UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL DAY LABORER ORGANIZING NETWORK, et al.,
Plaintiffs,

v. 10CV3488(SAS)

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, et al.,
Defendants.

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New York, N.Y.
March 8, 2011
2:45 p.m.

Before:

HON. SHIRA A. SCHEINDLIN
District Judge

APPEARANCES

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(Case called)

THE COURT: Good afternoon. I have two letters here. I have a plaintiffs' letter dated February 28, asking for the court's assistance in obtaining more fulsome and comprehensive declarations attached to the government's motion for a stay pending appeal. I have a summary of some of the requests that the plaintiffs seek:

A description of the workflow process used to process FOIA requests by the agencies, for example, details about the exact software used in each agency; in each agency, the methods used to convert records into PDF or TIFF; the fields contained in the load files the agencies are currently capable of producing. That's 1.

Details about the technology or software available in other divisions or offices within the defendants' agencies that can be used to process, review and redact. That's 2.

A general description of the data sources for the electronic records that were requested and collected, and information on whether the metadata needed for the fields in this court's orders were available prior to the processing that has been described in the submitted declarations and, if so, when was such metadata stripped from the electronic records. That's 3.

An overview of how the requested data is collected and to what extent if any the collection process preserves document

structure and requested metadata, 4 and 5, a detailed description of the primary technical obstacles to compliance with the orders, including identification of all metadata fields that may implicate exempt information.

That's my summary not a summary from the plaintiffs' records, but it's my summary of the kinds of information the plaintiffs say should be supplemented in declarations.

The government comes back and says, first of all, you have been divested of jurisdiction and you can't do this. If that's the government's position there is nothing to be said, because I gather that if I order the government to supplement its declarations, it would not do so. So we are at a standstill here if that's the government's position.

My position is that the government does not make the decision to what extent this court is divested of jurisdiction on any part of this case; the court decides that. But in this case, the government takes the position that it decides everything. It does not. I understand the argument of divestiture, but I don't think that's the proper approach to this request.

Then the government's next argument is that supplying this information would force the government to disclose the very matters at issue, I am quoting from the government's March 2 letter, it would force the government to disclose the very matters at issue and would therefore moot the government's

appeal and deprive it of its right to appellate review with respect to the materials at issue.

The government in its letter cites to a Supreme Court case from 1989, *John Doe Agency v. John Doe Corp.*, deciding an application for a stay of a disclosure order in a FOIA case and noting, and I quote, the fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure of the Vaughn index would also create an irreparable injury. So that seems to be the government's second position

The Third position is that supplying this information would somehow turn this into a summary judgment motion and that would be inappropriate to have a summary judgment motion made in the context of a stay motion. I think that fairly summarizes what's in the government letter.

Now the plaintiffs have not yet been required to respond I think to the stay application but I will say in determining whether to grant a stay, the court has to weigh four factors. Those are, I quote from the Second Circuit 1994 case, *LaRouche v. Kezer*, the standard is whether the movant will suffer irreparable injury absent a stay, whether a party will suffer substantial injury if the stay is issued, whether the movant has demonstrated a substantial possibility although less than a likelihood of success on appeal, and fourth, the public interest that may be affected.

Just a more recent quote from the Second Circuit, *In*

Re World Trade Center Disaster Site Litigation, 2007, the circuit also said the degree to which a factor must be present varies with the strength of the other factors, meaning that more of one factor excuses less than the others. I looked at that standard to prepare for this discussion even though the plaintiffs have not yet had a chance to respond. It's important to have a response, obviously, but the essence of the government's argument with respect to either likelihood of success on appeal or substantial issues is that metadata is not readily reproducible for FOIA purposes and that the court has inappropriately expanded the scope of the original FOIA-requested production of metadata.

That seems to me two things. The court impermissibly expanded the scope, I required metadata, and metadata is not readily reproducible. On the first issue on whether the court inappropriately expanded the scope, I don't think any supplementation of the declarations will help. I have a definitively strong view on this. To me, I think this was firmly expressed on the record at the last conference, metadata is an intrinsic part of electronic records period. At the time it's created, it's part of the record.

You can then strip it out, and if you strip it out and turn into a static image, you might in fact not maintain the original format. You may have no metadata to produce. That's something we did not focus on in the oral argument. I

understand that may be a problem here, that there is no metadata because, although the record was created originally with metadata, that was done by the machine, by the computer, not by the operator, you have to take it out. You have to recreate the document in a different image from the way it was originally created. I find that argument not only not a winner but not even a substantial issue.

However, on the other issue that the metadata is, quote, not readily reproducible for FOIA purposes, that's precisely the issue the declarations do address. So in order to assess the first factor that one has to assess on the four-part test for a stay, whether the movant has demonstrated a substantial probability although less than a likelihood of success on appeal, there is no way to assess that in this court without understanding whether the metadata is readily reproducible. That's what the plaintiffs are asking for in their expanded requests for declarations.

With respect to the government's other argument, I am somewhat dumbfounded if not downright speechless. I do not see how expanded declarations as to the capability of producing metadata forces the government to disclose the very matters at issue. That is not true. What the government does not want to disclose down the road is the metadata together with the records. These declarations wouldn't require the government to disclose any metadata. These declarations are simply to ask

the people to expand on their ability to reproduce it, that's all, which is the government's own argument.

The government says you have to be wrong, judge, because we don't have the ability to reproduce it. Well, that fine, but if I order expanded declarations, I am certainly not ordering the government to disclose the very matters at issue, because the matters at issue are the metadata, and there is nothing about these expanded declarations that calls for the production of metadata.

So I don't know if the government is making good faith arguments to this court, and I address all five government attorneys present in my courtroom. I would not be ordering the very matters in dispute in the appeal to the appellate court, which are the records themselves with metadata. That's what I ordered and that's you have appealed and that's OK. But these expanded declarations just talk about the ability to do it, not the actual production of the metadata.

The government's final argument says that this would adjudicate the case the merits, no, it would turn this thing into a summary judgment somehow which is inappropriate in the context of a stay motion. But the summary judgment is (A) way down the road; first, you have to figure out whether you have to comply with my order or not with respect to the metadata, then comes summary judgment, I suppose, on exemption, on the ability to produce certain things.

But at this point, there needs to be a developed record as to the argument that the government tardily raised; namely, that it can't readily reproduce this stuff and, therefore, impermissibly expanded the scope of the request, an argument that was never made to me at our multi-hour hearing, that this whole request for metadata impermissibly changed the nature of the original request under FOIA.

That's my little speech to start with.

Now I would like to hear from Mr. Diana.

MR. DIANA: Thank you, your Honor. I don't have much to add. The one thing I would also, in terms of one of the reasons why we want this information, I think it impacts not just the voyance about the standards for the stay, but it also goes I think to the irreparable harm they claim. They keep saying if the stay is not granted, they are going to be producing all this information that they wouldn't be required to be produced, but it's not clear to me that they have any information that they have to produce and what exactly that information is.

THE COURT: You say the expanded declarations would help you understand that.

MR. DIANA: Absolutely.

THE COURT: It may be, as I have said many times since this all got to the hightened level of rancor that it's now at, that there may not be any metadata. It may be that the form of

preservation at some of these agencies, they didn't preserve it and they had no obligation to, so it's not a matter of a spoliation case either. If they didn't preserve it because it was their agency practice to turn it into a static image or worse yet a piece of paper and throw away the electronic, that's fine. They didn't just have a duty to preserve it any other way. I don't know what the big deal is. If that's the case, that's the case, we stop there, but we don't know that.

Anyway, I think you are right again; I think it does somewhat go to irreparable harm. I think the factors that favor the plaintiffs the least at the moment are the second and fourth, whether a party will suffer substantial injury if a stay is issued. I don't know that you will suffer substantial injury. My understanding is that the government intends to continue making production. I didn't order that production already made be remade in this format that I have now ordered.

But they didn't have to go back anyway because there is the spreadsheet which the government pretty well conceded at oral argument that it knew that the spreadsheet, it had to provide metadata to make it at all useful. Everybody knows about lock cells and the need for the formula. So the government understood that. I believe the four people who didn't understand it got involved, but the government lawyers at the hearing certainly understood about the spreadsheet.

They didn't have to go back in time, but going

forward, as I understood from the last conference, they were to continue to make production anyway. My bottom line is I don't know whether you can show that you suffered substantial injury. I have not seen your papers yet. Are you planning to say you will suffer substantial injury if a stay is issued.

MR. DIANA: We do plan to make that argument, your Honor, with several declarations to that effect.

THE COURT: How will you suffer, just a little preview, substantial injury?

MR. DIANA: We are going to expound several instances because of the stripped metadata and the inability to really functionally review the records and organize them in any fashion. They are producing them. We are still looking at the production to see if they actually comply with some of the initial aspects of the order like parent/child relationship and the like.

One of the things we will be talking about is the effort it's taken because they are producing in essence still paper documents for electronic documents, the inability to really manage that, distribute the information to the public at large in a way that we need to to adequately advocate on behalf of both the plaintiffs and the public at large. So we will be getting into that in detail in the declarations.

THE COURT: Even though I didn't make them reproduce the original production with the metadata.

MR. DIANA: I understand that. But I think there is a lot of moving parts here. One of the things that we are concerned about, and obviously it depends on how your Honor rules on some of the other partial summary judgment motions that are pending because that could actually impact how productions are done in the future and it could be a substantial amount of information, and one of the things we will be getting into in terms of the merits here in terms of our prejudices, the reason why we are here is because the SCERA community is being implemented across the country and legislatures are now taking up issues in part because of the documents that are released.

Our clients are getting requests all the time from both the government's legislatures and the press saying do you have documents that show this, do you have documents that show that. It's very difficult to do that when, you know, if someone from, you know, Maryland wants to know, give me all the communications from Maryland, we don't have a way of actually searching that.

THE COURT: Wasn't there an editorial in The Times called the Anti-Arizona or something, an interesting op-ed piece this week or an editorial piece?

MR. DIANA: There was an editorial piece on this exact issue and it was based on the documents that were obtained.

THE COURT: I didn't know that but I saw the piece.

MR. DIANA: There have been a number of press reports on this case focused on the documents that were produced in the opt-out production. We will detail some of the challenges we have had complying with the requests that we have been getting just from the opt-out production on January 17.

THE COURT: Then there was a fourth factor and that's the public interest that may be affected. I guess you are about to argue that that's very strongly in your favor.

MR. DIANA: Very strongly in our favor, your Honor, and I think one of the things we will argue, and this is why we need these declarations, is you have to weigh that with what is the prejudice to the government. I don't think they can show that without telling us what information they would actually give us. They say they can't comply with the order, but then they don't say what metadata can they give us, what can't they give us. So without knowing that --

THE COURT: That's why I quarrel with the government's notion that if I were to require the expanded declarations, somehow I would be granting the very relief that they seek. That can't be true. The relief they seek is not to have to give you the metadata because the declarations don't call for one piece of metadata.

MR. DIANA: It's going to take time for them to even comply with that order.

THE COURT: Which order?

MR. DIANA: Just in terms of, for example, if your Honor rules in our favor on the search cutoff date.

THE COURT: That's pending.

MR. DIANA: That's the pending summary judgment motion. We are asking for a cutoff date that's much later than the government's cutoff date. If you rule in our favor then they will have to go back admittedly and gather that information from the same data sources which is going to take time and you have not even ruled yet.

THE COURT: Worse yet, I have not even read one line of the papers.

MR. DIANA: So when they do that, they are going to collect the information, they can collect the information in compliance with your order and preserve that for purposes of appeal, and then when the appeal comes down, they can just release it.

THE COURT: I will go further. I don't know if the government at this point listens to a thing I say because they think I am divested, but from this point forward, if they destroy metadata, I will consider that spoliation. Somewhere down the road some day when I get jurisdiction back somehow, that will be spoliation. If they have metadata today, they are on notice not to destroy it. That should be apparent to the five government attorneys sitting here. But if it's not, it now is completely clear. They are not to destroy it, whatever

else they do, they are not to destroy to. Surely they understand that there is a duty to preserve.

MR. DIANA: One more point that was not in the letters but it's something we are thinking about, I am not sure if your Honor is aware, but there have been two recent Supreme Court decisions.

THE COURT: I saw one yesterday, but that seemed off-point.

MR. DIANA: In some ways it's off-point, but it actually --

THE COURT: Policy-wise it favors full disclosure, robust disclosure.

MR. DIANA: It also talks about the approach that courts should look at FOIA and look at the language of the statutes, the definition of record, and we didn't really get into that.

THE COURT: What was the other one besides yesterday's, what was the other Supreme Court case?

MR. DIANA: The AT&T case on corporate privacy.

THE COURT: Tell me a little more; I know I read a summary but I need to be refreshed.

MR. DIANA: I don't have the cite.

THE COURT: Whatever any of the five of you can remember, can anybody briefly summarize it.

MR. DIANA: I can tell you what it was about.

Basically AT&T as a corporate was claiming privacy rights.

THE COURT: Right, right.

MR. DIANA: And whether a corporation has person privacy rights.

THE COURT: It does not.

MR. DIANA: They looked at the Webster Dictionary definition of personal and that's how they approached it. Similarly yesterday, they did the same thing in terms of looking at the actual text of the statute.

THE COURT: How does either case help you?

MR. DIANA: Because what we are contemplating is the definition of records under FOIA is very expansive; it talks about any information, about any format. I think under those definitions it would actually help us. Procedurally we are not sure how to approach this. One of the things we are contemplating is a 62.1(a)3 motion which allows the court to at least give an indicative finding on that particular issue.

THE COURT: What court?

MR. DIANA: You, your Honor.

THE COURT: On what issue?

MR. DIANA: On just the issue, basically interpreting the statute in accordance with the way the Supreme Court would interpret the statute.

THE COURT: Beyond my saying that if a record contains metadata at the time it's created, it is part of the record? I

have already done that at least 10 times, maybe 12 times.

MR. DIANA: I understand that, but it wasn't in the context of looking at the definition of the term record. We will be making that argument on appeal. I don't know if we will except it if you have not had a chance to look at that argument, but it goes to the substantial possibility of likelihood of success.

THE COURT: It sounds like an interesting issue if I have not already done it. I didn't quote that part of the statute in the opinion?

MR. DIANA: I don't believe so.

THE COURT: I remember looking at the statute.

MR. DIANA: I didn't see it.

THE COURT: Mr. Cordaro, why don't you start with how I am divested of jurisdiction to decide how the declarations should be expanded to address the simple question of whether they are reproducible.

MR. CORDARO: Yes, your Honor. The government's position is that the district court has been divested of jurisdiction with respect to the orders that it entered. In other words, if the plaintiffs were asking the court to modify the orders --

THE COURT: They were?

MR. CORDARO: I am using that as an example.

THE COURT: If they were.

MR. CORDARO: If they were.

THE COURT: If they were asking the court to modify its orders, I could not.

MR. CORDARO: Yes, that would be the government's position.

THE COURT: I would agree with that.

MR. CORDARO: Insofar as the stay motion is concerned, the court has jurisdiction over that. We have made it to this court as the federal rules contemplate and we submitted declarations in connection with that stay motion.

The government's argument is that it is inappropriate for the court to order the government to submit supplemental declarations, because like any movant, we have submitted declarations in support of the motion. Our position is that the plaintiffs now have a chance to oppose that motion with their own declarations if they wish, and then there would be reply papers.

With respect to the court's authority or jurisdiction, so to speak, to order the government to submit supplemental declarations, our position is that it's improper. It's not a jurisdictional argument. The stay motion is properly before the court.

THE COURT: So why is it improper?

MR. CORDARO: We would say it is improper because as a matter of procedure, we submitted declarations in support of

the stay motion. Those declarations go to the four factors that your Honor elucidated that are in the motion for a stay and that govern whether this court grants a stay pending appeal.

One of the arguments we made with respect to substantial case on the merits is the readily reproducible argument that your Honor laid out here today. That is not the only argument we make with respect to one of the four factors. We make several other arguments that we think present a substantial case for appeal to the circuit. So, I think it's incorrect for the plaintiffs to suggest that the motion turns on readily reproducible. It does not.

THE COURT: They didn't; I did.

MR. CORDARO: In fact, stays in FOIA matters are routinely granted after the district court issues a disclosure order. One of the reasons for that is the irreparable harm factor which is very crucial.

THE COURT: That is because you see it as a disclosure order. I don't. It was a form of production issue that was really quite simple when it was presented to me. It was how must the agency produce its documents going forward. I ruled. The government chose to take an appeal, that its right; if it's appealable, that's its right. This notion that it's improper for the court to request further information on any motion is offensive.

It is my understanding, and I have been doing this a long, long time, more than 20 years as a judge, it's never improper for a court to request further information if it needs further information to decide a motion pending before it. I have a motion for a stay pending before me. I know the four factors I have to consider.

If there is not enough information in the record, it is never improper, procedurally or in other any other way, for the court to say to the litigant, I need to have further briefing on a certain issue, I need to have further information submitted on a certain issue, I don't have enough evidence in some cases or understanding of the legal issues, please provide further. Every litigant has said, of course, your Honor, if you need more information, we will provide it. The real argument I thought was, no, that would be requiring us to provide the very relief we seek, or something like that, you would be mooting our appeal. That cannot be true.

So, I think to cut to the chase, there is every reason to grant the plaintiffs' request, that I asked for supplemental declarations to elucidate how the agencies stored the information, whether the information existed and was stripped, whether it still exists, what are the technical capabilities to make this producible or not producible.

It creates a record that's going to be important here. If I were to deny the stay, the appellate court will want to

know the same things to hopefully carefully decide whether a stay should be granted and not just do it reflexively. Information is needed to decide issues, Mr. Cordaro. So it seems to me, the bottom line is, yes, further information is needed by this court to make an informed decision on the stay. It in no way provides the relief you are seeking in the circuit. It does not moot the appeal in any way.

MR. CORDARO: Your Honor, may I just make a record; I think you have ruled now, I just want to make a record. As far as the government's argument goes on disclosure of the information, that argument was made in the context of the stay application. In other words, we were arguing in the letter that stays are routinely granted in FOIA cases. The reason is because if the government in required to disclose the material that's at the heart of the disclosure order, that would moot the appeal.

THE COURT: Correct, and you are not being required to produce any of the information sought by the order that compelled production of certain metadata. I am not requiring one piece of metadata to be produced in the expanded declarations.

MR. CORDARO: We were not arguing that, your Honor.

THE COURT: I still misunderstand what I am hearing. In any event, I don't think we are not going to benefit one another by turning this into a further circle. This

information will be helpful to this court in granting a stay or denying one. I believe it will be helpful to the circuit in granting a stay or denying one.

There are four factors. While they may often be granted, they may typically be granted, they can't always be granted or we wouldn't have four factors. It would just say stays are to be granted in FOIA cases. I have not seen a law saying that. I have seen two Second Circuit cases that lay out four factors. When there are four factors, the court is supposed to take them seriously and pay attention to each one of the four in a thorough and thoughtful way. I am trying to do that. I need further information to do it.

That's my order.

MR. CORDARO: Thank you, your Honor. I think then the next thing would be to figure out when the court would want the supplemental declarations.

THE COURT: When are your papers due, Mr. Diana?

MR. DIANA: The 11th, Friday, this Friday.

THE COURT: What do you want to do? Delay is costly to everybody. If you really want the supplemental declarations before your papers, we are bumping the schedule. This is only the lower court on the stay issue. If it should be denied here, it goes to the circuit; if it's granted here, then the stay is granted. But it's only causing delay up and down and you are often arguing the high cost of delay to your clients.

Do you want to put in papers then have the right to supplement them if need be based on the supplemental declarations? That's one thought; at least we are moving right along.

MR. DIANA: That would move it along.

THE COURT: It's somewhat inefficient.

MR. DIANA: Yes.

THE COURT: I understand that but delay is also.

Mr. Cordaro, do you have any estimate how long it would take to provide the limited information that plaintiffs have sought in the requests for supplemental declarations? It didn't seem onerous. It basically says what are your capabilities, what machines do you have, do you store metadata or not, was it there, did you strip it.

MR. CORDARO: I have five agencies that would have to submit such declarations. I think it's a little more than --

THE COURT: Have you submitted one per agency already?

MR. CORDARO: We just submitted four; I don't believe OLC submitted a declaration.

THE COURT: So it would only be four supplemented.

MR. CORDARO: It's not something that can be put together quickly because the information plaintiffs seek which the government views is in the vein of interrogatories is more than insubstantial. May I confer with my colleagues.

THE COURT: Of course.

(Pause)

MR. CORDARO: Thank you, your Honor. The government proposes March 23. That would have been the date for the reply declarations, rather reply papers on this motion. That should give us the time we need to respond to the questions plaintiffs posed in the letter.

THE COURT: Two weeks and a day from today to put in supplemental declarations.

MR. CORDARO: Yes, your Honor.

THE COURT: It wouldn't be the reply papers.

MR. CORDARO: I am sorry, I was keying it to the date our reply submission would be due. It would not be, because the plaintiffs would not have been deposed yet.

THE COURT: It certainly is slow; the appeal is going to be very slow if we do that. Mr. Diana, what do you want to do?

MR. DIANA: We would want at least a week, but then they would still get a reply?

THE COURT: Of course. They don't know what you are going to say. It's their motion; they get the last word. That's what I am trying to say, because the nightmare we are going to be in mid-April before the stay is even figured out here, much less the appeal if it is denied. Do you have any schedule yet from the circuit on the appeal itself, the merits appeal, so to speak?

MR. CORDARO: No, your Honor.

THE COURT: Is there any question of appealability; are you challenging that?

MR. DIANA: We have not determined that; I don't think so.

THE COURT: I don't know the answer. I think I will leave it to the plaintiffs. It doesn't bother me. I will say we are not going into a third round. You will get what you get in response to the questions you pose and that's the end or it. That's the point.

MR. DIANA: I understand that as well.

THE COURT: You are not going to have a reiterative process. I had that recently in another case that had to do with the adequacy of the search. The government was wise, I though, to keep supplementing it because it eventually won the point. This is not an adequacy-of-search issue.

MR. DIANA: If it was the 23rd, that's when they are submitting their supplementals, and then we would have until March 30.

THE COURT: That sounds fair because there is no reason you shouldn't be busily drafting these papers now. All you are going to get is more fact information. The legal arguments are clear to you now. They are not going to make new legal arguments. These are fact declarations, just adding facts on technical capability essentially; you are not going to use it as a way to put in new legal arguments.

MR. CORDARO: Yes, your Honor, I wouldn't to be making legal arguments in declarations.

THE COURT: Mr. Diana, you can be almost all the way toward ready to file except that you and your experts would look at the additional declarations and respond. You would be ready on most of it. The legal arguments don't change; hopefully, more facts will help you one way or the other.

MR. DIANA: If we have until March 30 for opposition.

THE COURT: How long did the government have for reply the first time around after opposition?

MR. CORDARO: I think it may have been around 12 days or two weeks.

THE COURT: Really?

MR. DIANA: I would like it to be somewhat shorter, since they are getting two bites at the apple for the declarations.

THE COURT: I don't think it has any impact at all on reply. Believe me, they don't want the two bites. I don't think you should charge for them what they don't want. That's not fair. On the original schedule you had 12 working days, business days, calendar days?

MR. CORDARO: I believe 12 calendar days.

THE COURT: Your team might be checking.

MR. DIANA: We were filing on the 11th; they were filing on the 23rd. We were filing our opposition on the 11th,

and they were filing their reply on March 23.

THE COURT: That's 12. If we stuck with the same 12, that would be April 11. I am sorry it has dragged out that long. I will try to rule promptly at that point, drop everything and rule on the stay application.

MR. DIANA: Are we going to schedule an evidentiary hearing.

THE COURT: I don't know. Why do you think you will need one? It seems a little bit over the top for a stay application. I will evaluate the written submissions and rule one way or the other. It's up or down. Either I think this case is worth it or I don't. If I don't, it will go right to the circuit; if I do, it's done. I wouldn't in the ordinary course schedule an evidentiary hearing.

MR. CORDARO: I think the question Mr. Diana was probably asking was are you going to schedule oral argument.

THE COURT: No. I think he said what he meant, evidence on the technical side.

MR. DIANA: Yes.

THE COURT: I don't usually take oral argument on legal issues; I find people repeat their briefs pretty much. It's my practice if I need it on technichal issues. I am going to have to evaluate two sets of declarations, if that's what it turns on. I will look at them and come to a conclusion. I can also get back to you after I get the papers and I can request

oral argument.

MR. CORDARO: We did have an oral argument set down for March 25.

THE COURT: We had done that for two days after?

MR. CORDARO: I believe so.

THE COURT: The record is going to be so full, we will just see. If I want oral argument, I will let you know. I will take it off the calendar for the 25th. Was that only on that issue, because we always have issues in the case otherwise, if you have other things to talk about?

MR. CORDARO: At the time the court scheduled it, it was meant to be oral argument on the stay motion.

THE COURT: I don't think I don't need it for that. Before I take it off calendar, should we leave it there as a control date which you can cancel if needed, but you might need it, because in this case you always seem to have issues that come about something or other, I don't know, how a search is going or something. So if you want to keep it, it can be canceled if both sides want it canceled, but I will keep it on the calendar until both sides say they don't need it.

MR. DIANA: That's fine, your Honor.

THE COURT: Fine. OK. I will not schedule oral argument on this motion but I will ask for it if I think I need it. Are you continuing to negotiate with each other on some of the issues you said you were going to do.

MS. KESSLER: Yes, your Honor. We have been in conversations and are making progress but nothing to report.

THE COURT: Somewhat productive talks?

MS. KESSLER: Yes.

THE COURT: Does this case have a magistrate judge?

MR. CORDARO: The magistrate judge was Magistrate Judge Fox. There has been no formal referral order.

THE COURT: Would it be helpful in your negotiations on some issues, I don't know what issues you are talking to each about, but would it be helpful to have the assistance of a neutral if you reach a roadblock? Do you have a view on that at this time.

MR. DIANA: From plaintiffs' perspective, I don't think at this time it's necessary.

THE COURT: Does the government agree?

MR. CORDARO: We are always amenable to having a magistrate judge to supervise any aspects of the case that the district court wishes.

THE COURT: There is nothing I wish. Since you are in negotiations with each other, do you think it would be helpful in breaking a logjam or a roadblock or whatever?

MR. CONNOLLY: At this point I think the negotiations are going fine; we don't need the magistrate right now.

THE COURT: If you need one just ask and I will do a referral. Thank you.

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