 under way. Obviously, with the amount of data and amount of
14 documents, this is taking longer than anybody wants, certainly
15 me, and we are doing the best we can, Judge.

16 THE COURT: Regardless of what the defendants decide
17 to do, you are going to go ahead and put everything on this
18 web-based --

19 MS. CANTWELL: Correct. So if at any time any
20 defendant wants to go back to that system or have that system
21 available to them, it is available to them. They have chosen
22 on their own to do this, which is totally fine, which was
23 always a possibility. I think, in the end, it is going to be a
24 benefit, because the company that they hired is this company
25 called EPIQ, which originally processed the data. And the

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1 unfortunate thing here, Judge, is because the company has been
2 in bankruptcy and is on its way to being completely dissolved,
3 if not already, the company couldn't afford to keep this system
4 on line, so they had archived everything. My understanding, at
5 a basic level, is this is what has caused the problems. But
6 assuming that EPIQ and CACI can get together, we are hoping to
7 resolve it as quickly as possible.

8 THE COURT: All right. I think I asked you this last
9 time -- I guess I am going to get the same answer -- you still
10 don't know when you will have everything on there?

11 MS. CANTWELL: I don't, Judge. We have asked or we
12 will ask the court to have the next conference on October 11.
13 We are obviously going to be working full-time to get these
14 problems worked out, as we have been to date.

15 THE COURT: I will hear from the defendants.

16 MS. PEIKIN: Your Honor, Ms. Cantwell is basically
17 correct in summary. It has taken longer than everybody
18 expected. We, in fact, have all decided to hire another
19 vendor, EPIQ. Among other reasons, it actually provided a
20 bunch of benefits as far as review and efficiencies for the
21 defense. And we have been working with both EPIQ and CACI now
22 to actually try to accomplish this transfer and try to do it in
23 as expeditious a way as possible.

24 We think probably that it won't be before four weeks,
25 my guess is at a minimum, until this thing is up and running

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1 for both EPIQ and CACI. I think it will end up being
2 simultaneous in some respects because we will do this exchange,
3 we will get stuff from the government system and they may
4 actually get some help and support from our vendor.

5 And then I guess once it is up and running in four to
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7 six weeks, something in that range, we will obviously for the
8 first time be looking through the discovery. And, as
9 Ms. Cantwell indicated, it is 7 million images, so we are
10 hoping actually to set another status conference, I think we
11 all were thinking that sometime in early October might be a
12 good time, so that we would have at least enough time to have
13 gone through the discovery, see what it is, see how much is out
14 there and be in a better position to report to your Honor about
15 where we wanted to go from here.

15 THE COURT: Okay. Anybody else?

16 Mr. Wisenberg.

17 MR. WISENBERG: Yes, your Honor. I have got a
18 slightly different take on it, and I will confess to the court
19 that I am upset and my client is upset, too.

20 My client was fired, Paul Barnaba, within 72 hours of
21 the indictment coming down in this case. He has limited funds.
22 His life is basically at a standstill.

23 As your Honor knows, the government controls, is in
24 complete control, absent statute of limitations problems, of
25 when they decide to bring charges. The government brought the

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1 charges here and, for whatever reason, did not have its act
2 together with respect to the documents. We did not get -- and
3 we are the defendant that asked to use the CACI system, we have
4 also decided to go with as, Ms. Peikin said, to go with the
5 other vendor because we have hired IT people who have told us
6 that CACI's a couple of generations behind. I agree that the
7 other system will be more efficient.

8 But we are clearly on record that we wanted to have
9 the discovery as soon as it was available. We did not get one
10 piece of electronic discovery until June 28. It wasn't made
11 available to us until June 27. And even now, that is less
12 than -- I was going to say to your Honor it was less than ten
13 percent of the 5 million expected documents. Now I hear that
14 it is seven million expected pages, I apologize, pages not
15 documents. We have been working with it since we got access to
16 it. There are approximately 455,000 pages on it, well under 10
17 percent. To give you an example, not that we need these
18 particular documents, but Mr. Barnaba has approximately 4500 of
19 his own documents that he submitted over two years ago to the
20 SEC. They are not loaded onto the system.

21 So it is very frustrating. We are basically three
22 months behind. This is obviously the kind of case where nobody
23 is going to come in and say we want 90 days under the -- 70
24 days under the Speedy Trial Act, you know, seven million pages
25 of documents.

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1 You know, our goal, Paul Barnaba's goal is to start
2 the review process, to get the coding done, to get what we need
3 as soon as possible and to prepare for the trial. But I am
4 very frustrated and I am very upset because we start basically
5 three months behind. June 28 is three months from the
6 indictment being unsealed essentially, and even now we have
7 only got 10 percent. It hasn't been a phase.

8 As far as I can see in looking, we are the only
9 defendant who has decided to get access to the system, I
10 believe. It has been steady since June 28 at about 455,000 --
11 455,000 documents. So what I would like to see, what Paul
12 Barnaba would like to see, is the next critical stage here, in
13 addition to simply having the documents loaded so that we can
14 look at them, is making sure that they get efficiently and as
15 quickly as possible sent from the CACI system to the EPIQ
16 system. And even though that's partly dependent upon the
17 companies involved, and we have been talking to the two
18 companies in recent days, I think that it is the obligation of
19 the government and the U.S. Attorney's office to do absolutely
20 everything possible to ensure that that transfer is done as
21 seamlessly as possible, given the fact that we have waited
22 three months to even get off the ground.

23 And what we would respectfully ask the court is that
24 the government be given a deadline, a realistic deadline, which
25 I believe would be in the neighborhood of four weeks, to

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1 shepherd that process and to make sure that everything is up
2 and running, not only on CACI, but that everything has been
3 transferred to the EPIQ system; and, if they don't, some form
4 of sanction imposed by the court. It is really quite unusual
5 in my experience to be waiting three months before getting one
6 electronic document. Case 1:07-cr-00220-BSJ Document 40-4 Filed 04/24/2008 Page 10 of 12

7 And if I could add one other thing into the mix,
8 another reason that Mr. Barnaba is concerned, there is a D&O
9 liability insurance policy involving this case, your Honor, and
10 Mr. Barnaba is benefiting from that, but it will run out at
11 some point in time. And all of the defendants in the various
12 civil cases that are going on, the SEC case, the class action
13 case, there is another case out of Delaware, are potentially
14 able to draw from that pool. I am concerned that it has
15 already been three months before we have one document. I want
16 him to be able to have an effective defense and to be able to
17 prepare like he should.

18 THE COURT: I have a few reactions to that. First of
19 all, in a perfect world, perhaps the government would have
20 started to try to establish this Web site pre-indictment. They
21 didn't. But the point of the Web site, as I understand it, is
22 to make this discovery the most efficiently, and it is
23 certainly not the only way discovery could have been made. The
24 government has offered to give you the databases on DVD's, I
25 guess it is, or CD's and they have also offered to give you

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1 paper discovery. I wouldn't be surprised if you told me you
2 don't want that, that you want to wait for the Web site, but my
3 impression is everybody is working as fast as they can, and it
4 is your choice to wait for the Web site, Mr. Wisenberg.

5 MR. WISENBERG: I actually am not aware that paper
6 discovery had been offered, but you are right, your Honor, a
7 system that is commonly used in litigation when somebody is
8 saying we have seven million documents.

9 THE COURT: I completely understand. I am just saying
10 that if you want the system, you may have to wait longer than
11 you would normally have to wait, and I don't believe that
12 anybody is dragging their feet here. Okay? Thanks. You are
13 on record.

14 MR. WISENBERG: Thank you, your Honor.

15 THE COURT: Anything else?

16 MS. CANTWELL: Your Honor, I think Mr. Wisenberg at
17 the last conference mentioned that he was going to file a
18 motion. We have discussed the motion. I think he has a
19 proposed schedule which is acceptable to the government.

20 THE COURT: Okay. What's the motion, Mr. Wisenberg?

21 MR. WISENBERG: It's going to be a motion to recuse
22 AUSA Cantwell. We expect to file it by close of business
23 Tuesday, which is the 17th of July. Ms. Cantwell, the
24 government, would have the opportunity to reply by August 17
25 and -- to respond, and then we have -- we will come up with

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1 some acceptable period for us to reply, if necessary, for
2 Mr. Barnaba, too, and I will put that in the letter and send it
3 to your Honor with the permission of the court.

4 THE COURT: Sure.

5 You have all agreed on October 11? What time, Denise?

6 THE DEPUTY CLERK: 2 p.m. Case 1:07-cr-00220-BSJ Document 40-4 Filed 04/24/2008 Page 12 of 12

7 THE COURT: We will have our next conference.

8 THE DEPUTY CLERK: Sorry, 4.

9 THE COURT: We will have our next conference October
10 11 at 4 p.m. And at that point I am sure we will hear what
11 progress has been made by the government. Hopefully there will
12 be something to report. And the defendants equally can advise
13 me how they are doing with respect to being able to get some
14 meaningful discovery here.

15 I am going to exclude the time from today through that
16 date so that we can continue this discovery process under the
17 interests of justice exception. I am not going to put the
18 government under any deadlines at this conference. We will see
19 how the progress goes.

20 So I will see everybody October 11 unless there are
21 any other applications.

22 Ms. Cantwell?

23 MS. CANTWELL: Not from the government, no.

24 THE COURT: Any of the defendants?

25 MR. ABRAMOWITZ: No, your Honor.