

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3 COURTROOM 12, 3RD FLOOR

4 C O P Y

5 NIRA SCHWARTZ, Case No. CV96-3065-RSWL(RCx)  
6 Plaintiff,  
7 vs. November 13, 2002  
8 TRW, et al.,  
9 Defendants.  
10 . . . . .

11 TRANSCRIPT OF DISCOVER MOTIONS  
12 BEFORE THE HONORABLE ROSALYN M. CHAPMAN  
13 UNITED STATES MAGISTRATE JUDGE.

14 APPEARANCES:

15 For the Plaintiff: Joseph C. Barrera, Esq.  
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19 For Defendant Boeing: James J. Gallagher, Esq.  
20 Susan A. Mitchell, Esq.  
21 For Defendant TRW: Richard E. Drooyan, Esq.  
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1 before this hearing. And I just would like to say that  
2 it's true, as counsel pointed out in their pleading that  
3 was filed late last week that, yes, these subpoenas were  
4 served back on March 15th. But soon thereafter, the  
5 parties were notified that plaintiff -- the Queton  
6 plaintiff's attorneys, all five of them, were planning to  
7 withdraw. And that took quite a process and quite a while.  
a I don't think that officially occurred until June or July.

9 THE COURT: Well, excuse me.

10 Mr. Barrera.

11 MR. BARRERA: Yes, ma'am. Yes, Your Honor.

12 THE COURT: Yeah. You should probably be up here  
13 at counsel table. Why don't you sit next to Mr. Egan. I'm  
14 sorry. You didn't make an appearance, but I do have your  
15 card. Why don't you make your appearance at this time.

16 MR. BARRERA: Joe Barrera for the plaintiff.

17 THE COURT: All right. Have a seat.

18 Go ahead.

19 MR. EGAN: Thank you, Your Honor.

20 And Judge Lue ruled that the Queton plaintiff  
21 would have 60 days to -- as I recall, the date was  
22 September 9th of this year to find an attorney. That's the  
23 second time this has happened. Judge Pie has entered the  
24 same order as the Court is aware.

25 So at that point, then, for parts of July and all

1 of August and early September, there was a possibility that  
2 the False Claims Act count would be dismissed, would go by  
3 the wayside. So under those circumstances, it was  
4 difficult for us in the Department of Justice to convince  
5 the higher ups, if you would, within the Department of  
6 Defense that this is a pressing matter that must be dealt  
7 with immediately.

a I don't want the Court to think that -- and I'm  
9 aware and I recognize the fact that this Court is  
10 confronted constantly with situations where there are  
11 parties that are slow in producing documents or for some  
12 reason or another refuse to produce documents. That's not  
13 the situation here.

14 Here we're dealing with an extremely sensitive  
15 matter that is -- in terms of the Department of Defense has  
16 the highest classification. In fact, if -- and that's the  
17 keyword I want to suggest here and use throughout. If the  
18 Department of Defense decides to file declarations, that  
19 declaration, one of them would be seen by only three people  
20 in the Department of Defense. Only three, including the  
21 secretary. That's how sensitive this matter is. And  
22 that's how important it is to the Government that this be  
23 handled very carefully.

24 And I think under these circumstances, the  
25 parties here should proceed with caution. This isn't just

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1 a simple situation where, let's say Government agencies  
2 have not had their act together. We have been proceeding  
3 as quickly as we can at the working level in making this  
4 happen.

5 But I received instructions last week and I  
6 passed those on to Mr. Drooyan and to Mr. Gallagher,  
7 indirectly at least, that I've been told that the senior  
8 officials in the Department of Defense need 60 days to  
9 review this matter. That what we're talking about here,  
10 Your Honor, as -- is consistent with the 9th Circuit's  
11 ruling in Casa v. Browner, we're talking about two  
12 declarations, an unclassified one by the Secretary of  
13 Defense and a classified one by the head of the agency, in  
14 this case the missile defense agency, Lieutenant General  
15 Cadish [ph.]. That declaration is over 30 pages. And as I  
16 said, only three people in the Department of Defense are  
17 going to review it.

18 Again, if -- and I can't at this time nor can  
19 anyone in the Department of Justice say that the Secretary  
20 of Defense is going to do this. But that's the tract that  
21 we're proceeding on.

22 This declaration, the lengthy one, has been  
23 coordinated with many federal agencies. So it's not a  
24 simple matter of pulling a few documents together. As  
25 counsel's pleading filed last week indicated, the

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1 supplemental memorandum, this includes not just simply the  
2 40 documents that were subpoenaed from the missile defense  
3 agency and the Department of Army and the Department of  
4 Justice, but also a number of associated entities such as  
5 aerospace corporation, Lawrence Livermore. So that it was  
6 a lengthy process just to gather these documents.

7 In fact, the Government had to ask defendants TRW  
8 and Boeing for some of these documents that were  
9 identified. But just finding them all was a very lengthy  
10 process.

11 So, Your Honor, the one point I want to make,  
12 which I've made before and I want to reiterate, and that is  
13 that there's no certainty at this time that this will be  
14 done. But if it's done, the Secretary of Defense and the  
15 senior officials in the Department of Defense needs 60 days  
16 to review this matter.

17 THE COURT: All right. Do you have any comments  
18 regarding the Court's discussion of the law on this issue,  
19 Mr. Egan?

20 MR. EGAN: I must confess, Your Honor, I just saw  
21 it this morning. I haven't had an opportunity to review  
22 it. But --

23 THE COURT: Do you want to take some -- a few  
24 minutes to do that?

25 MR. EGAN: Thank you, Your Honor.

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1           **THE COURT:** I'm sorry. My clerk had said  
2 everyone had had a chance to read the tentative. That's  
3 not true?

4           **MR. DROOYAN:** We did, Your Honor.

5           **THE COURT:** Although this motion was not brought  
6 by the plaintiff, it seems clear to the Court that, if  
7 these documents remain classified, the plaintiff can't make  
8 her case-in-chief separate and apart from the issue of the  
9 defendant. Or certainly we'd have a hard time making her  
10 case-in-chief.

11           So I originally when I drafted this got into a  
12 discussion of what happens next in terms of a party moving  
13 for summary judgment on the grounds that the case-in-chief  
14 by the plaintiff couldn't be made or only parts of the case  
15 could be made, in any event, and where we go from here.  
16 And I cut that out of the draft because I thought it was  
17 probably premature until we see exactly what happens with  
18 the Government and whether they actually file the  
19 declaration.

20           Now, Mr. Egan has basically pleaded for 60 days  
21 instead of the 30 days that the Court put in the tentative.  
22 Do you have any argument, Mr. Drooyan?

23           **MR. DROOYAN:** First of all, we do not oppose the  
24 Government's request for the 60 days. We would like that  
25 to be the deadline. We propose January 13th, that Your

1 Honor's order read exactly as it is except it says that the  
2 Government must produce them on January 13th.

3 We are concerned about the timing and we're  
4 getting into the holiday season and for a whole host of  
5 reasons, we're willing to give the Government the other  
6 30 days that they've requested.

7 But if the Government files this declaration and  
8 if it isn't grounds for getting this case dismissed, we're  
9 going to be serving another subpoena on the Government, a  
10 much broader subpoena for documents. I assume that they  
11 will raise the state secrets privilege as to some of those  
12 documents as well. But it will be a much broader subpoena  
13 requesting communications between the parties, internal  
14 communications, evaluations and things like that.

15 so we've got to get moving on this process right  
16 away. And that's why -- we're not opposed to the extension  
17 to January 13th, but we would really request that the Court  
18 stick to that date to get this issue resolved so we can see  
19 where we are in this litigation.

20 THE COURT: Do you have any argument,  
21 Mr. Gallagher?

22 MR. GALLAGHER: Only, Your Honor, that this case  
23 has been around for a couple of years now. And some of us  
24 actually do have the clearances necessary -- that would be  
25 necessary to see the highest classification level of

1 documents that are involved in the case.

2 But in addition to the clearance, you almost must  
3 have a determination by the Government that there's a need  
4 to know. The Government has refused to give that  
5 authorization. So we have not seen any of what we consider  
6 to be the most probative documents in the case.

7 And as Mr. Drooyan says, it is necessary we think  
8 to set a finite date beyond which this is not going to  
9 continue. **Either the Government is going to come in with  
10 their state secrets declarations or the documents are going  
11 to be declassified or otherwise made available to us.**

12 THE COURT: Well, I think we should raise a  
13 couple of issues, then, for Mr. Egan to think about. One  
14 is I'm not sure Mr. Barrera has any kind of clearance since  
15 he's new to the case.

16 MR. BARRERA: That is correct.

17 MR. DROOYAN: And clearly if we reach a point  
18 where we actually do exchange classified documents, we have  
19 to figure out and the Government should start working on I  
20 would state, obtaining some sort of clearance for  
21 Mr. Barrera. And I'm not going to address the issue.

22 And I realize this is your motion, Mr. Drooyan,  
23 but my analysis of the case is that it affects the  
24 plaintiff as much as it affects the defendants in this  
25 case. And we have to know whether what we're dealing with

1 with Mr. Barrera is clearance.

2 So you've raised the issue of the need to know  
3 separate and apart from the classification.

4 MR. DROOYAN: Correct.

5 THE COURT: I'm also raising the issue of the  
6 classification for Mr. Barrera, the classification for the  
7 Court, the classification for my law clerk who is not an  
a American citizen but is a citizen of Britain, which is our  
9 ally I think. Probably our best ally at this point.

10 And you should probably wrap that into  
11 Mr. Gallagher's discussion about need to know also applying  
12 to the people who get the clearances including the  
13 plaintiff's counsel, the Court and my clerk.

14 Having said that, I'm hoping that's something you  
15 can deal with in the 60-day period that you're also dealing  
16 with the people you have to regarding whether or not we're  
17 going to get declarations to keep these classified or not.

18 Yes, Mr. Drooyan.

19 MR. DROOYAN: It's even more complicated than  
20 that because, if the Government doesn't assert the state  
21 secrets privilege and produces the documents to us, those  
22 documents will be used in the litigation. Under an  
23 appropriate protective order, they will be shown to  
24 witnesses in depositions, the court reporters will have  
25 copies of them.

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1           My own view of this is that, if the Government  
2 doesn't assert a states secrets privilege, probably  
3 supported with the appropriate declarations, that those  
4 documents can then be used in the litigation and can be  
5 viewed by people without security clearances subject to an  
6 appropriate protective order to guard the sensitive nature  
7 of the information.

8           But, if the Government doesn't assert the  
9 privilege, they in fact waive that privilege, and it does  
10 go way beyond the people in this room in terms of people  
11 who ultimately would have access to those documents,  
12 including potentially jurors in a public trial.

13           THE COURT: Absolutely. And I'm not even  
14 addressing the issue of what happens if the Government  
15 doesn't claim the privilege. I'm addressing solely the  
16 issue if the Government does claim the privilege, then  
17 Mr. Barrera needs clearance.

18           MR. DROOYAN: But if -- my view is, if the  
19 Government does claim the privilege and if you find they  
20 have appropriately --

21           THE COURT: Then no one is going to look at it at  
22 all, including the Court. Is that --

23           MR. DROOYAN: That's correct.

24           THE COURT: Well, I wasn't sure if the Court had  
25 to look at it to determine whether this was a case in which

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1 the subject matter of the litigation itself fell within the  
2 secrets act. You understand what I'm saying? Or just the  
3 documents fell within the military secrets act. Because  
4 the Court seems to draw a distinction between those two  
5 kinds of issues, at least in the cases that I read, talking  
6 about it.

7 And it may be that the plaintiff would believe  
8 that she could still make some of her Queton case-in-chief  
9 without these particular documents based on other things.  
10 But I was under the impression that I might actually have  
11 to look at some of these documents to figure that out. And  
12 I wasn't precluding that, which is why I'm raising with  
13 Mr. Egan that he should definitely get into the issue of  
14 clearance for the Court.

15 And if he can't do it for a British citizen, then  
16 I'll just deal with this myself. And he can do it with me.

17 MR. DROOYAN: My own view on this is that the  
18 only issue that we're really dealing with before Your Honor  
19 is the production of the documents and not the impact on  
20 the litigation. It is true that in pleadings filed before  
21 Judge Lue the plaintiff has suggested that she could  
22 possibly pursue this case without the classified  
23 information.

24 The defendants are firmly of the view that she is  
25 not going to be able to do that. But if she can, we can't

1 defend ourselves and that raises a whole host of issues  
2 that I think ultimately would have to be decided by  
3 Judge Lue and a summary judgment motion to dismiss those  
4 types of issues.

5 THE COURT: Well, some of them may still be  
6 related to discovery. You never know when you get into  
7 summary judgment whether the other side is going to claim  
8 they have to do additional discovery to respond to summary  
9 judgment. And I'm not taking myself out of the loop that  
10 quickly.

11 MR. DROOYAN: Not at that point, I agree with  
12 you. I think for right now, though, the issue is really  
13 the documents. And that if the Government does assert the  
14 states secrets privilege, and I have not heard them to  
15 indicate that they have decided firmly to do that. But if  
16 they do it and if you make the determination that the  
17 declarations are appropriate, that they've satisfied their  
18 burden, I'm not sure that you would need to look at the  
19 individual documents if you have high level declarations  
20 from Department of Defense officials swearing under oath as  
21 to what the documents are.

22 THE COURT: I may not have to, but I would just  
23 as soon cover all bases. I mean I'm assuming that, if I  
24 survive FBI clearance for this job, I should be able to get  
25 the **same** clearance Mr. Gallagher says he has. But I could

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1 be wrong. You never know.

2 But based upon what Mr. Egan said, he's talking  
3 about two declarations. He's talking -- he **says** about one  
4 unclassified declaration. And then he's talking about a  
5 classified declaration. If I'm going to review the  
6 declarations, including a classified declaration, we're in  
7 a catch 22 situation if I don't have clearance to review  
8 that declaration.

9 So you follow my suggestion here that I think we  
10 should at least take that step so that, if the Government  
11 exercises its discretion to claim privilege, I can at least  
12 look at the declarations.

13 MR. DROOYAN: I certainly agree with that. I  
14 understood that he was not planning to serve the classified  
15 declaration on the defendants or the plaintiff in the case,  
16 that we would only get served with the unclassified.

17 THE COURT: I have no idea who he's serving, but  
18 I'm assuming the Court would have to look at it.

19 MR. DROOYAN: You will get the unclassified,  
20 that's right. Or you'll get the classified, excuse me.

21 THE COURT: That's my only point, Mr. Drooyan.  
22 And that's why I said to Mr. Egan, I would like him to  
23 start moving on getting me clearance and me to know if I  
24 need both of those. But go ahead.

25 MR. EGAN: No, Your Honor, you're correct. It's

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1 that -- as Mr. Drooyan and the Court just indicated, the  
2 unclassified declaration would be served on everyone. The  
3 classified declaration would be lodged with the Court. The  
4 Court then would have the option to review it if the Court  
5 so decided. And I must confess that -- and I certainly  
6 don't mean to offend. But I was told that a district judge  
7 does not need a background check. They're automatically.

8 THE COURT: Is that a magistrate judge as well?

9 MR. EGAN: That's -- that's what I don't know.  
10 But that -- you know.

11 THE COURT: I don't know either. And I have  
12 never been in this situation before. so --

13 MR. EGAN: Well, yeah. And Mr. Gallagher raised  
14 an interesting point to. And that is where he talked about  
15 he has the clearance. But he did distinguish between  
16 there's a clearance and then there's -- and then there's  
17 access.

18 THE COURT: Right.

19 MR. EGAN: Or need to know.

20 THE COURT: Right.

21 MR. EGAN: And that's why when I said before  
22 that, if the declaration goes forward, it would be reviewed  
23 by three -- it was going to be reviewed by just two  
24 individuals in the Department of Justice. They would have  
25 to update their background check, if you would, and then be

1 read on, read the declaration, and then be read off.  
2 That's how sensitive we're talking about in terms of the  
3 material here.

4 Now -- and a lot of that type of information  
5 apparently has been deleted to make it easier. And perhaps  
6 it will be in the future too because getting that  
7 declaration out here and storing it in the Los Angeles area  
8 is -- it's more complicated depending on the level of the  
9 material involved. But that declaration would -- the Court  
10 is right. It would just be lodged with the Court. It  
11 would be available then for the Court to review.

12 THE COURT: All right.

13 MR. EGAN: And then apparently all of the  
14 documents would also be lodged would be available. So  
15 that's the -- that's the plan. If -- and, again, that's  
16 the big if.

17 THE COURT: All right. Now, you heard the plea  
18 from Mr. Drooyan and Mr. Gallagher that the Court stand  
19 firm on 60 days if it's what you're asking for is 60 days.  
20 So on the 59th day when I get an ex parte application from  
21 you, Mr. Egan, for another 30 days, my question to you is  
22 how certain are you that you're going to accomplish this in  
23 60 days.

24 MR. EGAN: Well, the difficulty is is that we're  
25 talking here about material that has gone up to the

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1 presidential appointment level. And my marching orders  
2 were get 630 days. And I can now go back and say that  
3 we -- that the magistrate gave us the 60 days, please get  
4 it done. I have no push for attention. And that's the  
5 difficulty.

6 So I can't -- I can only tell you what I was  
7 told. And they -- the word from on high was we need  
8 60 days. And I can only say that everybody is moving as  
9 quickly as possible. Thank you, Your Honor.

10 THE COURT: Any other comments?

11 MR. BARRERA: Your Honor, we would like to  
12 indicate again that we believe we can prove our case with  
13 the documents that we have. We just want it known.

14 MR. DROOYAN: We're sympathetic to the  
15 Government's situation. This subpoena was served on  
16 March 15th of this year. We're up to eight months now. By  
17 January we're going to be up to 10 months. This is a case  
18 that's prosecuted in the name of the United States. We  
19 need these documents. And the Government's got to make a  
20 decision on what's it going to do.

21 We absolutely need these documents to defend  
22 ourselves. These documents are referred in the complaint.  
23 They are the critical documents. And if we're not going to  
24 have access to them, it raises a whole host of due process  
25 issues and other issues. But we got to know that issue and

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1 that's got to be resolved.

2 THE COURT: All right. Other than the changing  
3 of the 30-day period to the 60-day period, it doesn't seem  
4 to me that any of the parties have any comments about the  
5 substance of the Court's order. And in that regard, the  
6 Court will issue this tentative as a permanent but make  
7 minor changes to it based on the appearances today and  
8 change the 30 days to the 60 days. And the order should go  
9 out today.

10 Thank you, then. We're adjourned.

11 MR. BARRERA: Thank you, Your Honor.

12 MR. DROOYAN: Thank you, Your Honor.

13 MR. EGAN: Thank you, Your Honor.

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15 (Proceedings concluded.)

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2 CENTRAL DISTRICT OF CALIFORNIA  
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11  
12 I, JON A. HEGVOLD, a court approved transcriber,  
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