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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,) CR-11-00471-DLJ
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) NOVEMBER 1, 2011
)
COLLINS, ET AL,) PAGES 1-20
)
DEFENDANT.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
UNITED STATES BY: HANLEY CHEW
MATTHEW PARELLA
150 ALMADEN BLVD, STE 900
SAN JOSE, CA 95113

FOR THE DEFENDANT: NOLAN, ARMSTRONG, BARTON, LLP
COVELLI BY: DAN BARTON
600 UNIVERSITY AVENUE
PALO ALTO, CA 94301

(APPEARANCES CONTINUED ON NEXT PAGE.)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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COOPER BY: MICHAEL WHELAN, JR.
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DOWNEY BY: JOHN HAMASAKI
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7 FOR THE DEFENDANT: STANLEY COHEN & ASSOCIATES
HAEFER BY: RANDOLPH DAAR
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13 FOR THE DEFENDANT: LAW OFFICES OF OMAR FIGUEROA
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FOR THE DEFENDANT: ATTORNEY AT LAW
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FOR THE DEFENDANT: ATTORNEY AT LAW
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FOR THE DEFENDANT: ATTORNEY AT LAW
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FOR THE DEFENDANT: LAW OFFICE OF GREGORY BENTLEY
VO BY: GREAGORY BENTLEY
ALEXIS BRIGGS
506 BROADWAY
SAN FRANCISCO, CA 94133

1 SAN JOSE, CALIFORNIA NOVEMBER 1, 2011

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE CLERK: CALLING CRIMINAL ACTION
6 11-00471.

7 UNITED STATES V. DENNIS COLLINS.

8 IF THAT ATTORNEY WOULD STATE THEIR
9 APPEARANCE, OR SOMEONE APPEARING FOR HIM.

10 MR. CHEW: GOOD MORNING, YOUR HONOR.

11 HANLEY CHEW APPEARING FOR THE
12 UNITED STATES GOVERNMENT.

13 MATTHEW PARELLA IS ALSO A PROSECUTOR ON
14 THIS CASE BUT HE IS UNAVAILABLE AS HE'S IN TRIAL
15 BEFORE JUDGE WHYTE.

16 THE COURT: OKAY.

17 THE CLERK: CHRISTOPHER COOPER.

18 MR. WHELAN: YES, GOOD MORNING.

19 MICHAEL WHELAN, W-H-E-L-A-N, ON BEHALF OF
20 MR. COOPER WHOSE PRESENCE HAS BEEN WAIVED.

21 THE COURT: ALL RIGHT.

22 THE CLERK: JOSHUA COVELLI.

23 MR. BARTON: DAN BARTON APPEARING FOR
24 TOM NOLAN ON BEHALF OF MR. COVELLI WHO IS PRESENT
25 IN COURT, OUT OF CUSTODY.

1 THE CLERK: KEITH WILSON DOWNEY.

2 MR. HAMASAKI: GOOD MORNING.

3 JOHN HAMASAKI, H-A-M-A-S-A-K-I, ON BEHALF
4 OF MR. DOWNEY WHOSE PRESENCE HAS BEEN WAIVED.

5 THE CLERK: MERCEDES HAEFER.

6 MR. DAAR: RANDOLPH DAAR APPEARING ALSO
7 FOR CO-COUNSEL STANLEY COHEN. HER APPEARANCE HAS
8 LIKewise BEEN WAIVED.

9 GOOD MORNING, YOUR HONOR.

10 THE CLERK: DONALD HUSBAND.

11 MR. VIZZI: EAN VIZZI APPEARING FOR
12 MR. HUSBAND WHOSE PRESENCE HAS BEEN WAIVED.

13 THE CLERK: VINCENT CHARLES KERSHAW.

14 MR. FIGUEROA: GOOD MORNING, YOUR HONOR.

15 OMAR FIGUEROA APPEARING ON BEHALF OF
16 VINCENT CHARLES KERSHAW WHO IS PRESENT OUT OF
17 CUSTODY.

18 THE CLERK: ETHAN HAINDL MILES.

19 MR. ARCHER: GOOD MORNING, YOUR HONOR.

20 GRAHAM ARCHER FOR MR. MILES WHO IS
21 PRESENT OUT OF CUSTODY.

22 THE CLERK: JAMES MURPHY.

23 MR. FONG: GOOD MORNING, YOUR HONOR.

24 JERRY FONG APPEARING SPECIALLY FOR BOB
25 CAREY ON BEHALF OF MR. MURPHY WHOSE PRESENCE HAS

1 BEEN WAIVED.

2 THE CLERK: DREW ALAN PHILLIPS.

3 MS. MEIERHENRY: GOOD MORNING,
4 YOUR HONOR.

5 DENA MEIERHENRY ON BEHALF OF MR. PHILLIPS
6 WHO IS PRESENT IN THE COURTROOM OUT OF CUSTODY.

7 THE CLERK: JEFFREY PUGLISI.

8 MR. LUECK: GOOD MORNING, YOUR HONOR.

9 JOHN LUECK ON BEHALF OF MR. PUGLISI WHO
10 IS PRESENT OUT OF CUSTODY IN COURT.

11 THE CLERK: DANIEL SULLIVAN.

12 MS. SPENCER: GOOD MORNING, YOUR HONOR.

13 MICHELLE SPENCER APPEARING FOR
14 MR. SULLIVAN WHOSE APPEARANCE HAS BEEN WAIVED.

15 THE CLERK: TRACY ANN VALENZUELA.

16 MR. THOMPSON: JAMES MCNAIR THOMPSON
17 APPEARING ON BEHALF OF MS. VALENZUELA WHO IS
18 PRESENT OUT OF CUSTODY.

19 THE CLERK: CHRISTOPHER VO.

20 MS. BRIGGS: GOOD MORNING, YOUR HONOR.

21 ALEXIS BRIGGS FOR MR. VO WHO IS OUT OF
22 CUSTODY. HIS APPEARANCE HAS BEEN WAIVED.

23 HE'S ALSO BEING REPRESENTED BY CO-COUNSEL
24 GREG BENTLEY WHO IS APPEARING AS SOON AS HIS LOGIN
25 INFORMATION IS AVAILABLE ON ECF.

1 THE COURT: IS MR. COLLINS HERE?

2 THE CLERK: HIS APPEARANCE HAS BEEN
3 WAIVED.

4 THE COURT: WE HAVE THE RECORD AS
5 PETER LEEMING AS HIS ATTORNEY.

6 MR. FONG: I WILL BE GLAD TO MAKE A
7 SPECIAL APPEARANCE ON BEHALF OF MR. LEEMING.

8 THE COURT: YES.

9 THANK YOU, MR. FONG.

10 THEN I THINK WHAT WE HAVE TO START WITH,
11 I'LL GIVE EVERYBODY AN OPPORTUNITY TO BE HEARD
12 ALONG THE WAY.

13 LET'S START WITH YOU MR. CHEW.

14 AND I WANT TO HAVE A REPORT NOW,
15 OBVIOUSLY IN TERMS OF THE STATUS OF DISCOVERY IN
16 THIS MATTER, NOT ONLY THE STATUS WITH REFERENCE TO
17 COMMON ISSUES THAT MIGHT BE SUBJECT MATTER
18 DISCOVERY BUT ALSO INDIVIDUAL DEFENDANT DISCOVERY
19 THAT MAY BE -- SO I WOULD LIKE TO HAVE A REPORT AS
20 TO THAT.

21 MR. CHEW: YES, YOUR HONOR.

22 TO BEGIN WITH, THE INDIVIDUAL DISCOVERY
23 THAT IS THE DISCOVERY THAT'S SPECIFIC TO EACH
24 INDIVIDUAL DEFENDANT, HAS BY AND LARGE BEEN
25 PRODUCED.

1 WHAT WE ARE DOING NOW IS WE ARE PRODUCING
2 THE ELECTRONIC DISCOVERY, WHICH IS CONSIDERABLE.

3 THAT DISCOVERY INCLUDES THE CONTENTS OF
4 TWO ELECTRONIC SERVERS AND IT ALSO INCLUDES
5 APPROXIMATELY, I THINK 16 OR 17 PERSONAL COMPUTERS.
6 IT INVOLVES ABOUT APPROXIMATELY 9 OR 10 TERABYTES
7 OF DATA WHICH ARE SEVERAL THOUSAND PAGES OF
8 DOCUMENTS.

9 THE STATUS IS THIS: THE DEFENSE HAVE
10 AGREED TO PRODUCE A -- I'M SORRY, HAVE AGREED UPON
11 A DISCOVERY COORDINATOR BY THE NAME OF RUSS AOKI.

12 THE GOVERNMENT HAS BEEN PRODUCING COMMON
13 DISCOVERY TO MR. AOKI AND MR. AOKI WILL DISTRIBUTE
14 IT TO ALL THE INDIVIDUALS OR MAKE IT AVAILABLE TO
15 THE INDIVIDUAL DEFENDANTS.

16 WHERE WE ARE NOW IS WE ARE PRODUCING
17 ELECTRONIC DISCOVERY, MR. AOKI HAS PROVIDED THE
18 GOVERNMENT WITH SEVERAL HARD DRIVES, I BELIEVE 11
19 OVER 12. AND THE GOVERNMENT IS PROCESSING THE
20 INFORMATION IT HAS COLLECTED IN THIS CASE, THE
21 ELECTRONIC DISCOVERY ON THOSE HARD DRIVES, AND WILL
22 BE PRODUCING THEM TO MR. AOKI FOR DISTRIBUTION TO
23 THE DEFENDANTS.

24 WE ANTICIPATE THAT THE PROCESS OF HAVING
25 THE HARD DRIVES PROCESSED AND SENT BACK TO

1 DEFENDANTS WILL BE COMPLETED BY THE END OF NOVEMBER
2 AND EARLY DECEMBER AT THE LATEST.

3 THE COURT: YOU SAY THAT YOU RECEIVED A
4 COMMUNICATION FROM THE COLLECTIVE DEFENDANTS, AS IT
5 WERE, THAT MR. AOKI WILL BE THE POINT MAN FOR THE
6 DISCOVERY AS TO THE DISTRIBUTION TO ALL THE
7 DEFENDANTS.

8 MR. CHEW: THAT'S CORRECT, YOUR HONOR.

9 THE COURT: IS THERE SOMEONE WHO IS --
10 FROM THE STANDPOINT OF THE DEFENDANTS, IS THERE
11 SOMEONE WHO IS TAKING THE LEAD AS FAR AS DISCOVERY
12 ISSUES ARE CONCERNED?

13 MR. WHELAN: MR. NOLAN'S OFFICE, AND
14 SOMEONE WHO IS HERE FOR MR. NOLAN, IS TAKING THE
15 LEAD WITH RELATION TO MR. AOKI.

16 THE COURT: MR. BARTON?

17 MR. BARTON: YES.

18 THE COURT: WILL YOU GIVE ME A REPORT IN
19 TERMS OF WHAT'S HAPPENING AS FAR AS YOU ARE
20 CONCERNED?

21 MR. BARTON: I UNDERSTAND THERE'S A
22 DISCOVERY COORDINATOR WHO IS WORKING WITH THE U.S.
23 ATTORNEY FOR DISCOVERY TO BE PROVIDED.

24 I DON'T HAVE ANY FURTHER INFORMATION.

25 THE COURT: OKAY.

1 MR. FONG: OH, YOUR HONOR, FOR THE RECORD
2 I SEE THAT MR. LEEMING HAS APPEARED.

3 THE COURT: MR. LEEMING IS NOW HERE AND
4 SO MR. FONG WE APPRECIATE YOUR ASSISTANCE, BUT WE
5 DON'T NEED.

6 SO WE ARE IN THE PROCESS NOW OF CARRYING
7 OUT THE STATUS CONFERENCE.

8 MR. LEEMING: AND GOOD MORNING,
9 YOUR HONOR.

10 I APOLOGIZE, THERE WAS TRAFFIC.

11 I HAVE SPOKEN TO MR. AOKI MYSELF. HE IS
12 EXPECTING THE DELIVERY OF THE VARIOUS HARD DRIVES,
13 BUT I BELIEVE STIPULATIONS HAVE BEEN ENTERED BY ALL
14 PARTIES, ALMOST ALL PARTIES. AND HE IS A
15 EXPERIENCED DISCOVERY COORDINATOR WHO SEEMS TO BE
16 UNIQUELY QUALIFIED FOR THIS.

17 THE COURT: I SAW THE PAPERS.

18 I AGREE. THAT IS A VERY USEFUL KIND OF
19 ENDEAVOR BY MR. AOKI AND ON YOUR BEHALF.

20 MR. CHEW: YOUR HONOR, THERE IS ONE
21 MATTER THAT RELATES TO ONE OF THE INDIVIDUAL
22 DEFENDANTS.

23 WE HAVE RECEIVED, OR MR. AOKI AND THE
24 GOVERNMENT HAVE RECEIVED, WRITTEN AUTHORIZATIONS TO
25 PRODUCE THE PERSONAL COMPUTERS OF INDIVIDUAL

1 DEFENDANTS TO MR. AOKI. WE RECEIVED ALL BUT ONE.

2 MR. CAREY HAS INDICATED THAT HE WILL BE
3 GETTING US A WRITTEN AUTHORIZATION CONCERNING
4 TURNING OVER HIS CLIENTS, THE CONTENTS OF HIS
5 CLIENT'S PERSONAL COMPUTER TO MR. AOKI AND TO -- TO
6 MR. AOKI, AND THAT'S THE ONLY -- THAT'S THE ONLY
7 ISSUE THAT I'M CURRENTLY AWARE OF CONCERNING THE
8 PRODUCTION OF ELECTRONIC DISCOVERY.

9 THE COURT: THANK YOU.

10 MR. FONG, DO YOU WANT TO FOLLOW UP ON
11 THAT?

12 MR. FONG: TO BE HONEST, YOUR HONOR, I'M
13 NOT AWARE OF THE SITUATION BUT I'M SURE WHAT
14 COUNSEL SAID IS ABSOLUTELY ACCURATE AND I'M SURE
15 THAT WILL BE PROVIDED FORTHWITH.

16 I'LL MAKE SURE.

17 THE COURT: IF YOU WOULD, PLEASE.

18 ALL RIGHT. IT APPEARS TO ME, AND THEN WE
19 WILL OPEN THIS UP IN TERMS OF ANY INDIVIDUAL
20 COUNSEL WHO WISHES TO BE HEARD WITH REFERENCE TO
21 WHERE WE ARE, BUT MY ASSESSMENT IS THAT WHAT WE
22 NEED TO DO IS TO CARRY OUT THE PROCESS OF DISCOVERY
23 THAT'S GOING ON RIGHT NOW.

24 AND OBVIOUSLY EVERYONE NEEDS TO REVIEW
25 THAT MATERIAL IN TERMS OF WHAT IT MEANS TO THEIR

1 CLIENT. THEN WE SHOULD BE BACK HERE ON A STATUS
2 CONFERENCE TO SEE TO IT THAT ALL DISCOVERY HAS BEEN
3 ACCOMPLISHED AND MAKE SURE THAT WILL HAPPEN, AND
4 I'M SURE YOU DO TOO, AND THAT YOU ALL GET A CHANCE
5 TO REVIEW THE DISCOVERY.

6 THEN WHAT I WOULD LIKE TO DO AT THE
7 STATUS CONFERENCE IS AFTER WE HAVE HAD THAT PROCESS
8 OF ACTUALLY GETTING FAMILIAR WITH THE GOVERNMENT'S
9 CASE, IN ESSENCE, THAT WE THEN OPEN THE ISSUE IN
10 TERMS OF ANY MOTIONS THAT MAY BE THERE WITH
11 REFERENCE TO DISCOVERY OR ANY OTHER LEGAL ISSUE.

12 SO WE WANT TO GET IT ON TRACK FOR A
13 MOTION KIND OF PROCESS AND FOR THE LITIGATION TRACK
14 IN THIS MATTER.

15 SO THAT MEANS THAT WE SHOULD BE BACK HERE
16 IN ANOTHER MONTH OR SO AFTER THE DISCOVERY PROCESS
17 HAS BEEN PLAYED OUT AND THEN WE CAN GET AN
18 ASSESSMENT FROM ALL OF YOU AS TO WHERE YOU SEE THE
19 LITIGATION TRACK GOING.

20 NOW GIVEN THAT BACKGROUND IS THERE ANY
21 INDIVIDUAL COUNSEL THAT WOULD LIKE TO BE HEARD WITH
22 REFERENCE TO THIS ISSUE -- THOSE ISSUES?

23 MR. WHELAN: I WOULD LIKE -- ON BEHALF OF
24 MR. COOPER, AGAIN, I'M MICHAEL WHELAN FOR
25 MR. COOPER.

1 I HAVE SERVED ON THE GOVERNMENT AN
2 INITIAL, SPECIFIC -- WELL, A GENERAL AND SPECIFIC
3 DISCOVERY DEMAND. AND I JUST WANT TO BRIEFLY
4 ADVISE THE COURT OF ONE BREWING ISSUE THAT IS
5 LIKELY TO BE BEFORE THE COURT IN THE FUTURE.

6 THE SPECIFIC DISCOVERY DEMAND IS TAILORED
7 TOWARDS OBTAINING INFORMATION THAT IS THE BASIS FOR
8 THE GOVERNMENT'S CLAIM OF THE AMOUNT OF LOSS IN THE
9 CASE. THE AMOUNT OF LOSS THAT PAYPAL CLAIMS TO
10 HAVE --

11 THE COURT: WELL, DAMAGE IS AN ISSUE
12 OBVIOUSLY.

13 MR. WHELAN: IT'S A BIG ISSUE.

14 THE COURT: AND THAT OBVIOUSLY IS AN
15 ISSUE FOR THE DISCOVERY PROCESS AND FOR THE
16 LITIGATION PROCESS.

17 SO NO PROBLEM ABOUT THAT.

18 IT APPEARS TO ME THAT THE QUESTION IS
19 WHAT DISCOVERY IS PROVIDED. AND THEN YOUR
20 ASSESSMENT AT THAT POINT AS TO WHETHER OR NOT
21 THERE'S ANY MOTION PRACTICE AND THEN FOLLOW THROUGH
22 ON THAT

23 AND MR. CHEW AND PARELLA HAVE CONSIDERED
24 THAT INITIAL, SPECIFIC DISCOVERY REQUESTS FOR
25 INFORMATION TAILORED TO THAT ISSUE AND HAVE

1 CONCLUDED THAT THE GOVERNMENT IS NOT IN POSSESSION
2 OF ANY OF THE INFORMATION THAT I'VE REQUESTED AND
3 THEIR PREFERENCE AND POSITION IS THAT IT NEEDS TO
4 BE SUBPOENAED.

5 SO I WILL BE GOING THROUGH THE SUBPOENA
6 PROCESS SOONER THAN LATER AND EXPECT THAT PAYPAL
7 WOULD PROBABLY BE MAKING AN APPEARANCE POTENTIALLY
8 TO CONTEST OR NOT, I DON'T KNOW.

9 BUT I WANTED THE COURT TO KNOW THAT THAT
10 IS A FAIRLY BIG ISSUE.

11 THE COURT: AS I SAID, I SEE -- SO WE
12 UNDERSTAND WHERE WE ARE, I SEE DAMAGE AS A SPECIFIC
13 ISSUE IN THE CASE. AND THAT MEANS THAT THE
14 DISCOVERY WITH REFERENCE TO THAT ISSUE IS
15 PERTINENT. AND IF THEY DON'T HAVE ANY INFORMATION
16 ON DAMAGE, YOU PROBABLY ARE IN GOOD SHAPE.

17 MR. WHELAN: I COMPLETELY AGREE.

18 THE COURT: THEN I THINK THAT'S GOING TO
19 CHANGE.

20 BUT WHAT I THINK YOU ARE TALKING ABOUT IS
21 PRECISELY WHERE I WANT TO GO IS TO MAKE SURE ALL
22 THE AVENUES OF DISCOVERY HAVE BEEN FOLLOWED
23 THROUGH.

24 MR. WHELAN: THAT'S CORRECT.

25 THANK YOU.

1 MR. LEEMING: THERE'S ONE OTHER THING,
2 YOUR HONOR, I WANTED TO ADDRESS IN TERMS OF THE
3 TIMING.

4 ONCE AGAIN, PETER LEEMING FOR MR. COLLINS
5 WHO IS NOT PRESENT.

6 FOR EXAMPLE, FOR MY CLIENT THERE WAS
7 APPROXIMATELY A TERABYTE OF INFORMATION SEIZED,
8 WHICH IS A LOT. LET'S JUST CALL IT A LOT.

9 IN THAT DISK OR COPIES OF THE DISKS IS A
10 LOT OF MATERIAL THAT DOESN'T BEAR ON THIS, SUCH AS
11 HE PREPARES TAX RETURNS FOR MEMBERS OF HIS FAMILY,
12 FOR EXAMPLE.

13 I ASKED MR. AOKI BEFORE WE SHARE ANY DATA
14 RELATING TO THIS, IF WE DO, TO GO THROUGH THAT SET
15 OF DISKS WHEN HE RECEIVES IT AND ISOLATE MATERIAL
16 THAT MAY BE PERTINENT TO THIS MATTER WHICH I HAVE
17 BEEN ADVISED MIGHT TAKE A WHILE.

18 SO JUST -- YOUR HONOR MENTIONED A MONTH.
19 I THINK IT MAY BE A LITTLE LONGER THAN A MONTH.

20 THE COURT: THAT DOESN'T MEAN -- I SAID
21 THAT AS AN APPROXIMATION, OBVIOUSLY, BECAUSE WE
22 NEED TO GO THROUGH ALL OF THIS AND IT MAY TAKE SOME
23 MORE TIME.

24 IF YOU HAVE THIS KIND OF SITUATION, IF
25 THERE'S BEEN A SEIZURE OF SOME PIECE OF EQUIPMENT

1 THAT IT CARRIES WITH IT INFORMATION ABOUT THIS CASE
2 AND ALSO INFORMATION ABOUT OTHER MATTERS, THEN THAT
3 HAS TO BE SEGREGATED OUT AND THE GOVERNMENT CAN'T
4 HOLD SOME INFORMATION THAT DOESN'T HAVE ANYTHING TO
5 DO WITH THIS CASE. THEY HAVE TO TAKE STEPS TO MAKE
6 SURE THAT IT GETS BACK.

7 SO I THINK THAT'S A PART OF THE DISCOVERY
8 PROCESS IN A SENSE IN TERMS OF SEEING TO IT THAT
9 ALL THE -- THE ONLY INFORMATION THAT THE GOVERNMENT
10 RETAINS IS THAT WHICH IS RELATED TO THE CASE

11 MR. LEEMING: EXACTLY.

12 THE COURT: ALL RIGHT.

13 ANYBODY ELSE?

14 I KNOW THIS IS -- MAY NOT BE THE LAST
15 TIME, BUT I THINK THAT DECEMBER 13TH -- LET'S DO
16 DECEMBER 13TH AT 9:00.

17 MR. HAMASAKI: JOHN HAMASAKI ON BEHALF OF
18 KEITH DOWNEY.

19 WE WERE TALKING ABOUT JANUARY 24TH.

20 THE COURT: I'M -- I JUST WANT TO KEEP IT
21 MOVING.

22 SORRY, BUT I THINK I GET A LITTLE
23 HESITANT WHEN WE TALK ABOUT 2012. I MEAN -- SO,
24 ALL RIGHT. BUT JANUARY 24TH IS THE SUGGESTED DATE.
25 OKAY. JANUARY 24TH IS A TUESDAY. THAT'S THE

1 PRESENT INCLINATION.

2 IF WE ARE GOING TO BE CHANGING DAYS OR
3 ANYTHING ELSE WE CAN TALK ABOUT THAT LATER ON.
4 RIGHT NOW WE ARE GOING TO CONTINUE THIS MATTER TO
5 JANUARY 24TH AT 9:00.

6 RIGHT NOW THERE ARE A NUMBER OF PEOPLE
7 WHO HAVE BEEN EXCUSED BY WAY OF STIPULATION AND BY
8 WAY OF PAPERS FILED WITH THE COURT. OTHER PERSONS
9 ARE HERE WHO HAVE MADE AN APPEARANCE TODAY, AND ALL
10 THOSE WHO HAVE MADE PHYSICAL APPEARANCES TODAY ARE
11 ORDERED TO BE BACK HERE ON JANUARY 24TH AT 9:00.

12 NOW GIVEN THE FACT THAT THERE IS
13 EXTENSIVE DISCOVERY IN THIS MATTER AND IT NEEDS TO
14 BE REVIEWED BY COUNSEL AND WE NEED TO GET INTO A
15 POSITION WHERE WE CAN PREPARE ANY MOTION TRACK OR
16 LITIGATION TRACK IN THIS CASE FOR CONTINUITY OF
17 COUNSEL AND EFFECTIVENESS OF REPRESENTATION OF THIS
18 MATTER, I WILL FIND IN THE INTEREST OF JUSTICE THAT
19 IT WILL BE EXCLUDABLE TIME UNTIL JANUARY 24, 2012,
20 AT 9:00.

21 THE COURT: ALL RIGHT.

22 THANK YOU.

23 MR. LEUCK: YOUR HONOR, MAY I JUST -- ONE
24 ISSUE NOT RELATED TO DISCOVERY SPECIFIC TO
25 MR. PUGLISI.

1 MR. PUGLISI INFORMS ME -- FIRST OF ALL,
2 JOHN LUECK ON HIS BEHALF. HE INFORMS HE HAS DONE A
3 DOZEN CLEAN DRUG TESTS AND HE WOULD ASK TO BE
4 RELIEVED FROM FUTURE DRUG TESTING.

5 THE COURT: YOU MEAN IN TERMS OF A
6 CONDITION OF RELEASE.

7 MR. LEUCK: IT'S A CONDITION OF HIS
8 RELEASE.

9 THE COURT: I'M NOT GOING TO TAKE OVER
10 HIS RELEASE CONDITIONS.

11 MR. LEUCK: THANK YOU.

12 THE COURT: THAT'S SOMETHING THAT IS
13 REALLY DONE THROUGH PRETRIAL. YOU START WITH THAT
14 FIRST.

15 THE CLERK: YOU GO BACK TO THE
16 MAGISTRATE.

17 THE COURT: IF IT'S GOING TO COME TO THE
18 COURT'S ATTENTION, YOU CAN DO THAT, BUT RIGHT NOW I
19 SEE NO REASON WHY I SHOULD GET INVOLVED WITH THAT
20 DECISION MAKING PROCESS.

21 MR. CHEW: YOUR HONOR, THERE IS ONE OTHER
22 QUICK MATTER, I APOLOGIZE FOR NOT BRINGING IT UP
23 SOONER. I THINK THE GOVERNMENT AND THE PARTIES
24 DISCUSSED THIS BRIEFLY.

25 THE GOVERNMENT WOULD ALSO MOVE TO HAVE

1 THIS CASE DECLARED AS A COMPLEX CASE GIVEN THE
2 NUMBER OF DEFENDANTS.

3 THE COURT: I ALLUDED TO THAT IN A SENSE
4 IN TERMS OF THE COMPLICATION.

5 OBVIOUSLY, I DON'T KNOW WHETHER EVERY
6 CASE WITH A TERABYTE OF INFORMATION, OR WHATEVER
7 THAT IS, MAKES IT COMPLEX. BUT IT SEEMS TO ME THAT
8 THIS IS CLEARLY THE KIND OF A CASE THAT IS DEEMED
9 TO BE COMPLEX.

10 DO ALL COUNSEL AGREE WITH THAT?

11 I WILL SO FIND AND WE'LL PROCEED ON THAT
12 BASIS.

13 MR. CHEW: THANK YOU, YOUR HONOR.

14 (WHEREUPON, THE PROCEEDINGS IN THIS
15 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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9 Attorneys for Plaintiff

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14
15 UNITED STATES OF AMERICA,)
16 Plaintiff,)
17 v.)
18 DENNIS COLLINS, CHRISTOPHER)
COOPER, JOSHUA COVELLI, KEITH)
19 DOWNEY, MERCEDES RENEE)
HAEFER, DONALD HUSBAND,)
20 VINCENT CHARLES KERSHAW,)
ETHAN MILES, JAMES MURPHY,)
21 DREW ALAN PHILLIPS, JEFFREY)
PUGLISI, DANIEL SULLIVAN, TRACY)
22 ANN VALENZUELA, and)
CHRISTOPHER VO,)
23 Defendants.)
24)
25)

No. CR 11-00471-DLJ (PSG)
MOTION FOR LEAVE TO FILE MOTION
FOR RECONSIDERATION AND
~~PROPOSED~~ ORDER

26 **I. INTRODUCTION**

27 On March 16, 2012, the Court issued its order on defendants’ motions to compel the
28 government to take certain actions regarding the electronic information that it had seized

1 pursuant to search warrants executed on January 27 and 28, 2011. In that order, the Court stated:
2 “In sum, . . . the government has no claim to data outside the scope of the warrant. By some
3 other reasonable effort that minimizes the government’s exposure to non-targeted documents, no
4 later than 30 days from the date of this order, the government must endeavor to give back to the
5 defendants data outside the scope of the warrants.” March 16, 2012 Order, at 12. On or about
6 April 9, 2012, the Court extended the compliance deadline for its March 16, 2012 Order to May
7 16, 2012.

8 The government has substantially complied with the other aspects of the Court’s order,
9 that is, it has returned to defense counsel all digital devices that were outside the scope of the
10 search warrants, produced complete forensic copies of all the computers in its possession either
11 to defense counsel or to the defense electronic discovery coordinator, Russ Aoki, and, with the
12 exception of the electronic information seized from defendant Joshua Covelli, has provided
13 copies, segregated by defendant, of the electronic information determined to fall within the scope
14 of the search warrants to Mr. Aoki to be shared by all defendants and defense counsel. The
15 Silicon Valley Regional Computer Forensics Laboratory (SVRCFL) has communicated that it is
16 working to complete the segregation of Covelli’s electronic information and anticipates
17 completion by next week. Upon completion, Covelli’s data will be sent to Mr. Aoki. At that
18 point, Mr. Aoki will have all the “within scope” data from each of the defendants.

19 In preparing to comply with the “deletion/destruction” aspect of the Court’s March 16,
20 2012 Order, the government has met with representatives from the SVRCFL to examine the
21 issues related to the deletion of the electronic information that purportedly falls outside of the
22 search warrants from the forensic images of the computers and digital devices seized from
23 defendants. The SVRCFL has communicated that there are significant technical difficulties
24 related to the proposed deletion.

25 First, the SVRCFL has determined that co-mingled data, such as Windows system
26 registry files and file fragments in the unallocated space of a hard drive, cannot be stripped or
27 edited without fundamentally altering the original evidence. Second, the SVRCFL has also
28 determined that the broad deletion of data may render many files useless and unreadable by

1 removing the programs upon which they depend. Finally, the SVRCFL has further encountered
2 difficulty in determining what constitutes data within the scope of the warrants, for example,
3 dates and times associated with each file item in a file system may be used to establish the
4 identity of the user who was utilizing the computer when an computer-related offense was
5 created. The government plans to set out these difficulties in greater detail through the
6 declarations of technical experts in its motion for reconsideration. The government is continuing
7 to communicate with its experts and anticipates being prepared to file its motion for
8 reconsideration by June 1, 2012. Therefore, the government respectfully seeks leave to file a
9 motion for reconsideration of the “deletion/destruction” portion of the Court’s March 16, 2012
10 Order. As part of that same request, the government asks that compliance with the
11 “deletion/destruction” portion of the Court’s March 16, 2012 Order be stayed until further order
12 of the Court.

13 **II. ARGUMENT**

14 Civil L.R. 7-9(a)¹ states that:

15 Before the entry of a judgment adjudicating all of the claims and the rights and
16 liabilities of all the parties in a case, any party may make a motion before a Judge
17 requesting that the Judge grant the party leave to file a motion for reconsideration
18 of any interlocutory order made by that Judge on any ground set forth in Civil
19 L.R. 7-9(b). No party may notice a motion for reconsideration without first
20 obtaining leave of Court to file the motion.

21 Civil L.R. 7-9(b) states that:

22 The moving party must specifically show:

- 23 (1) That at the time of the motion for leave, a material difference in fact or law exists
24 from that which was presented to the Court before entry of the interlocutory order for
25 which reconsideration is sought. The party must also show that in the exercise of
26 reasonable diligence the party applying for reconsideration did not know such fact or law
27 at the time of the interlocutory order; or
- 28 (2) The emergence of new material facts or a change of law occurring after the time of
such order; or
- (3) A manifest failure by the Court to consider material facts or dispositive legal
arguments which were presented to the Court before such interlocutory order.

¹The Civil Local Rules are made applicable by Crim. L.R., which states that “[t]he provisions of the Civil Local Rules of the Court shall apply to criminal actions and proceedings, except where they may be inconsistent with these criminal local rules, the Federal Rules of Criminal Procedure or provisions of law specifically applicable to criminal cases.

1 Civil L.R. 7-9(d) states:

2 Unless otherwise ordered by the assigned Judge, no response need be filed and no
3 hearing will be held concerning a motion for leave to file a motion to reconsider.
4 If the judge decides to order the filing of additional papers or that the matter
5 warrants a hearing, the judge will fix an appropriate schedule.

6 In the present case, the government's attempt to comply with the Court's March 16, 2012
7 Order has uncovered new material facts and issues that were not presented to the Court in the
8 earlier proceedings. Specifically, the SVRCFL has determined that there are multiple technical
9 issues related to the deletion of the electronic information purportedly outside the scope of the
10 warrants which will impact the integrity of the data. The government respectfully requests the
11 opportunity to present these issues for the Court's review in a motion for reconsideration.

12 In the event that the Court grants leave for the government to file a motion for
13 reconsideration, the government would propose the following briefing schedule. The
14 government will file its motion for reconsideration no later than June 7, 2012. The defendants
15 will file their response to the motion for reconsideration no later than June 21, 2012. The
16 government will file its reply, if any, no later than June 26, 2012. The motion for reconsideration
17 will be heard on June 28, 2012, or on another date convenient to the Court.

18 Defendants will suffer no prejudice from the Court's granting the government leave to
19 file a motion for reconsideration. The government has returned all digital devices that fall
20 outside the scope of the search warrants to defense counsel. The government has already
21 produced complete forensic copies of all the computers in its possession either to defense counsel
22 or the defense electronic discovery coordinator, Russ Aoki. The government has also provided a
23 copy of all the electronic information of all the defendants, other than Christopher Covelli, that
24 the government has determined falls within the scope of the search warrants, to Mr. Aoki to be
25 shared by defendants and defense counsel. Because of the large volume of the data in defendant
26 Covelli's computers, the government will be unable to complete the imaging of the electronic
27 information responsive to the search warrant for his residence for an additional two weeks. The
28 government will produce a copy that information to Mr. Aoki as soon as it become available. As

~~PROPOSED~~ ORDER

Having considered the government's request and finding good cause, IT IS HEREBY ORDERED that the government is granted to leave to file a motion for reconsideration of the Court's March 16, 2012 concerning the deletion/destruction of electronic information purportedly outside the scope of the search warrants. The government will file its motion for reconsideration no later than June 7, 2012. Defendants will file their response no later than June 21, 2012. The government will file its reply, if any, no later than June 26, 2012. The hearing on the government's motion for reconsideration will be held on June 28, 2012.

IT IS FURTHER ORDERED that compliance with the Court's March 16, 2012 Order be stayed pending further order of the Court.

IT IS SO ORDERED.

DATED: Oct 3, 2012


HONORABLE PAUL S. GREWAL
United States Magistrate Judge