

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	2:96-cr-0259-GEB
Plaintiff,	)	
	)	
v.	)	<u>ORDER</u>
	)	
THEODORE JOHN KACZYNSKI,	)	
	)	
Defendant.	)	
_____	)	

Defendant Theodore John Kaczynski ("Kaczynski") filed a motion on August 19, 2010, to modify the August 5, 2010 Order, which supplemented the court-approved plan developed to sell or dispose of the property seized during the criminal investigation of Kaczynski's criminal bombings. Specifically, Kaczynski seeks to modify the August 5, 2010 Order to 1) provide a mechanism to request corrections to the electronic copy of his original writings, which the government is to provide his counsel after the conclusion of the auction, and 2) to provide for "the disposal of papers that were seized from [his] cabin that are not [his] own writings, but the writings of others" (ECF No. 772, 1:25-2:4.)

Kaczynski argues he is entitled "to an opportunity to request that the government replace any illegible or corrupted documents that may exist in the electronic copy provided by the government in the first

1 instance." Id. at 2:11-13. His motion includes two alternative
2 proposals to ensure his receipt of a complete copy of his writings.
3 Kaczynski first proposes that the government provide his counsel an
4 electronic copy of his original writings "[p]rior to any redactions[,]"
5 and that after receipt of the copy his counsel be given ninety days in
6 which "to examine the electronic copy and apply to the government for
7 correction of any illegible document or corrupted file contained in the
8 initial copy." Id. at 3:12-16. Kaczynski argues "if the Court is not
9 willing to order that the auction be delayed [for 90 days] to ensure
10 that [he] receives a complete, exact copy of his documents," his
11 alternative, second proposal should be adopted. Id. at 3:19-23.

12 Kaczynski's second proposal provides for "one year from the
13 date in which the electronic copy is originally provided to
14 [Kaczynski's] counsel during which he can, through counsel, make
15 application to the government for a new copy of any illegible or
16 corrupted document or file." Id. at 4:7-10. Kaczynski notes this
17 proposal requires "the government to keep its own copy of the original
18 documents, prior to redaction, so that such applications can be
19 fulfilled." Id. at 3:23-25.

20 Kaczynski further argues in his motion that a provision should
21 be made for the writings seized, other than those he authored, since
22 "these items have not been dealt with separately in the litigation." Id.
23 at 4:27-5:1, 5:10-16. Kaczynski states:

24 The simplest, least costly method for disposing of
25 such documents is to either return them to Mr.
26 Kaczynski or copy such documents along with Mr.
27 Kaczynski's own writings and include them in the
28 electronic copy to be provided to counsel. Such
method avoids any additional litigation should the
government's implementation of the order lead to
the destruction or loss of such documents. Further,
these documents are fairly characterized as
essential to the communication of ideas in Mr.

1 Kaczynski's own writings because many of them are
2 responses to Mr. Kaczynski's writings or related in
3 some other manner to his writings and are thus
logically disposed of in the same manner as Mr.
Kaczynski's own writings.

4 Id. 5:2-9.

5 The government objected to Kaczynski's motion in a filing on
6 August 26, 2010, in which it argues, *inter alia*, "[the] motion is a
7 transparent attempt to prevent the sale of his property, to keep wasting
8 this Court's time and scant resources, and to continue victimizing the
9 victims[, which] should be summarily denied." (ECF No. 773, 2:7-9.) The
10 government also argues Kaczynski waited "two months after the [status
11 conference]" to request the ability to compare his electronic copies to
12 the originals, and "he has never [previously] alleged that his First
13 Amendment rights are somehow violated if he is not given a copy of
14 anyone else's writings." Id. 2:3-7, 2:13-15.

15 An order issued on September 3, 2010 requesting "[c]ounsel for
16 the United States, Theodore John Kaczynski, and the Named Victims . . .
17 to discuss Kaczynski's objection concerning when Kaczynski's counsel
18 shall be provided an electronic copy of Kaczynski's original writings as
19 they appeared prior to redactions." (ECF No. 774, 1:12-16.) The
20 September 3, 2010 Order includes the statement: "the Court desires
21 further input on this objection in a filing or filings due no later than
22 September 13, 2010." Id. 1:21-23.

23 The Named Victims filed a response on September 13, 2010. (ECF
24 No. 775.) In their response, the Named Victims object to Kaczynski's
25 first proposal that he be granted 90 days before the auction to apply
26 for corrections to the electronic copy of his writings, arguing "the
27 long-planned auction would be delayed another 90 days while Kaczynski's
28 [counsel] quality-checks the electronic version of the unredacted

1 writings." Id. 1:21, 1:24-26. The Named Victims contend the delay is
2 "unfair and unnecessary" because, *inter alia*, it

3 represents yet another attempt by Kaczynski to
4 privilege his own asserted rights above the Named
5 Victims' right to compensation. What he seeks is
6 nothing less than perfection. Based on the
7 miniscule risk that a handful of the 40,000 pages
at issue here fails to meet his standard of
legibility, the victims will suffer-at a
minimum-another three months' [sic] delay in
receiving money that their families vitally need.

8 But Kaczynski is not entitled to perfection-
9 merely to a reasonable accommodation
Indeed, the Ninth Circuit held years ago that the
10 auction plan must seek to maximize monetary returns
for the victims if it is to "defeat" Kaczynski's
11 countervailing right to the return of his property
. . . . That approach-mandating the design and
12 implementation of an auction plan capable of
"defeat[ing]" Kaczynski's rights-certainly does not
13 privilege those rights above the Named [Victims']
rights or give him a veto over the auction whenever
14 some detail of it is not to his liking.

15 Id. 1:26, 2:5-18. The Named Victims further argue that any infringement
16 to Kaczynski's First Amendment rights in not receiving an exact copy of
17 his original writings is de minimis and does not give rise to a First
18 Amendment claim. Id. at 2:21-3:11.

19 The government also filed a response to Kaczynski's objection
20 on September 13, 2010 in which it "concurs with the Named Victims'"
21 responses to Kaczynski's modification motion. (ECF No. 776, 2:13.)

22 The government and Named Victims do not object to Kaczynski's
23 second proposal in which he requests a one-year period after receipt of
24 his copy within which he can "[apply] to the government for a new copy
25 of any illegible or corrupted document or file, and [have] the
26 government . . . comply with such application provided it is made within
27 that one-year window of time." However, the Named Victims propose that
28 the government provide Kaczynski with a hard, versus electronic, copy.

(ECF No. 775, 3:18-20.) The Named Victims argue providing Kaczynski with an electronic copy undermines the Ninth Circuit's stated purpose in allowing the sale of Kaczynski's redacted writings, i.e. "a reasonable compromise that permits the victims to hopefully recoup some monetary value without further compromising their privacy or memories of their loved ones" since he could "in a manner of minutes, . . . upload to the Internet a complete and unredacted set of his writings, rife with the details of his victims' identities and injuries and his systematic efforts to harm them." Id. 3:22-28. The Named Victims also state they recognize after Kaczynski receives a physical copy of his writings, he can have them scanned into electronic format, but contend "there is no reason to place taxpayer resources at his disposal to accomplish (and accelerate) that task, thereby undermining the purpose of the auction plan and its attendant privacy protections." Id. 4:11-14.

The government states it is "prepared to make photocopies of [Kaczynski's] writings and produce the same to [his] representative . . . [,]" and will "retain the scanned or photocopied documents for any period of time," if ordered to do so. (ECF No. 776, 2:15-18.)

A. Kaczynski's Ability to Seek Corrections of Copied Writings and the Form of His Copy

Kaczynski's first proposal would delay the auction preparation process for 90 days while Kaczynski's representative makes a comparison of documents that his counsel could have made much earlier in this case. Since this proposed delay does not foster the goal of having the auction "within a reasonable period of time," Kaczynski's first proposal is rejected. U.S. v. Kaczynski, 416 F.3d 971, 977 (9th Cir. 2005).

///

///

1 Kaczynski's second proposal, "that the order . . . provide for
2 a window of time after [Kaczynski's] counsel receives . . . [a] copy [of
3 Kaczynski's writings] during which his designated representative can
4 examine the copy and his attorney of record can make applications to the
5 government for new copies of documents or files that are corrupted or
6 illegible," will be adopted; however, the copy he shall receive will be
7 a physical copy rather than electronic copy. Kaczynski's counsel
8 proposed the then unopposed electronic copy idea at the June 14, 2010
9 status hearing. However, now both the Named Victims and the government
10 request that this portion of the August 5, 2010 Order be modified. The
11 Named Victims state after reflecting on the matter, their preference is
12 that Kaczynski be provided a hard copy of his unredacted writings, not
13 electronic. The Named Victims' argument that providing Kaczynski an
14 electronic copy could enable Kaczynski to readily undermine the purpose
15 of the Court's redaction plan is persuasive. Therefore, the August 5,
16 2010 Order (ECF No. 771) is amended as follows:

17
18 Page 9, lines 1-2 are replaced with the following: "exact
19 photocopy of his original writings as they appeared before
20 redaction."

21
22 and

23
24 Page 9, line 26 through Page 10, line 2 are replaced with the
25 following: "2. Sixty days after conclusion of the auction,
26 the government shall provide Kaczynski's counsel with a
27 photocopy of his original writings (the "Writings") as they
28 appeared prior to the redactions described below."

1 Further, the August 5, 2010 Order is supplemented on page 11
2 by adding the following paragraph at the commencement of line 6:

3 "6. Kaczynski shall have one year from the date on which the
4 copy is provided to his counsel within which he can, through counsel,
5 make application to the government for a new copy of any illegible page;
6 and the government shall comply with such application provided it is
7 made within one-year of the referenced date. At the conclusion of this
8 one-year time period, provided the government has reasonably satisfied
9 all applications made within that time, the government need no longer
10 maintain a copy of the original documents."

11 **B. Others' Writings**

12 Lastly, Kaczynski's arguments concerning the seized writings
13 of others are not persuasive. The Ninth Circuit decision on the
14 district court's order denying Kaczynski's motion to return the property
15 seized during his criminal investigation held, "[i]n the probable event
16 that the value of Kaczynski's property is more than negligible, the
17 property is needed to satisfy the terms of the restitution order, and
18 the government has a cognizable claim of ownership sufficient to defeat
19 Kaczynski's motion for its return." U.S. v. Kaczynski, 416 F.3d at 976
20 (quotation omitted). Therefore, Kaczynski's request for a return of the
21 writings of others has not been shown to be ripe for decision since it
22 is not now known whether any of those writings will be sold or disposed
23 of in accordance with the orders issued in this case.

24 Further, Kaczynski's arguments that these writings can be
25 "fairly characterized as essential to the communication of ideas in
26 [his] own writings . . . and are thus logically disposed of in the same
27 manner as [his] own writings," and that additional litigation involving
28 these writings could be avoided if what he proposes is adopted, concern

1 a stale claim not before alleged as an issue in this case. (ECF No. 772,
2 5:4-9.) The government's objection to this claim essentially raises
3 "[t]he defense of laches [which] stems from the principle that 'equity
4 aids the vigilant, not those who slumber on their rights,' and is
5 designed to promote diligence and prevent enforcement of stale claims."
6 Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966) (citation omitted).

7 The equitable doctrine of laches was designed to
8 promote justice by preventing surprise through the
9 revival of claims permitted to slumber for an
10 unreasonable period of time. In other words, the
11 right to be free of stale claims prevails over the
12 right to prosecute them. Long ago Mr. Justice
13 Story, with customary clarity, stated the reason
14 for the rule in these words: "It is for the public
15 interest and policy to make an end to litigation .
16 " Public interest, order and tranquility,
17 therefore, require that interested parties acquaint
18 themselves with existing rights within a reasonable
19 time. What constitutes a reasonable time is not
20 [limitless].

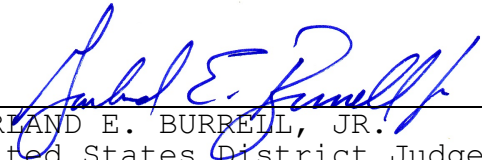
21 Warner v. First Nat. Bank of Minneapolis, 135 F.Supp. 687, 693 (D.C.
22 Minn. 1955).

23 Kaczynski's unexplained unreasonable delay of waiting until
24 the eve of the auction preparatory process to raise this claim, combined
25 with his threat to litigate this claim at this late stage of the
26 proceeding, and the Named Victims' concern that further delay deprives
27 them of "receiving money that their families vitally need," evinces
28 that this issue is barred by the equitable doctrine of laches.
Kaczynski has not previously raised this issue during the five years
that the parties and district court have been developing and
implementing the plan to sell or dispose of his property, and he
provides no explanation why he did not raise it at an earlier stage of
the proceeding. Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d
549, 555 (9th Cir. 2006) (laches requires proof of (1) lack of diligence

1 by the party against whom the defense is asserted, and (2) prejudice
2 resulting from the delay). For the stated reasons, this portion of
3 Kaczynski's request is denied.

4 IT IS SO ORDERED.

5 Dated: September 17, 2010

6
7 
8 _____
9 GARLAND E. BURRELL, JR.
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28