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Conference

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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IN RE: BISYS SECURITIES  
LITIGATION,

04 CV 03840 (JSR)

New York, N.Y.  
April 20, 2009

U.S. DISTRICT COURT  
MAY 01 2009  
S.D. OF N.Y.

Before:

HON. JED S. RAKOFF,  
District Judge

# 187

APPEARANCES

CARNEY WILLIAMS  
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BY: J. ALLEN CARNEY  
CURTIS BOWMAN

KIRBY MCINERNEY  
Attorneys for Plaintiffs  
BY: PETER S. LINDEN  
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JONATHAN L. FRANK

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Attorneys for Defendants  
BY: SHARMILA SOHONI

LAW OFFICES OF JOHN WESLEY HALL, JR.  
Attorney for S. Gene Cauley  
BY: JOHN WESLEY HALL, JR.

ALSO PRESENT: LISA BUCKSER-SCHULZ, ESQ.  
S. GENE CAULEY, ESQ.

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1 (In open court)

2 THE DEPUTY CLERK: April 20, 2009. Robert Grant v.  
3 The Bisys Group. Counsel, please state your name for the  
4 record.

5 MR. CARNEY: Allen Carney, your Honor.

6 MR. BOWMAN: Curtis Bowman, your Honor.

7 MR. LINDEN: Peter Linden of Kirby McInerney, your  
8 Honor.

9 MR. PRESS: Ira Press of Kirby McInerney, your Honor.

10 MS. FOTI: Catherine Foti from Morvillo, Abramowitz on  
11 behalf of AB Data. With me is vice president and general  
12 counsel of class administration section of AB Data, Lisa  
13 Buckser-Schulz.

14 THE COURT: Good morning.

15 MR. HIRSCH: Good morning, your Honor. Jerome Hirsch  
16 on half of The Bisys Group.

17 MR. FRANK: Jonathan Frank on behalf of The Bisys  
18 Group.

19 MS. SOHONI: Sharmila Sohoni for Jenner & Block for  
20 Mr. Fradin.

21 MR. HALL: Good morning, your Honor. John Wesley Hall  
22 of Little Rock on behalf of Mr. Cauley.

23 MR. CAULEY: Gene Cauley, your Honor.

24 THE COURT: All right. Mr. Cauley, before we get into  
25 the details, maybe you can explain what's going on.

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1 MR. HALL: Your Honor, I've only been in this since  
2 Friday. My limited ability to find out what's going on tells  
3 me that the funds are presently unavailable to be delivered,  
4 hopefully will be.

5 THE COURT: What does that mean?

6 MR. HALL: They cannot be liquidated.

7 THE COURT: And why is that?

8 MR. HALL: Your Honor, if I go into anymore detail, I  
9 think I might violate a privilege against self-incrimination.

10 THE COURT: All right. I think that is not unlikely,  
11 so let me give the background of this. Is there someone here  
12 from the U.S. Attorney's Office? You want to identify  
13 yourself?

14 MR. STELLMACH: Yes, your Honor. William Stellmach  
15 from the U.S. Attorney's Office.

16 THE COURT: All right. It appears not unlikely from  
17 the little information available to me that Mr. Cauley may have  
18 committed a crime or several crimes, that he may have committed  
19 disbarrable conduct in one or many ways. Here is all I know  
20 about it.

21 I received a letter that was faxed with permission to  
22 my chambers on April 15th from the Carney Williams firm and  
23 signed by Mr. Bowman, Mr. Williams, and Mr. Carney, which  
24 indicated that after the then firm of Cauley, Bowman, Carney &  
25 Williams was designated as co-lead counsel representing the

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1 class in this litigation, Mr. Cauley designated himself as the  
2 sole signatory on the account. He established to accommodate  
3 the settlement fund of \$65,875,000. That was the result of the  
4 settlement in this case.

5 In that position as, in effect, a fiduciary escrow  
6 agent, Mr. Cauley represented that the settlement proceeds were  
7 to be invested in U.S. Treasury bonds. And pursuant to the  
8 order that I signed ordering the distribution, various  
9 transmissions were made to AB Data on December 19th, 2008,  
10 December 24th, 2008, December 30th, 2008, and February 19th,  
11 2009. The last conveyance, totaling approximately \$9.3  
12 million, was supposed to have occurred, according to the  
13 parties, on April 2nd. Instead, Mr. Cauley, according to the  
14 letter I'm referring to, informed Mr. Bowman on April 13th that  
15 the remaining funds in excess of \$9,000,000 were "unavailable,"  
16 and that he believed they would be available within 90 days.

17 Immediately after my chambers received this letter,  
18 although I was out of the country at the time, I directed my  
19 law clerk to have counsel convene a joint telephone call to  
20 include Mr. Cauley, but I am told he declined to participate in  
21 that call. I then issued the order requiring his appearance  
22 and appearance of the other parties here today.

23 Since this is a civil matter, although Mr. Cauley has  
24 the right to invoke his Fifth Amendment privilege, as he has  
25 just done, in effect, across-the-board, the Court can and at

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1 this stage docs draw an adverse inference, which the law  
2 permits in a civil matter, from the invocation of the Fifth  
3 Amendment. And the inference I'm drawing is that Mr. Cauley  
4 has either misappropriated or otherwise misallocated these  
5 funds. And because of that possibility, I asked the U.S.  
6 Attorney's Office to have someone here today. I'm delighted  
7 they are. I trust there will be a prompt investigation of this  
8 matter by the U.S. Attorney's Office.

9 Mr. Cauley, by virtue of his appearance in this case,  
10 is also subject to the Grievance Committee of the Southern  
11 District of New York. I will, unless further information is  
12 received that warrants reconsideration, refer the matter of  
13 Mr. Cauley to that committee. I am chair of that committee,  
14 but I will recuse myself from participation in the committee's  
15 proceedings regarding Mr. Cauley.

16 Now, the most immediate problem we have is that the  
17 victims of this alleged fraud have been deprived over  
18 \$9,000,000 or so it would seem. I need to find out now from  
19 everyone here what they know about this situation. I preface  
20 this by also noting for the record that earlier in this case,  
21 although it is minor compared to what has now emerged, there  
22 was less than assiduous monitoring of this case by any of the  
23 parties which caused the Court to have to convene a conference  
24 at that time and to order and receive the parties' agreement to  
25 various prophylactic measures. I am, therefore, doubly

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1 disappointed that something further has happened.

2 I commend the partners of the Carney Williams firm for  
3 bringing this to my attention. I should note for the record I  
4 also received a me-too letter from Mr. Linden at Kirby  
5 McInerney.

6 Now, let's start with AB Data.

7 MS. FOTI: Your Honor, thank you. Precisely what  
8 you've already put on the record in terms of the facts is what  
9 AB Data is aware of. They did receive those transfers. They  
10 were in communication early in April about the other transfer.

11 THE COURT: What was your understanding as to why the  
12 remaining funds wouldn't be available until April?

13 MS. FOTI: There was an email received through  
14 Mr. Carney from Mr. Cauley that said that the funds were in a  
15 T-bill, were going to mature on April 2nd, possibly will not be  
16 available till April 8th because of settlement issues. And  
17 shortly thereafter, there were communications as to when will  
18 the funds arrive. And, in fact, there was an understanding  
19 from AB Data, there was request for wiring instructions, an  
20 understanding that, in fact, the funds were going to be  
21 transmitted on April 8th. And then there were additional  
22 communications as to where are the funds. And then we also  
23 received a letter.

24 THE COURT: At any time did you ever receive from  
25 Mr. Cauley or from anyone else an actual breakdown or some sort

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1 of form or some sort of specification of what T-bills were in  
2 what account, where, under what circumstances, etc.?

3 MS. FOTI: No, your Honor. There was information  
4 provided concerning the amount of funds that would be  
5 available, amount of funds that would eventually be  
6 transferred. On April 8th there was a specific number  
7 provided, but not specifications as to what the investments  
8 were.

9 THE COURT: I signed the order directing a  
10 distribution back in December. And most of the transfers were  
11 made or many of the transfers were made immediately after my  
12 order. Did it not occur to you that it seemed unlikely that  
13 \$9,000,000 of this would not be available till April?

14 MS. FOTI: Your Honor, what the understanding was from  
15 the emails from Mr. Cauley, was that right prior to your order,  
16 immediately -- shortly prior to your order, one of the  
17 investments had essentially sort of rolled over into another  
18 90-day investment, so that did not seem unusual that that  
19 particular -- that not all the funds were going to be  
20 available. So when the funds started coming in at fairly  
21 regular transfers, nothing seemed amiss.

22 THE COURT: How did you determine to whom to make the  
23 distribution while some of the funds were still outstanding?

24 MS. FOTI: My understanding is that they were waiting  
25 for all the funds to make a decision, to do a pro rata and make

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1 an ultimate decision.

2 THE COURT: So none of the distribution has been made.

3 MS. FOTI: No.

4 THE COURT: To this very day.

5 MS. FOTI: To this very day. The funds were  
6 transferred into a bank account that AB Data established. And  
7 ultimately what would happen is once all the funds reached  
8 their bank account that AB Data established, there would be a  
9 pro rata calculation made as to what the distribution should be  
10 for each of the plaintiffs.

11 THE COURT: Well, is there any reason why AB Data  
12 shouldn't distribute what it has now with a notification to the  
13 parties that there remains some additional funds that may be  
14 distributed subsequently?

15 MS. FOTI: The only issue, your Honor, may be that  
16 there would be additional administrative expenses for the class  
17 to do another pro rata --

18 THE COURT: Right. Which I think should be borne by  
19 AB Data.

20 MS. FOTI: We certainly will take that into  
21 consideration, your Honor.

22 THE COURT: Well, let's put it this way: You're going  
23 to make that distribution; you're going to make it in the next  
24 week. That's an order.

25 MS. FOTI: OK. Yes, sir.

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1 THE COURT: And if there are additional expenses with  
2 respect to the funds that are recovered at the moment, it seems  
3 to me perfectly appropriate for AB Data to bear the expense of  
4 that. But I won't decide that till I've heard from AB Data and  
5 everyone else at that time.

6 At the moment, I'm concerned that we'll even be able  
7 to get those \$9,000,000. So this may be a long process. But  
8 it would be absurd not to give the victims what we have in hand  
9 while we're waiting for that just because it might cause a  
10 little bit of administrative expense to a company whose  
11 performance during this entire case leaves something to be  
12 desired.

13 MS. FOTI: Your Honor, a couple of comments. The time  
14 period that will be required for the distribution I believe is  
15 actually -- takes five to six weeks to actually do the  
16 calculations.

17 THE COURT: Good. You can start on it tomorrow.

18 MS. FOTI: We certainly can do that, your Honor. And  
19 just in terms of AB Data, AB Data is the class administrator.  
20 The information they receive is from Mr. Cauley. He had sole  
21 signature authority over the escrow funds. They have taken all  
22 the steps that they are required to take as class  
23 administrator.

24 THE COURT: Well, if this were the first problem that  
25 had arisen in this case, I would be more sympathetic to the

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1 position, but it's not.

2 MS. FOTI: There is not --

3 THE COURT: And you were right in the middle of the  
4 previous problem. And I would have thought that that would  
5 have led you to be more punctilious, more aggressive, more  
6 inquiring than perhaps the law required you to be just because  
7 the history of this matter.

8 MS. FOTI: Your Honor, I believe that they were more  
9 punctilious, more aggressive, and more inquiring, even though I  
10 may not be able to pronounce punctilious. But the fact of the  
11 matter is --

12 THE COURT: As long as the reporter gets it right,  
13 that's all that matters.

14 MS. FOTI: She can spell it. But the fact of the  
15 matter is, your Honor, the AB Data undertook -- immediately  
16 upon receiving the docketed order that these funds could be  
17 distributed, they undertook to set up the bank account, they  
18 were in communication with Mr. Cauley's firm, Mr. Carney, they  
19 were in communications. We sent the wire instructions, they  
20 received a number of transfers fairly quickly thereafter.

21 They were informed in what seemed perfectly reasonable  
22 at the time that the money was in T-bill; it had not matured.  
23 And when they expected the money to mature, they were in  
24 communication. So they did everything that they could possibly  
25 have done in terms of these funds over which they had no

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1 control.

2 So to say that they were not doing their job, which is  
3 essentially what you're saying, I don't think that's accurate.

4 THE COURT: No, I don't have enough data to make that  
5 assertion. I'm just disappointed that somehow one individual,  
6 Mr. Cauley, was left with total control of the situation and  
7 apparently no oversight or scrutiny from any of the other  
8 players involved. But you make a fair point.

9 In any event, let's get the money we do have out as  
10 quickly as possible -- if it takes five six weeks, so be it --  
11 and we'll deal with the remaining money and the remaining  
12 expenses if and when that becomes ripe.

13 MS. FOTI: Yes, your Honor. Thank you.

14 THE COURT: So let me hear from whoever wants to speak  
15 for Carney Williams.

16 MR. CARNEY: Allen Carney, your Honor. I'm not sure,  
17 I think the full experience of our understanding of what's  
18 going on was reflected in the letter to you that was sent last  
19 week.

20 THE COURT: Well, I think I need to appoint you as  
21 co-escrow agent at this point. I can't release Mr. Cauley from  
22 his legal obligations. And he has, I hope, the money  
23 somewhere, but we need to have someone else also involved. So  
24 that is so ordered and I'll issue a written order later to  
25 that.

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1 MR. CARNEY: Yes, your Honor.

2 THE COURT: I'll ask the same question I asked of AB  
3 Data, which is you were being told orally, as I gather from  
4 Mr. Cauley, that this was all T-bills, but I take it nothing in  
5 writing was ever -- other than maybe an email or something like  
6 that, but nothing in the way of, Here's the account, here are  
7 the specific T-bills, anything like that, correct?

8 MR. CARNEY: No, your Honor. That is correct.

9 THE COURT: All right. I am concerned that if this  
10 money is recovered, that there will be some additional  
11 expenses. And based on what happened, when we had the what now  
12 seems to be the much more modest snafu earlier in this case, I  
13 think maybe the parties want to talk about some arrangement to  
14 share those expenses. That's probably the sensible way to  
15 proceed. Certainly we don't want to take that money away from  
16 the victims.

17 Anyone from Kirby McInerney wants to be heard? Yes.

18 MR. LINDEN: Yes, your Honor. Peter Linden. When we  
19 learned after the Court's order of distribution, we contacted  
20 AB Data promptly and the Carney Williams firm and told them  
21 that we wanted the monies to be provided and wire transferred  
22 as soon as possible. And we were told that there was some  
23 staggered funds; that these treasury bills were being  
24 staggered. And so that they were being provided, wired, on an  
25 intermittent basis, as the Court has indicated.

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1           We communicated with both AB Data and with our  
2 co-counsel on a regular basis asking when would the next  
3 tranche be wired, when would the next tranche be wired.

4           In approximately late February/early March, we had  
5 anticipated that there would be an earlier wire which had not  
6 occurred. And so we wrote to our co-counsel asking for  
7 assurances as to where and when the money would be transferred.  
8 And at that point we were advised that Mr. Cauley had the  
9 information and would provide us with the detail. And we did  
10 receive at that point, I think it's been referred to earlier  
11 today, a written email from Mr. Cauley through Mr. Carney --  
12 Mr. Carney provided it to us -- that specified the detail, and  
13 said that the money would be --

14           THE COURT: Excuse me for interrupting. All of these  
15 documents should be turned over by the parties to the U.S.  
16 Attorney's Office.

17           MR. LINDEN: Yes, your Honor.

18           THE COURT: Go ahead.

19           MR. LINDEN: And we asked when that would occur, and  
20 were told that it would occur at the beginning -- I'm sorry, no  
21 later than April 8th. I think there was some -- the April 2nd  
22 date had been mentioned, but we're told that it would occur no  
23 later than April 8th.

24           I was away on vacation the week of April 8th. I  
25 returned to the office the week of April 13th. And I received

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1 a note from AB Data saying that the money had not been wired  
2 the prior week. So I promptly wrote to Mr. Carney asking where  
3 the money was, which led ultimately to the letter that was sent  
4 to the Court on the 15th.

5 THE COURT: All right. Thank you very much. Anyone  
6 from defense want to be heard on this?

7 MR. HIRSCH: Only to point out, your Honor, that on  
8 behalf of The Bisys Group, our knowledge of this situation came  
9 at the same time as your Honor in a letter that I received.

10 THE COURT: Well, every indication is that this is a  
11 matter for the U.S. Attorney's Office. I am just hopeful that  
12 one way or another we can still recover these funds. But we  
13 will -- I'll ask Mr. Carney to keep me apprised of everything  
14 that's going on, and then we'll see whether we need to  
15 reconvene again.

16 When I hear people cracking lawyer jokes, I always  
17 take umbrage and point out that the profession of Lincoln, the  
18 profession of Madison and Jefferson often represents the  
19 highest ideals in our society. But recent events give me pause  
20 about how true that is.

21 All right. Thank you very much.

22 We will adjourn *sine die*.

23 \* \* \*

24

25