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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SIDNEY GORDON,

4 Plaintiff,

5 v.

11 Cv. 9665 (JSR)

6 SONAR CAPITAL MANAGEMENT LLC,
7 et al.,

8 Defendants.

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9
10 February 17, 2012
12:00 p.m.

11 Before:

12 HON. JED S. RAKOFF

13 District Judge

14 APPEARANCES

15 SHAPIRO HABER & URMY LLP
Attorneys for Plaintiff
16 BY: EDWARD F. HABER

17 SEWARD & KISSEL LLP
Attorneys for Defendants Sonar and Druker
18 BY: JULIA C. SPIVACK
MICHAEL W. BROZ

19 DECHERT LLP
Attorneys for Defendant Freeman
20 BY: BENJAMIN E. ROSENBERG
21 DAVID S. HOFFNER

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1 (Case called)

2 THE DEPUTY CLERK: Will the parties please identify
3 themselves for the record.

4 MR. HABER: Good afternoon, your Honor. Edward Haber
5 for the plaintiff, Sidney Gordon. I have been admitted pro hac
6 by your Honor.

7 THE COURT: Good afternoon.

8 MR. ROSENBERG: Benjamin Rosenberg, along with
9 colleague David Hoffner from Dechert, on behalf of Mr. Noah
10 Freeman.

11 MS. SPIVACK: Julia Spivack, Seward & Kissell, with my
12 colleague Michael Broz, on behalf of Sonar Capital Management
13 and Neil Druker.

14 THE COURT: So in the original case management form
15 that I sent you I asked that this case be ready for trial in
16 June, and you wrote me back and said you didn't think it could
17 be ready for trial in October. And I am not yet convinced, but
18 let me hear anything further that you have to say in that
19 regard.

20 MR. HABER: Your Honor, just for clarification, the
21 original order that you entered, as you said, asked for the
22 trial to be ready in June. When the conference was rescheduled
23 till a month later till today, it was plaintiff's understanding
24 that your Honor wanted us to submit an order having the case
25 ready for trial five months from today as opposed to last

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1 month. In my letter to your Honor --

2 THE COURT: That's fair. But nothing like October.

3 MR. HABER: Plaintiffs have submitted a proposal to
4 you, your Honor, a case management order.

5 THE COURT: I'm sorry. My mistake. My law clerk gave
6 that to me and I missed it. So it's really defense counsel
7 that I need to hear from then.

8 MR. HABER: That's correct. Just so your Honor knows
9 just before we get there, we received, and I frankly did not
10 know whether I should file it, a somewhat strange notice of
11 filing a Chapter 7 by the last defendant in this case, which is
12 Primary Global. It was mailed to my office. They hadn't filed
13 a suggestion of bankruptcy in this court.

14 THE COURT: Let me see it.

15 Well, the first page has an interesting caption. It
16 reads United States District Court of California, Southern
17 District of New York, and it's true that the Southern District
18 of New York has a very broad view of its jurisdiction. But
19 then they attach the actual notice of bankruptcy filing in the
20 Northern District of California. So that would stay
21 automatically this proceeding. Of course, you can apply to the
22 bankruptcy court to lift the stay if you want to, but at least,
23 so far as I am concerned, I think we have to stay the case only
24 as to Primary Global, the rest will go forward.

25 MR. HABER: Plaintiff agrees, your Honor.

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1 THE COURT: Very good.

2 So let me hear from defense counsel.

3 MS. SPIVACK: After consideration of what we expect
4 that this case is going to entail, we are going to have to go
5 through a class certification motion, which I don't know when
6 plaintiff plans to make one, we are going to have to do extra
7 discovery in connection with that motion, and anticipating the
8 kind of cushion for discovery disputes and any other ancillary
9 motions that we may need to make, defendants jointly believe
10 that we need a little extra time than the original July date
11 that your Honor has requested. And we think the extra couple
12 months period will give us that time so we don't have to come
13 back and ask for an extension. It also sounds like your Honor
14 has a July schedule and August schedule that is filling up for
15 a trial date.

16 THE COURT: That may preclude you from having the
17 actual trial then. It won't preclude me from dealing with
18 discovery or motion practice. I have had cases, frankly, ten
19 times the size of this case come to trial within six months.
20 Obviously, we have highly professional firms here involved.

21 Why don't we do it this way. Let's take it item by
22 item and see where it comes out. I am looking at your form.
23 So, first, does anyone actually anticipate joining any
24 additional parties?

25 MR. HABER: It is conceivable, your Honor, in terms of

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1 investors in Sonar who conceivably could have received
2 distributions.

3 THE COURT: I will leave the May 30 date then that
4 your adversary and -- you had said May 31 so you're both
5 largely in agreement there.

6 Discovery. First request for production of documents
7 must be served by March 16. Interrogatories by March 16.

8 Now, there is a good example. Let me go to defense
9 counsel. Why in the world do you want to wait around till
10 March 16? For example, the only interrogatories that I permit
11 are the ones under local rule 33.3(a). Basically, they ask
12 your adversary for the names of persons with knowledge of the
13 transactions in issue. Some of that you get through the
14 required discovery anyway, but, presumably, you want to know
15 who the other side thinks has knowledge of these matters sooner
16 rather than later, don't you?

17 MS. SPIVACK: Yes, your Honor.

18 THE COURT: On a slow day, because the rule spells out
19 what those interrogatories consist of, it would take you maybe
20 two minutes to draft those interrogatories. So why wait around
21 till March 16?

22 MS. SPIVACK: Those are also the dates that plaintiff
23 had proposed and in the spirit of trying to compromise and get
24 an order to you.

25 THE COURT: Now you're stuck with me. Why don't we

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1 say March 1 for those.

2 MS. SPIVACK: Your Honor, also mentioned in the letter
3 that was sent out on Friday is the defendants plan on asking
4 your Honor for permission to make a motion to dismiss.

5 THE COURT: We will deal with that separately in a
6 minute, but we are not going to hold this up for that. If you
7 really want to get that done before discovery really gets
8 going, you will want to do it on an expedited schedule. If you
9 don't want to do it on an expedited schedule, then you will
10 have to deal with discovery and getting going.

11 So March 1 for first request for documents and for the
12 only interrogatories I permit, which are under the local rule.

13 Before we turn to experts and class certification, how
14 many fact witnesses does the plaintiff intend to propose?

15 MR. HABER: At this time I can only guess.

16 THE COURT: I understand that.

17 MR. HABER: I am going to guess probably in the half
18 dozen to nine range, but that is really just a guesstimate.
19 And part of that is there may be third party depositions, but
20 they may be mostly to obtain and authenticate documents.

21 THE COURT: How about defense counsel?

22 MR. ROSENBERG: At this point, given Mr. Freeman's
23 position and history and guilty plea, we don't intend to call
24 any fact witnesses.

25 MS. SPIVACK: Again, given the very early stages of

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1 this case, I can only guess half a dozen.

2 THE COURT: I understand this is a ballpark guess and
3 not binding on anyone, but it sounds like there is going to be
4 something like maybe a dozen depositions, probably not many
5 more. So I would think you could do that easily within April,
6 May and June.

7 Actually, I am not going to use the defendants' form
8 because I see you have put in all sorts of interesting stuff
9 about class certification that I don't think should be part of
10 this form. Let me just get out a clean version.

11 What kind of experts does the plaintiff contemplate?

12 MR. HABER: Right now the plaintiff would anticipate
13 damages experts.

14 THE COURT: One or more?

15 MR. HABER: Probably one, but I can't say yet.

16 THE COURT: None of this is binding. This is just to
17 give me an idea. But I think I would be very surprised in a
18 case like this that there would be more than one.

19 MR. HABER: So would I.

20 THE COURT: On the defense side, will there be more
21 than one?

22 MS. SPIVACK: There may be, your Honor. We may choose
23 to call a liability expert as well as a damages expert.

24 THE COURT: What would a liability expert be
25 testifying to?

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1 MS. SPIVACK: About the industry and what is normal
2 and accepted practices, whether people pursue certain
3 activities. I am speculating here, your Honor.

4 THE COURT: I am glad you are because I am sceptical
5 that such an expert would be permitted, but I can't say, of
6 course, not knowing more about the case.

7 MR. ROSENBERG: I anticipate there may be a damages
8 expert and also perhaps the same person to talk about the
9 materiality of certain information, when it came on to the
10 market, perhaps the nature of the trading of the stock. It may
11 be the same person, but it may be different.

12 THE COURT: I am sceptical about a materiality expert
13 too, but I'm not saying it's impossible.

14 I see no reason why plaintiff's expert cannot propound
15 his or her report and disclosures by June 29 and defendants'
16 experts by July 20.

17 MS. SPIVACK: If I may.

18 THE COURT: Yes.

19 MS. SPIVACK: One of the alterations to your order
20 that defendants have requested is a bifurcated process to
21 account for damages experts, and we have requested that we need
22 not designate or conduct discovery of the damages expert until
23 after the class certification motion has been decided.

24 THE COURT: When do you think you would be ready to
25 bring a class certification motion?

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1 MR. HABER: I have given that thought, your Honor. I
2 need to evaluate a little more whether or not there is anything
3 that would prevent me from bringing that motion very promptly,
4 and I don't know what the defendants would want.

5 THE COURT: I am not going to pressure you for an
6 exact date today, but it sounds like it is more likely than not
7 that you could bring that motion in the next two months.

8 MR. HABER: Oh, yes.

9 THE COURT: And then you would have a few weeks to
10 respond, and I am sure I can get that all decided before June
11 29, which is when plaintiff's expert disclosures are due. So I
12 don't think it changes the dates that we just set.

13 MS. SPIVACK: In the event, and I appreciate plaintiff
14 currently anticipates to file their motion promptly, and I
15 don't have any reason to believe they are not going to, but I
16 don't have any control over what they do, and I think it would
17 be more efficient to build into the order of process in the
18 event they don't make their motion until very late in the
19 process.

20 THE COURT: When I said two months, by his body
21 language he indicated for sure he was going to do it within two
22 months. He just wasn't sure he could do it in one month or
23 something like that.

24 Do I read you right?

25 MR. HABER: That's correct.

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1 THE COURT: So I don't see any need to do that.

2 So all depositions including any expert depositions
3 must be completed by July 30. All discovery to be completed by
4 August 6. Requests to admit by July 6. Moving papers on
5 summary judgment August 16, answering papers August 27, reply
6 papers August 31, and we will have a final pretrial conference
7 as well as oral argument on any summary judgment motion on,
8 let's look at September 7.

9 THE DEPUTY CLERK: September 7, a Friday, 4:30.

10 THE COURT: So the effect of that is that instead of
11 July, we have a ready for trial date on September 7. That's
12 when we will set the actual trial. My guess is it will be an
13 October or November trial, but the point of all this is to make
14 sure that when we set that date everything is cleared away and
15 there is nothing else to be done, and the only thing we have to
16 worry about is the schedule of the lawyers and other matters
17 but nothing further. So I think that's a reasonable
18 compromise.

19 MR. HABER: Can I make just one request? The dates
20 your Honor gave for the potential summary judgment motion
21 practice gives opposing parties 11 days to respond.

22 THE COURT: But they only have after the close of
23 discovery ten days to move.

24 MR. HABER: I understand. I was wondering whether we
25 could get a little bit more time to respond on summary judgment

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1 motions.

2 THE COURT: How much more do you want?

3 MR. HABER: Even just make it a total of two weeks
4 would be terrific.

5 THE COURT: That would be August 30. And then I will
6 give them for their reply papers, because there is Labor Day
7 and the summer, sill September 7, and we will change the final
8 pretrial conference to, let's look at September 14.

9 THE DEPUTY CLERK: September 14, 4:30.

10 THE COURT: So I have signed the case management plan.
11 It will be available for both sides. I think it is a fair
12 compromise between the July date that the Court had wanted and
13 the October date that defense wanted.

14 Anything further we need to take up?

15 MR. HABER: A few things if we could, your Honor.

16 THE COURT: Yes.

17 MR. HABER: I have discussed with defense counsel, and
18 we have agreed, subject of course to your Honor's approval, a
19 protective order that we would like your Honor to sign.

20 THE COURT: Is it in the form that's on my Web site?

21 MR. HABER: Precisely, your Honor, it is identical to
22 the protective order your Honor entered in the SEC case which
23 related to this, only eliminating three paragraphs.

24 THE COURT: Let me see it.

25 MR. HABER: I will tell your Honor it does contain

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1 paragraph 9.

2 THE COURT: That's really the one that's most
3 important to me.

4 This looks fine. All parties consent to this order?

5 MR. ROSENBERG: Yes, your Honor.

6 MS. SPIVACK: Yes, your Honor.

7 THE COURT: I have signed that, and I will give it now
8 to my courtroom deputy to docket, and I will also give her the
9 case management plan.

10 MR. HABER: In addition, plaintiff has another few
11 requests that I will tell you the defendants do not agree with
12 that I have simply ascribed into a proposed order.

13 THE COURT: Hand it up and we will talk about it. And
14 then we also have to hear the defense on the motion to dismiss.

15 So the first of these proposed requests is for the
16 defendants to produce all documents produced by them to the SEC
17 which relate in any way to Sigma Designs, Inc.

18 So let me hear first from defense counsel and then
19 from plaintiff's counsel.

20 MS. SPIVACK: With regard to this particular request
21 and all of the requests plaintiff is making, he is seeking to
22 expedite and put shorter time limits on defendants' time --
23 really defendants' time because we are the ones with all the
24 documents in this case -- to prepare and produce documents. We
25 feel, in particular Sonar as really being the only party with

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1 voluminous documents to produce, it is unfair and one-sided to
2 be compelled to produce documents within a time period, first
3 of all, without a request except this order by your Honor, but
4 also in a time period less than that which is provided under
5 the Federal Rules of Civil Procedure. And in particular, it is
6 not like we have these documents ready to go and with a push of
7 a button we can make a production.

8 THE COURT: Let me hear from plaintiff's counsel.
9 You can propound your normal document request immediately and
10 you would get the documents in 30 days.

11 MR. HABER: Your Honor, the request is really, number
12 one, because we are on, as your Honor has just ordered, a tight
13 schedule to have this case ready pursuant to the case
14 management plan your Honor has entered. It is obvious we can
15 ask for exactly these documents in the document request that I
16 can serve this afternoon. The point is these are documents
17 that, by definition, have already been searched for, they have
18 already been accumulated, they have already been screened for
19 privilege, and they have already been produced to the SEC. So
20 there is no burden to produce them.

21 THE COURT: I am not going to shorten the time frame,
22 but I will say this. It seems highly likely that the
23 defendants, if they have objections to the production of those
24 documents, such as privilege, for example, that they can serve
25 you on 30 days with a full privilege list, the whole thing, so

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1 if there are any objections, I can deal with them immediately.

2 So I am going to not require expedited production, but
3 I am going to require that whatever response is made it be full
4 and complete so that you can really call me the day after, if
5 there are disagreements, and I can deal with them on the phone
6 right then and there so you will get all that resolved by 31 or
7 32 days after you serve your document request.

8 MS. SPIVACK: I just have a question about your
9 Honor's instruction. When you say when the response is made,
10 there will be 30 days to make his request, we have 30 days to
11 propound our responses. Is your Honor instructing them to
12 produce all of the documents or prepare a privilege log on the
13 date of --

14 THE COURT: We are only talking right now, I want to
15 be clear, we are talking about the documents that you have
16 already produced to the SEC. That's the category we are
17 talking about relating to Sigma Designs. So your adversary is
18 making the point that you may not have totally gathered your
19 response together at this point, but you know those documents
20 in a way that you don't know other documents. You have already
21 searched for them. You know what you have produced to the SEC.
22 So you should be able to give them, 30 days after he gives you
23 the request for those documents, which sounds like he may do
24 today, the documents, or, if you're withholding any documents
25 on the grounds of privilege, a full privilege list, in

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1 accordance with Southern District rules, or, if you're raising
2 objections on other grounds, a full written statement of what
3 those objections are.

4 And what I am promising him is that after seeing that,
5 if there are objections or are privilege entries that he wants
6 to challenge, that he can jointly with you call chambers within
7 48 hours after receipt of that, and I will endeavor right there
8 on the phone to resolve it. And then, of course, if there is a
9 privilege document that I say, no, there is no privilege, you
10 will produce that immediately. So that's what I am saying.

11 MS. SPIVACK: The materials that are the subject of
12 this request is the entire volume of documents that may have
13 been given over to the SEC. Only a small subset, is my
14 understanding, relate to Sigma. They are not segregated out in
15 any way.

16 THE COURT: I understand it is still going to take a
17 little work on your part, but I think a fair compromise is that
18 you still are further --

19 MS. SPIVACK: Slightly further.

20 THE COURT: -- down the road on those and others that
21 we not get the kind of response, we are claiming privilege and
22 we will produce two weeks from now or 30 days from now the
23 privilege list. I think you should be prepared to, if you're
24 not giving any set of documents that's within this particular
25 request, that you have a full privilege list or a full

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1 statement of your objection within the 30 days.

2 MS. SPIVACK: If that's what your Honor is going to
3 order, what I would request then is, in the event that we
4 discover something that's going to extend our ability to make a
5 full and complete production of the non-objectionable documents
6 as of that time, that we have a mechanism to get relief from
7 the order.

8 THE COURT: I make it very, very easy because under my
9 rules all you have to do is jointly call chambers. We are
10 available well into the evening waiting for your call, feeling
11 lonely if you don't call. So that's the way to get it
12 resolved.

13 MS. SPIVACK: Thank you, your Honor.

14 MR. HABER: Some of the conversation that you just had
15 with myself and with defense counsel anticipates two of the
16 other requests that are in this proposed order, number 4 and 6,
17 which basically are asking for the same procedure with respect
18 to all discovery requests from all sides. That when the
19 written response to the document request is made, that at that
20 time the documents are produced and at that time a privilege
21 log is submitted.

22 THE COURT: I think that's a very good practice, but
23 there are too many potential issues that might arise for me to
24 make that across-the-board ruling. What I think I would say is
25 this. It should be the presumption in any document production

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1 that the documents and the objections are going to be made
2 within 30 days, and if there is objection on the grounds of
3 privilege, the privilege log is going to be available at the
4 end of the 30 days.

5 If there are other kinds of problems that arise, that
6 the documents are in a warehouse in Timbuktu, the documents are
7 in a form that can't easily be searched, the documents are
8 replete with difficult privilege issues that require a lot of
9 attorney review, my preference -- I am not going to order this,
10 at least not at this time, but my preference is that that be
11 raised by responding counsel or plaintiff's counsel before the
12 30 day period is over so that either you can work out something
13 that is mutually agreeable, or, if you can't, you can then call
14 the Court sooner rather than later so I can get involved in
15 setting some firm dates at that point.

16 The focus of the SEC produced documents was a discrete
17 group that I could make an order like that. All I will say as
18 to the others is my strong preference is any problems that
19 arise during the production process that are likely to lead to
20 potential delays be raised by defense counsel with plaintiff's
21 counsel before the 30 days is up so that either they can be
22 resolved on a schedule mutually agreeable, or, if they can't,
23 that plaintiff's counsel can then convene a call with the Court
24 so that I can set dates.

25 MR. HABER: The only other one that I would ask your

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1 Honor to consider, since I think the others have really been
2 covered by what you said, is number 2.

3 THE COURT: Let me hear defense counsel on that.

4 MS. SPIVACK: Your Honor, we have a couple of problems
5 with this request for leave to serve an interrogatory. Number
6 one being the breadth of the request. It covers a time period
7 well outside the class period identified in the complaint.
8 And, in any event, once we get into document production, I am
9 sure that the documents we are going to produce will give
10 plaintiff exactly the information that he is seeking here. So
11 I don't see the need to grant him special leave to serve a
12 interrogatory, in particular, the breadth sought after here.

13 THE COURT: I think he is ultimately going to be
14 entitled in one form or another to all that information. If
15 you are of the belief, based on what you have seen in this case
16 so far, that that will be set forth in pretty straightforward
17 fashion in the documents that will be produced, then I agree
18 with you that's an adequate thing. But he shouldn't be put in
19 the situation, for something that's fairly central to this kind
20 of case, to have to find, well, there is some stuff on page 6
21 and then there is some stuff in a different document on page
22 93. But if it is, as I would expect it may very well be, all
23 nicely collected in one document somewhere, or a couple of
24 documents at most, I agree with you that that document is
25 sufficient. Is that your best belief?

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1 MS. SPIVACK: Yes, it is, your Honor.

2 MR. HABER: Your Honor, I think then if you could
3 grant me leave to serve that interrogatory, a perfectly
4 appropriate response to the interrogatory would be --

5 THE COURT: I would just make it one of your document
6 requests. Let's see what happens to the document requests.

7 Now, someone wanted to make a motion to dismiss.

8 MR. ROSENBERG: We intend to make a motion to dismiss,
9 not the entire complaint, but the first and the third causes of
10 action.

11 THE COURT: When would you like to file your motion?

12 MR. ROSENBERG: I would like to file it on March 9.
13 And that was discussed with plaintiff.

14 THE COURT: March 9 is fine. Did you discuss a date
15 for response?

16 MR. ROSENBERG: We did, your Honor. Subject to the
17 Court's approval, March 30 and reply on April 6.

18 THE COURT: That's fine with me, but you understand
19 the document discovery is going forward.

20 MR. ROSENBERG: Understood, and we are not seeking to
21 stay that.

22 THE COURT: That's fine. And then we will have oral
23 argument on that motion, let's look at April 12.

24 THE DEPUTY CLERK: April 12 at 4:30.

25 MR. ROSENBERG: Under the Court's rules, there is to

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1 be a phone call prior to any motion. Does raising it here
2 obviate the need for that phone call?

3 THE COURT: Absolutely.

4 MS. SPIVACK: We also plan on filing a motion to
5 dismiss, and if we can combine it on the same schedule?

6 THE COURT: Same schedule. Very good. I will do all
7 of that on that schedule, and we will hear both motions on
8 April 12.

9 OK. Anything else?

10 MR. HABER: I don't think so. Not from the plaintiff.

11 THE COURT: Very good. Thanks so much.

12 (Adjourned)

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