UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	**:**	
-v.-	**:**	
PAUL C. BARNABA,	**:**	**07 Cr. 220 (BSJ)**
Defendant.	**:**	

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

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Dated: May 21, 2008
New York, New York

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Barnaba seeks severance. He makes two arguments. First, he claims that he suffers prejudice because joinder delays his trial, since he has represented that he is ready for trial, while his co-defendants are not. Second, he claims that his role in the alleged offenses is smaller than the roles of his codefendants. His motion should be denied.[1]

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). The Supreme Court has explained the strong institutional considerations underlying this settled principle:

> It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability — advantages

[1] Barnaba makes no argument that he is improperly joined.

> which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. *Marsh*, 481 U.S. 200, 209-210 (1987). *See also United States* v. *Lyles*, 593 F.2d 182, 191 (2d Cir. 1979) (presumption in favor of joint trials "conserves judicial resources, alleviates the burdens on citizens serving as jurors, and avoids the necessity of having witnesses reiterate testimony in a series of trials"). Thus, although joint trials may invite some prejudice to defendants, "[t]he risks of prejudice attendant in a joint trial are presumptively outweighed by the conservation of time, money and scarce judicial resources that a joint trial permits." *United States* v. *Jimenez*, 824 F. Supp. 351, 366 (S.D.N.Y. 1993). *See also United States* v. *Henry*, 861 F. Supp. 1190, 1199 (S.D.N.Y. 1994) (consideration of "the burdens upon the criminal justice system imposed by separate trials has given rise to a strong presumption in favor [of] joint trials and led courts to erect high barriers to defendants who move for severance").

In recognition of the compelling interests served by joint trials, it has long been the law that severance motions are "'committed to the sound discretion of the trial judge.'" *United States* v. *Scarpa*, 913 F.2d 993, 1014 (2d Cir. 1990) (quoting *United States* v. *Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989)); *see also United States* v. *Beverly*, 5 F.3d 633, 637 (2d Cir. 1993) (same); *United States* v. *Torres*, 901 F.2d 205, 230 (2d Cir. 1990) (same). "In exercising this discretion, the Court must pay heed to the powerful institutional interests in judicial economy favoring joint rather than separate trials." *United States* v. *Henry*, 861 F. Supp. at 1199.

Requests for severance are governed by Fed. R. Crim. P. 14(a) and the Supreme Court's decision in *Zafiro*. Fed. R. Crim. P. 14(a) provides, in pertinent part:

> If the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide other relief that justice requires.

Fed. R. Crim. P. 14(a). In *Zafiro*, the Supreme Court held that:

> when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

Zafiro, 506 U.S. at 539. Second Circuit law accords with *Zafiro*:

> The principles that guide the district court's consideration of a motion for severance usually counsel denial. Since there is a preference, in the federal system, for the joint trial of defendants indicted together, the district court should grant a severance motion only if there is a serious risk that a joint trial would compromise a specific trial right of the moving defendant or prevent the jury from making a reliable judgment about guilt or innocence.

United States v. *Rosa*, 11 F.3d 315, 341 (2d Cir. 1993) (citing *Zafiro*); *see also United States* v. *Lanza*, 790 F.2d 1015, 1019 (2d Cir. 1986) (the issue under Rule 14 is whether the prejudice "is sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials").

Defendants do not meet this burden "merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540. Morever, even in those rare instances when a defendant establishes a "high" risk of prejudice, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.* at 539.

Because Barnaba cannot establish "that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence," *Zafiro*,

506 U.S. at 539, his severance motion should be denied.

Barnaba's first argument essentially bootstraps into the severance context the claim he raised in his motion to dismiss based on speedy trial grounds. 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. In *United States* v. *Vega*, 309 F. Supp. 2d 609, 615 n. 5 (S.D.N.Y. 2004), Judge Koeltl rejected a defendant's severance motion based on the length of a pre-trial adjournment. Judge Koeltl reasoned that, because the adjournment did not violate the defendant's speedy trial rights, it was not a basis for severance. *See id.* at 615 n. 5. Other courts in this District have applied the same methodological analysis and reached the same conclusion when presented with the argument Barnaba makes here. *See United States* v. *Oruche*, 07 Cr. 124 (WHP), 2008 WL 612694, at *5 (S.D.N.Y. March 5, 2008); *United States* v. *Savarese*, 01 Cr. 1121 (AGS), 2002 WL 265153, at *5 (S.D.N.Y. Feb. 22, 2002); *United States* v. *Nguyen*, 94 Cr. 241 (LLS), 1995 WL 380122, at *1 - *4 (S.D.N.Y. June 26, 1995); *United States* v. *Gambino*, 784 F. Supp. 129, 137-41 (S.D.N.Y. 1992). Moreover, the central harm he purports to identify — the possibility of the directors and officers insurance policy running out of fund — is, as was the case in his speedy trial dismissal motion, wholly speculative and unsubstantiated.

Barnaba's second argument is that his role in the offense is smaller than the roles of his codefendants. But Barnaba's attempt to distance himself from the culpability of his codefendants by parsing the Indictment into discrete schemes of fraud is unavailing. Regardless of how he attempts to characterize the charged conduct attributable to him, Barnaba cannot escape the

reality of being charged together with each of his codefendants in all of the securities fraud-related counts in the Indictment. (*See* Ind. Counts I - IV). To prove these counts of securities fraud, the Government intends to call witnesses who worked alongside Barnaba and the other codefendants, and offer documents and emails, many of which Barnaba and his codefendants created or reviewed at the time the frauds were being committed. Separate trials would therefore result in a wasteful duplication of the presentation of this evidence, and offer an unfair advantage to the second group of defendants being tried, who will have an opportunity to assess the Government's witnesses and theories beforehand. *See Richardson* v. *Marsh*, 481 U.S. 200, 209-210 (1987). Of course this duplication would also be an inefficient use of the Court's time and resources.

In any event, Barnaba's "lesser-culpability" argument fails as a matter of law. "[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States* v. *Scarpa*, 913 F. 2d 993, 1015 (2nd Cir. 1990). The Second Circuit has "has repeatedly recognized that joint trials involving defendants who are only marginally involved alongside those heavily involved are constitutionally permissible." *United States* v. *Locascio*, 6 F.3d 924, 947 (2d Cir. 1993); *see also United States* v. *Carson*, 702 F.2d 351, 366-367 (2d Cir. 1983) (fact that defendant played a less prominent role in the conspiracy than many of his co-conspirators was not a sufficient ground for a separate trial); *United States* v. *Aloi*, 511 F.2d 585 511 F.2d 585, 598 (2d Cir. 1975) (individual trials are not warranted merely because of "differences in degree of guilt and possibly degree of notoriety of defendants" and the "likelihood that proof admitted as to one or more defendants will be harmful to others").

Moreover, because Barnaba is jointly charged with his codefendants in all securities fraud-related counts, contrary to his claim that "the Government can . . . and . . . will . . . be forced in a separate trial to present its case against Barnaba without introducing evidence of the other charged sub-schemes" (Barnaba Br. 23), evidence admissible to prove those counts would largely be admissible against him at a separate trial. Thus a joint trial is appropriate. *See United States* v. *Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (affirming denial of defendant's severance motion where evidence seized from co-defendant of "'holy war' literature and video tapes" was admitted as proof of conspiracy), *cert. denied sub nom. Abouhalima* v. *United States*, 122 S. Ct. 2681 (2002); *see also United States* v. *Miller*, 116 F.3d 641, 679 (2d Cir. 1997) (affirming denial of severance where movants not involved in co-defendant's violent acts because "[a]ll seven [defendants] were indicted on the conspiracy and racketeering counts, and thus, the evidence of the workings of the [conspiracy] and its violent acts would have been admissible against all of these defendants even if each had been tried separately"); *Rosa*, 11 F.3d at 341-42 (affirming denial of severance where evidence of "use of murder and mayhem" by other co-conspirators was introduced against movants, even though movants were not charged with acts of violence, because evidence was properly admitted as evidence of conspiracy); *Scarpa*, 913 F.2d at 1014-15 (affirming denial of severance and rejecting defendant's argument that "his extortion charges were only a minor part of the trial, and that . . . most of the evidence presented, particularly regarding . . . marijuana and other narcotics trafficking, had nothing to do with his case," because "[m]uch of the evidence admitted at trial relating to the marijuana activity would have been admissible against [defendant] even in a separate trial"); *United States* v. *Bin Laden*, 109 F. Supp. 2d 211, 216-17 (S.D.N.Y. 2000) (rejecting pre-trial motions seeking severance of

defendants charged with conspiring to commit embassy bombings, but not with substantive offenses arising out of the bombings, from defendants facing conspiracy and substantive charges arising out of the bombings, because all defendants were charged with conspiracy to commit bombings).[2] There is nothing prejudicial about the introduction of admissible evidence where defendants are charged in the same offenses (as is true here) and "minor players in a conspiracy trial are joined with co-conspirators who played more significant roles." *United States* v. *Cardascia*, 951 F.2d 474, 483 (2d Cir. 1991); *see also United States* v. *Bari*, 750 F.2d 1169, 1178 (2d Cir. 1984) (affirming denial of severance where defendant was "least active" but "nevertheless a fully implicated conspirator, and most of the evidence of which he complains would have been admissible against him in a separate trial as acts of co-conspirators in the furtherance of a conspiracy").

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[2] Even in instances where "not all of the evidence of each of the joined crimes would [be] admissible in separate trials of the individual counts, the fact that much of it could have been properly introduced greatly mitigates any prejudice to the defendants that results from the joinder." *United States* v. *Cole*, 857 F.2d 971, 974 (4th Cir. 1998); *see also United States* v. *Carson*, 702 F.2d 351, 367 (2d Cir. 1983) ("the fact that evidence may be admissible against one defendant but not another does not necessarily require a severance"). And, even if there is a possibility of prejudice from evidence only admissible against some defendants, the Second Circuit has routinely found the trial judge's instructions sufficient to avoid infliction of injury. *See, e.g.*, *United States* v. *Joyner*, 201 F.3d 61, 75 (2d Cir. 2000) ("[a]ny possibility of prejudicial 'spillover'" eliminated by several general instructions to the jury "to consider each defendant's guilt separately"), *decision clarified and reh'g denied*, 313 F.3d 40 (2d Cir. 2002); *Salameh*, 152 F.3d at 116-17 ("any possible prejudice was eliminated by the district court's repeated admonitions to the jury that each defendant's guilt had to be separately and individually considered"); *Bari*, 750 F.2d at 1178 ("the district court carefully instructed the jury to consider the acts of each defendant distinctly in deciding his role in the conspiracy"); *United States* v. *Aloi*, 511 F.2d 585, 599 (2d Cir. 1975) (relying on instruction to consider the acts of each defendant distinctly to affirm denial of severance); *see also Richardson*, 481 U.S. at 200 (citing the "almost invariable assumption of the law that jurors follow their instructions"); *Bin Laden*, 109 F. Supp. 2d. at 218-19 (denying pre-trial severance motion based on alleged prejudicial spillover of "graphic bombing evidence," after concluding that jury would be able to follow appropriate cautionary instructions).

Thus, Barnaba has not shown that joinder deprives him of a "specific trial right . . . or prevent[s] the jury from making a reliable judgment about [her] guilt or innocence," *Zafiro*, 506 U.S. at 539; *Rosa*, 11 F.3d at 341, much less that he may suffer prejudice so substantial that a "miscarriage of justice" will occur. *See Rosa*, 11 F.3d at 341. Any prejudice Barnaba may suffer is not "sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials." *Lanza*, 790 F.2d at 1019.

CONCLUSION

For the reasons set forth herein, the Government respectfully submits that the defendant's motion to sever should be denied.

Dated: May 21, 2008
New York, New York

Respectfully submitted,
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By: /s/
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CERTIFICATE OF SERVICE

Anthony S. Barkow deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 21st day of May, 2008, he caused a copy of the foregoing to be via ECF upon all counsel for all defendants.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Section 1746.

/s/
ANTHONY S. BARKOW

Executed on: May 21, 2008
New York, New York