UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | § | |
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| V. | § | No. 07 CR 0220 (BSJ) |
| | § | |
| PAUL C. BARNABA, | § | |
| *Defendant.* | § | |
| | § | |

**DEFENDANT BARNABA'S REPLY TO GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BARNABA'S MOTION TO SEVER**

TO THE HONORABLE BARBARA S. JONES U.S. DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF NEW YORK:

Defendant Paul C. Barnaba filed his Motion to Sever and Incorporated Memorandum of Law on May 7, 2008. The Government responded on May 21, 2008. Barnaba offers this brief reply.[1]

## 1. Introduction.

In his Motion to Sever, Barnaba argued that "severance is warranted in the unique circumstances of this case, including: substantial post-indictment delay; a Defendant who is ready for trial and has consistently expressed his desire for speedy trial; and, Codefendants who are months away from even

[1] Barnaba does not intend to waive any issue by not responding to contentions fully addressed in his Motion to Sever and Incorporated Memorandum of Law.

being able to suggest a possible trial date." Motion to Sever at 4. Specifically, Barnaba sought to show "a serious risk that a specific trial right, his constitutional right to speedy trial, will be compromised by a failure to sever him from his Codefendants." *Id.* at 10. Barnaba further maintained that, because he had established this serious risk, "severance would appear to be mandated." *Id.* The usual rationales in favor of joint trial were trumped, but even if they were not trumped, they had limited application in this case because of, among other things, Barnaba's limited role in comparison to his Codefendants. *Id.* at 11.

In its Response to Barnaba's Motion to Sever, the Government argues that Barnaba has bootstrapped "into the severance context the claim he raised in his motion to dismiss based on speedy trial grounds." Government's Response at 4. Since, according to the Government, Barnaba's speedy trial rights are not being infringed, his severance motion must likewise fail. *Id.* The Government also argues that Barnaba's more limited role in the Indictment is irrelevant under severance law, because he is charged as an alleged co-conspirator and with each of his Codefendants in the securities fraud counts. *Id.* at 5-7.

**2. The Wasting D&O Policy.**

The Government devotes only one paragraph of its Response to Barnaba's argument that failing to sever him seriously risks compromising his

speedy trial rights. The Government does not dispute Barnaba's contention that the right to a speedy trial is a specific trial right for purposes of severance analysis, nor does it dispute Barnaba's assertion that he has "proactively, concretely, and vigorously endeavored to exercise" his speedy trial rights "to the fullest." Motion to Sever at 7. According to the Government, "the central harm [Barnaba] purports to identify—the possibility of the directors and officers insurance policy running out of fund[s]—is, as was the case in his speedy trial dismissal motion, wholly speculative and unsubstantiated." Government's Response at 4.

This is inaccurate in two respects. First, the diminishing D&O Liability Policy ("D&O Policy") has never been identified by Barnaba as "the central harm." But it is obviously very important, as detailed in the Motion to Sever. Second, the impending exhaustion of these funds is neither speculative nor unsubstantiated.

The D&O Policy in question provides four layers of coverage—a total of $50 million. It provides coverage to a wide array of former Collins & Aikman ("C&A") executives and employees, including those who have been charged in this case, those who have been sued or subpoenaed in the civil SEC matter, and those who have been sued or subpoenaed in various class actions and other civil suits taking place around the country. The first $15 million layer of coverage was exhausted on or about June 15, 2007. The second $15 million

layer of coverage was exhausted on or about March 31, 2008. Invoices were submitted to the second layer carrier between in or around July 2007, and in or around March 2008, invoicing for work performed between in or around June 2007 and in or around February 2008. In other words, the second $15 million layer of coverage was exhausted in nine months at a rate of approximately $1.67 million per month. The monthly burn rate was higher at the end than at the beginning of this nine-month period.

This leaves $20 million of coverage remaining, but this amount is for invoices submitted beginning on or about April 1, 2008 for work that was performed beginning on or about March 1, 2008. Assuming a monthly burn rate of $2 million to $3 million, which is realistic and likely conservative, all policy proceeds will be exhausted sometime between mid-September 2008 and December 31, 2008. This is not speculation.

Counsel for Barnaba proffers this information as an Officer of this Court. If requested by the Court, Barnaba, through counsel, can and will present testimony and evidence substantiating these proffered facts.

**3. The Risk of Future Compromise to Constitutional Rights.**

As noted above, the Government accuses Barnaba of bootstrapping: "He now argues that he will suffer prejudice because he is ready for trial now, while his codefendants are not. Because Barnaba's speedy trial rights are not being infringed, however — as explained at length in the Government's opposition

to Barnaba's speedy trial motion — his severance motion premised on his speedy trial claim fails as well." Government's Response at 4. This ignores the key component of Barnaba's severance request.

Barnaba explicitly conceded that his Speedy Trial Motion was "currently before the Court" and that the Court might well disagree with the Speedy Trial Motion's analysis. But Barnaba also noted that "[t]here is, at a minimum, a 'serious risk' that Barnaba's constitutional right to a speedy trial will 'be compromised' absent a severance, because his Codefendants are nowhere near ready for trial and cannot even predict when they will be ready." Motion to Sever at 6. Barnaba further argued, based on earlier citations to the record, that his Codefendants "cannot predict when they will finish their document review, and do not even know if they will be in a position to ask for a motion schedule at the next status conference, currently set for July. By any reasonable estimate, it does not look like Barnaba's Codefendants will be ready for trial for at least another year." *Id.* The Government's Response does not mention this unmistakable and serious risk of *future* compromise to Barnaba's *constitutional* speedy trial rights.

The Government instead cites *United States v. Vega*, 309 F.Supp.2d 609, 615 n.5 (S.D.N.Y. 2004), for the proposition that a pretrial adjournment is not a basis for severance if the adjournment does not violate a defendant's speedy trial rights. Government's Response at 4. The Government also cites four other

U.S. District Court decisions from this District that supposedly "applied the same methodological analysis and reached the same conclusion when presented with the argument Barnaba makes here." *Id.* These decisions are: *United States v. Oruche*, 2008 WL 612694, at *5 (S.D.N.Y. March 5, 2008); *United States v. Savarese*, 2002 WL 265153, at *5 (S.D.N.Y. Feb. 22, 2002); *United States v. Nguyen*, 1995 WL 380122, at *1 (S.D.N.Y. June 26, 1995); and, *United States v. Gambino*, 784 F.Supp. 129, 137-141 (S.D.N.Y. 1992). Careful examination of these non-binding decisions, however, reveals that they do not support the Government's characterization of their holdings, or, that they fit legal arguments and/or fact patterns distinguishable from Barnaba's.

In *Vega*, defendant Mitchell, who was detained pretrial, moved for severance based on the possibility of prejudicial spillover. The court denied the motion. In a footnote, Judge Koeltl noted that "Defendant Mitchell's counsel requested that the Court consider the difficulty in scheduling a multi-defendant trial in deciding the motion for a severance." It seems clear from the opinion, however, that defendant Mitchell never specifically invoked either the Speedy Trial Act or the Sixth Amendment right to speedy trial. Nor did he argue that a joint trial seriously risked compromising a specific trial right.[2] And Judge Koeltl's opinion did not address the severance issue in those terms.

[2] Mitchell was indicted on August 21, 2003. Judge Koeltl's opinion was handed down on March 22, 2004. At the time of the opinion, trial was scheduled for September 7, 2004.

In *Oruche*, Judge Pauley denied defendant Oluigbo's motion for severance because "[a]s of the date of this Memorandum and Order, no time has elapsed on the Speedy Trial Clock for any Defendant" and a three month delay for codefendant's incoming counsel to adequately prepare for trial was excludable under the Act. *Oruche* at 4. There was no discussion in Judge Pauley's opinion of defendant Oluigbo's Sixth Amendment right to speedy trial, much less of the serious risk that this constitutional right would be compromised in the future by failure to sever.[3]

In *Savarese*, defendant Russo argued that he would be prejudiced by a delay in his trial date if he was not severed. PACER records indicate that Russo was indicted on December 3, 2001, and filed his motion to sever on January 14, 2002. Judge Schwartz, who issued his ruling on February 22, 2002, acknowledged that delay could be properly taken into account in deciding whether to grant severance, but noted that the delay in Russo's case would be a relatively short two to four months, since the court could not try the case until April 2002, even if it granted severance, and the trial was set for Summer 2002. Employing a balancing test, Judge Schwartz held that such a short delay did not

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PACER records indicate that Mitchell pled guilty on September 8, 2004. Barnaba was indicted over 14 months ago. If he is not severed from his Codefendants he will probably not go to trial for at least another year. Even a delay of ten more months will mean a trial two years post-Indictment.

[3] Oluigbo was indicted on June 12, 2007. Judge Pauley's opinion was handed down on March 5, 2008. Trial is currently set for June 11, 2008.

warrant severance.[4] By way of contrast, Barnaba has been awaiting trial for more than 14 months and faces the strong probability of at least another one year delay if he is not severed. Judge Schwartz' opinion never explicitly discusses the Sixth Amendment right to speedy trial or the serious risk that this right would be compromised by failing to grant Russo a severance.

In *Nguyen*, the defendant was arrested in October 2004. He moved to sever at a May 31, 1995 pretrial conference. The court had previously continued the trial date from June 26, 1995 to September 5, 1995, at a February 15, 1995, pretrial conference. In the portion of his ruling discussing the Sixth Amendment right to speedy trial, Judge Stanton assumed, for purposes of his opinion, that the 10-month delay between Nguyen's arraignment and the September trial date was presumptively prejudicial. Turning to the other three factors under the test laid out in *Barker v. Wingo*, 407 U.S. 514 (1972), Judge Stanton noted that the 10-month delay had largely been caused by the unusual complexity of a case involving 11 defendants and seven superseding indictments. Judge Stanton also stressed that Nguyen had not asserted his speedy trial rights in any manner until the May 31, 1995 pretrial conference. Not only had Nguyen failed to object to any previous continuances during five pretrial conferences; he had explicitly consented at the February 15, 1995

[4] PACER records indicate that Russo pled guilty on May 23, 2002, six months after his indictment.

conference to continuing the trial from June to September. Finally, Nguyen asserted no prejudice other than his pretrial incarceration.

Without explicitly stating so, Judge Stanton's opinion does seem to take into account the future potential risk to Nguyen's Sixth Amendment speedy trial rights. In contrast to our case, however, Judge Stanton knew that trial was set for a date certain and that the date was only ten months after arraignment. Barnaba has no idea when he will go trial if he remains tethered to the Codefendants, but he is reasonably certain that any trial will be at least 24 months post-Indictment. And, unlike Nguyen, Barnaba has long been on record objecting to Speedy Trial Act exclusions of time and requesting a trial date.

In *Gambino*, the defendants did not argue for severance based on Sixth Amendment speedy trial rights. They alleged instead that further delay would compromise their rights under the Speedy Trial Act. Nevertheless, Judge Leisure volunteered that "even if they had made such a [Sixth Amendment] claim, that claim would fail," because, among other things, "the moving defendants did not advance their Speedy Trial claims until…nearly three years after the original indictment was filed." *Gambino*, at 140-41. This obviously has no application to Barnaba. Barnaba has consistently and vociferously voiced his concerns about speedy trial since the second status conference in July 2007.

In sum, even assuming that the cases cited by the Government were binding, they do not foreclose Barnaba's argument.

**4. Barnaba's Limited Role.**

The Government apparently misconstrues Barnaba's argument about his limited role, in relation to the Codefendants, in the alleged crimes. Barnaba realizes that if his Motion to Sever was based on nothing more than his relatively limited role it would almost certainly fail. But, as Barnaba argued in the Motion to Sever, because he "has established a serious risk that a specific trial right, his constitutional right to speedy trial, will be compromised by a failure to sever him from his Codefendants, severance would appear to be mandated. The usual rationales militating against severance, although still valid, are trumped by Barnaba's constitutionally-based specific trial rights." Motion to Sever at 10.

And even if those usual rationales, such as the public's interest in economy, convenience, and prompt trials, are not trumped, they are of limited application here. Here, granting Barnaba's severance request will insure the accused's prompt trial. Here, because of Barnaba's relatively limited role in the charged offenses, because he is the only Purchasing Department employee charged with a crime, and because he has virtually no involvement in any alleged scheme other than the Supplier Rebate Fraud Scheme, severing him will entail only limited duplicative effort.

**5. Conclusion.**

For these reasons, as well as the reasons stated in his Motion to Sever, Barnaba implores the Court to sever his case from that of the Codefendants and set his matter for trial at the earliest possible opportunity.

Respectfully submitted,

/S/

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2008, I served a copy of this Defendant Barnaba's Reply to Government's Memorandum of Law in Opposition to Defendant Barnaba's Motion to Sever on the attorneys for the United States, Assistant U.S. Attorneys Helen Cantwell, Anthony Barkow, and Marc Berger, and on counsel for the Codefendants, by filing it electronically via ECF.

/S/
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