

JONES DAY

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April 13, 2011

VIA ECF AND HAND DELIVERY

The Honorable Joel H. Slomsky
U.S. District Court, Eastern District of Pennsylvania
United States Courthouse
Chambers, Room 5614
601 Market Street
Philadelphia, PA 19106-1797

Re: *Devon IT, Inc., et al. v. IBM, et al.*,
E.D. Pa., No. 10-cv-02899-JHS

Dear Judge Slomsky:

We write on behalf of all Defendants in the above-referenced matter. We ask your Honor's indulgence in accepting this letter in reply to Mr. Mitts' procedurally improper April 11 letter to the Court.¹ In that letter, even though discovery has not yet begun in this case, Mr. Mitts requests the Court's permission to depose Robert Moffat prior to his release from a six month prison sentence because Plaintiffs consider him a flight risk. Plaintiffs' concerns are unfounded, their request is premature, and the proposed deposition would be prejudicial.

There is no basis in fact—as compared to unfounded speculation—to believe that Mr. Moffat will flee the jurisdiction upon his release from prison. Mr. Moffat was sentenced to six months imprisonment for having engaged in insider trading, and he did not flee the country before his trial or after his conviction while he awaited incarceration. In fact, at his request, Mr. Moffat started his period of incarceration earlier than required so that he could be out of prison in time to attend his son's college graduation next month. *See* Letter from K. Lawrence to the Hon. Deborah A. Batts (Sept. 16, 2010) (attached as Exh. A). These are hardly the acts of a man who is planning the fanciful escape from the country *after* his period of incarceration that Mr. Mitts theorizes.

Following his release from prison in less than a month, Mr. Moffat will in fact be on “supervised release” for two years. During that time, Mr. Moffat (1) cannot leave the judicial district without permission of the court or his probation officer; (2) must submit a report to his

¹ *See* Judge Slomsky's Scheduling and Motion Policies and Procedures I(A) (stating that “written communications with the Court concerning any case . . . should be by the filing of a [] motion”).

The Honorable Joel H. Slomsky
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probation officer in the first five days of each month; (3) and must permit his probation officer to visit him at any time. *See* Judgment in Criminal Case (Sept. 16, 2010) (attached as Exh. B). The Government itself apparently is not concerned that Mr. Moffat is a flight risk during this period—having agreed, as Mr. Mitts’ letter points out, to having his passport returned to him. Again, there is simply no factual basis for the speculation in which Mr. Mitts engages.

Nor is there any reason why this issue should prematurely be raised before discovery is commenced and prior to a Rule 16 conference with the Court. *See* Fed. R. Civ. P. 26(d) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). . .”). Whether and how the deposition of Mr. Moffat is to be taken is plainly the type of issue that should be part of the Rule 16 case management process and order, and Mr. Mitts has not identified any factually-supported, compelling reason to deviate from that process.

It also would be prejudicial to Defendants to deviate from the Rule 16 process in order to take Mr. Moffat’s deposition in prison. We suspect that what Devon really wants is Mr. Moffat deposed in a prison jumpsuit for jury appeal purposes. But such a sight would plainly taint the record in this case. This court should not allow such transparent gamesmanship.

Indeed, Mr. Moffat is not even relevant to this proceeding. Devon has yet to identify any fact that ties Mr. Moffat to Devon, the joint developments agreements between IBM and Devon, or the disputes arising out of those agreements. The lone fact that Devon identifies to justify Mr. Moffat’s deposition is his brief service as the Senior Vice President for STG, the IBM division with which Devon contracted. But Mr. Moffat was not working in or responsible for the STG division until July 2008, a date long after the two offending joint development agreements were negotiated and signed in 2005 and 2007. *See* Complaint ¶¶ 19, 30, 52 (detailing first meeting in September 2005; signing of Blade Agreement on November 7, 2005; and signing of Hosted Client Agreement on June 7, 2007). Moreover, the crime of which Mr. Moffat was convicted, insider trading, is wholly unrelated to Devon and its allegations, and to IBM and its operations more broadly. In fact, IBM was a victim of that crime. Mr. Moffat simply has no relevance to this case.

For all of these reasons, we respectfully request that your Honor deny Mr. Mitts’ request to depose Mr. Moffat while he is still incarcerated. We are prepared to submit formal briefing on this issue if your Honor feels it necessary or appropriate.

Lastly, Defendants would be remiss if they did not inform the Court that they intend to file later this week a motion for reconsideration of this Court’s Order denying, in part, Defendants’ motion to dismiss. We respectfully request that your Honor review that upcoming filing before any decision is made on Plaintiffs’ request for Mr. Moffat’s deposition in prison or on the commencement of discovery, per the issuance of an order scheduling a Rule 16 Conference.

JONES DAY

The Honorable Joel H. Slomsky
April 13, 2011
Page 3

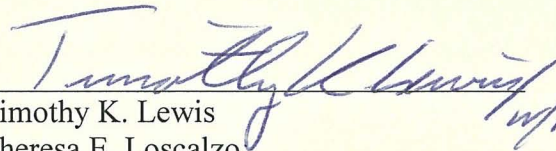
Respectfully submitted,



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*Counsel for Defendants IBM Corporation,
Rodney Adkins, James Gargan and Bernard
Meyerson*



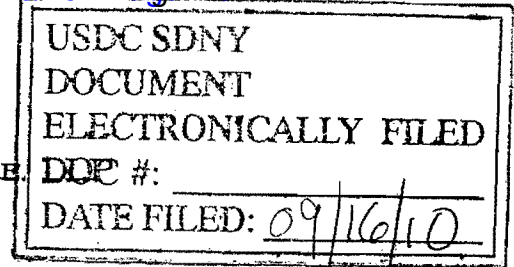
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Counsel for Defendant Thomas Bradicich

cc: Maurice R. Mitts, Esq.

EXHIBIT A

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SUITE 450
WHITE PLAINS, NEW YORK 10601



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September 14, 2010

Via Fax (212) 805-7902

Hon. Deborah A. Batts
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 2510
New York, New York 10007-1312

Re: United States v. Robert Moffat, Jr.
10 Cr. 270 (DAB)

Dear Judge Batts:

I am writing to request that the surrender date set by the Court at yesterday's sentencing of Mr. Moffat be accelerated to November 5, 2010.

Mr. Moffat, his family and counsel greatly appreciate the Court's consideration yesterday in setting a surrender date that would permit Mr. Moffat to both spend the holidays with his family and attend his son's college graduation in May, 2011. Mr. Moffat has discussed this matter with his family and they collectively feel that the pendency of a prison sentence creates substantially more stress than the benefit of spending the holidays together. The Moffats believe strongly that the entire family would be better off if Mr. Moffat were able to complete serving his sentence and be home in time for graduation.

I have talked with the designation unit at the Bureau of Prisons in Texas and am told that if the Court sets the above-requested surrender date of November 5, 2010 there is no anticipated problem in having Mr. Moffat's designation by that date.

MEMO ENDORSED
granted
DAB
9/14/10
MEMO ENDORSED

Hon. Deborah A. Batts, U.S.D.J.
September 14, 2010
Page 2

I have also discussed this matter with Special Assistant United States Attorney Andrew Michaelson and he consents to the request for an earlier surrender date for Mr. Moffat.

Mr. Moffat and counsel greatly appreciate the Court's consideration in this matter.

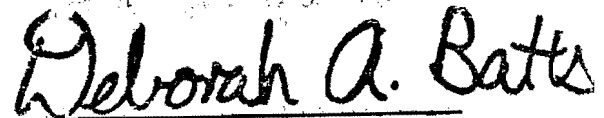
Respectfully submitted,



Kerry A. Lawrence

cc: AUSA Andrew Michaelson (via email)

SO ORDERED



DEBORAH A. BATTS
UNITED STATES DISTRICT JUDGE

Sept 16, 2010

EXHIBIT B

SAO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 09/16/10
NEW YORK

UNITED STATES DISTRICT COURT

SOUTHERN

District of

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

ROBERT MOFFAT, JR.

Case Number: 10 CR. 270 DAB

USM Number: 62789-054

KENNETH SCHACTER AND KERRY LAWRENCE

Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) ONE AND TWO ON 3/29/2010

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 371	CONSP. TO COMMIT SECURITIES FRAUD	OCT. 2008	1
15 USC § 78j(b) & 78ff	SECURITIES FRAUD	SEPT. 2008	2

The defendant is sentenced as provided in pages 2-6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

Count(s) _____ ☐ is _____ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

SEPTEMBER 13, 2010

Date of Imposition of Judgment

Deborah A. Batts

Signature of Judge

DEBORAH A. BATTS, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

September 16, 2010

Date

DEFENDANT: ROBERT MOFFAT, JR.
CASE NUMBER: 10 CR 270 DAB

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

SIX MONTHS.

The Defendant is notified of his right to appeal.

- X The court makes the following recommendations to the Bureau of Prisons:**
That the Defendant be designated to Otisville, N.Y.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
☐ as notified by the United States Marshal.

- X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:**

- X on** NOVEMBER 5, 2010. (Per attached memo endorsed Order dated Sept. 14, 2010.)
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROBERT MOFFAT, JR.
CASE NUMBER: 10 CR 270 DAB

SUPERVISED RELEASE

TWO YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ROBERT MOFFAT, JR.
CASE NUMBER: 10 CR 270 DAB

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall pay a special assessment of \$200 within 60 days of release from imprisonment.
2. The Defendant shall pay a fine of \$50,000.00, with interest, within 12 months from release from imprisonment.

DEFENDANT: ROBERT MOFFAT, JR.
CASE NUMBER: 10 CR 270 DAB

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 50,000.00	\$ NO RESTITUTION

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	0	\$ _____	0
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☐ Restitution amount ordered pursuant to plea agreement _____

☒ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ROBERT MOFFAT, JR.
CASE NUMBER: 10 CR 270 DAB

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

The Defendant shall pay a special assessment of \$200 within 60 days of release from imprisonment.

The Defendant shall pay a fine of \$50,000.00, with interest, within 12 months from release from imprisonment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

USDC SDNY
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*ALSO ADMITTED IN CT
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September 14, 2010

Via Fax (212) 805-7902

Hon. Deborah A. Batts
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 2510
New York, New York 10007-1312

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10 Cr. 270 (DAB)

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I have talked with the designation unit at the Bureau of Prisons in Texas and am told that if the Court sets the above-requested surrender date of November 5, 2010 there is no anticipated problem in having Mr. Moffat's designation by that date.

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granted
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Hon. Deborah A. Batts, U.S.D.J.
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I have also discussed this matter with Special Assistant United States Attorney Andrew Michaelson and he consents to the request for an earlier surrender date for Mr. Moffat.

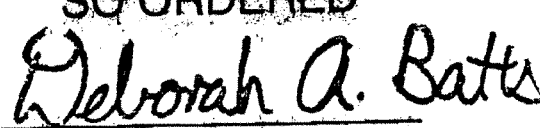
Mr. Moffat and counsel greatly appreciate the Court's consideration in this matter.

Respectfully submitted,



Kerry A. Lawrence

cc: AUSA Andrew Michaelson (via email)

SO ORDERED

DEBORAH A. BATTS
UNITED STATES DISTRICT JUDGE
Sept 16, 2010