UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	§	
	§	
	§	
V.	§	No. 07 CR 0220
	§	
PAUL BARNABA,	§	*Electronically Filed*
Defendant.	§	
	§	

MOTION TO RECUSE
ASSISTANT U.S. ATTORNEY HELEN CANTWELL
and Incorporated Memorandum of Authorities

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

Defendant Paul C. Barnaba now moves to recuse Assistant U.S. Attorney (AUSA) Helen Cantwell from participating in the trial of this case because her representation of the government at trial will violate the unsworn witness rule. *People v. Paperno*, 54 N.Y.2d 294, 445 N.Y.S.2d 119 (1981) (the prosecutor may not inject her own credibility into the trial). Mr. Barnaba submits that AUSA Cantwell's dual role as trial attorney and participant in proffer negotiations between the government and Mr. Barnaba threatens to turn her into an unsworn witness against Mr. Barnaba when his truthfulness and intent are placed in issue. In support of this motion, Mr. Barnaba shows the following:

1. The Relevant Facts.

In March 2007, Mr. Barnaba was indicted and charged with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and securities fraud, in

violation of 15 U.S.C. § 78j(b), 17 C.F.R. 240.10b-5, and 18 U.S.C. § 2. Mr. Barnaba is represented by Attorneys Solomon L. Wisenberg and Adrienne U. Wisenberg. The government is represented by AUSA Cantwell.

Mr. Barnaba was represented by another law firm until September 2006. During that firm's representation of Mr. Barnaba, he engaged in lengthy and wide-ranging proffer sessions with the government. AUSA Cantwell was the only Department of Justice (DOJ) representative present during these interviews. Securities and Exchange Commission (SEC) Enforcement Division Attorney Jim Eichner, SEC Accountant Robert Peak, and U.S. Postal Inspector Adam Golden, the case agent, also attended on behalf of the government. Three interviews took place over an eight month period, each lasting approximately three to four hours. In all, between October 2005 and June 2006, Mr. Barnaba met for more than 11 hours with AUSA Cantwell, Mr. Eichner, Mr. Peak and Inspector Golden. Inspector Golden's notes from the proffer sessions fill 42 handwritten pages.

The interviews were governed by the standard proffer agreement employed by the U.S. Attorney's Office for the Southern District of New York. Under this agreement, Mr. Barnaba's proffer meeting statements ("proffer statements") can be used against him at trial if he testifies. In addition, the government may be permitted to use the proffer statements in its case-in-chief, to rebut any evidence or arguments offered by Mr. Barnaba's attorneys at any stage of the criminal prosecution.

Mr. Barnaba has already pled not guilty and has publicly proclaimed his innocence. At trial, he will deny any criminal or fraudulent intent. Counsel's opening statement will squarely put Mr. Barnaba's intent at issue. Nothing in Inspector Golden's 42 pages of notes reflects an admission by Mr. Barnaba that he acted with criminal or fraudulent intent.[1] But the U.S. Attorney's Office has insinuated to undersigned counsel that Mr. Barnaba explicitly acknowledged, during the proffer sessions, intentionally engaging in criminal or fraudulent wrongdoing while employed at Collins & Aikman. Mr. Barnaba adamantly denies that he made any such admission of criminal or fraudulent intent during the proffer sessions. Even though Inspector Golden's notes support Mr. Barnaba's denial, the government is free, under the proffer agreement, to call Inspector Golden, Mr. Eichner, or Mr. Peak to the stand in rebuttal, once Mr. Barnaba or his attorneys have placed his intent in issue. In other words, despite Inspector Golden's proffer notes, nothing prevents the government from calling a witness to testify as to his recollections of Mr. Barnaba's statements at the proffer sessions. At that point, the proffer sessions and proffer statements will move to the forefront of Mr. Barnaba's case.

Not only will Mr. Barnaba's alleged proffer statements become a central trial question, relative to whether he had any fraudulent intent, but the

[1] The U.S. Attorney's Office has indicated that Inspector Golden was the only government note-taker during the proffer sessions. To date, no notes other than Inspector Golden's have been produced to the defense. In the event it is determined that AUSA Cantwell took discoverable notes during the proffer sessions, she will become a potential defense witness, triggering additional conflict-related concerns.

government's conduct and tactics during the sessions will also be subject to searching examination. Since AUSA Cantwell played a crucial, dominant part in arranging, conducting and leading the proffer sessions, her own conduct and tactics, including her veracity and integrity, are likely to come before the jury. This will create an inevitable conflict between AUSA Cantwell's role as a participant in relevant historical events and her role as a trial advocate, by turning her into an unsworn witness for the government.

2. The Unsworn Witness Rule.

As stated above, the unsworn witness rule "stands for the proposition that the prosecutor may not inject his own credibility into the trial." *Paperno*, 54 N.Y.2d 294, 300-01, 445 N.Y.S.2d 119, 123 (1981). The rule is premised on "the possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor." *Id.* at 301; *see also United States v. Aggrey-Finn*, 2006 WL 397912 (S.D.N.Y. 2006) (unpub. op.); *Morales v. Miller*, 41 F.Supp.2d 364 (S.D.N.Y. 1999). "An attorney acts as an unsworn witness when his relationship with his client results in his having first-hand knowledge of the events presented at trial." *United States v. Locascio*, 6 F.3d 924, 933 (2nd Cir. 1993).

Although *Locascio* dealt with the government's attempt to disqualify a defense attorney, its rationale applies with equal, if not greater, weight to government attorneys who are unsworn witnesses, because the Sixth Amendment right to counsel is not implicated in such instances. "Even if the

attorney is not called [as a witness] … he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question." *Id.* An attorney's "role as an advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination." *Id.* "An additional problem arises when the lawyer in question is a prosecutor in a criminal case. When a prosecutor testifies…there is a danger that the prestige associated with the prosecutor's office might induce a jury to grant too much weight to his testimony." *United States v. Bin Laden*, 91 F.Supp.2d 600, 622 (S.D.N.Y. 2000).

Even when the prosecutor "is not a necessary witness…a different problem can arise from [his] personal involvement in events that are at issue in a trial. If a witness testifies about events in which the attorney was involved, there is a danger that the jury will view that attorney as an unsworn witness, vouching for the accuracy of any testimony he elicits about events in which he was involved." *Id.* at 624. Criminal juries already tend to bond with prosecutors. The AUSA represents the United States of America and has automatic credibility with the jury through her official position as the government's attorney. AUSA Cantwell should not be allowed to use her built-in position of credibility and integrity to silently vouch, as an unsworn witness, for the government's version of proffer session events.

Of course, the unsworn witness rule, while sound, carries a potential for abuse. It can be used by defendants seeking an unfair tactical advantage against the government. *See United States v. Bin Laden*, 91 F.Supp.2d at 623. Accordingly, courts have required a compelling reason when defendants seek to disqualify government counsel on the eve of trial. *United States v. Regan*, 103 F.3d 1072, 1083 (2nd Cir. 1997). Moreover, "[s]tanding alone, the mere fact that a prosecutor took part in grand jury proceedings in which a defendant presented false testimony should not bar that prosecutor from participating in a subsequent trial for perjury." *Id.* Finally, courts have fashioned various prophylactic rules, such as redactions and instructions to witnesses and counsel, to prevent the trial jury from learning about an attorney's involvement in some of the facts presented at trial. *Bin Laden*, 91 F.Supp.2d at 625.

3. The Rule Requires Recusal.

This case presents compelling reasons, particularly in its early stages, for AUSA Cantwell's recusal. There exist a multitude of scenarios in which AUSA Cantwell's integrity and credibility would be placed in the forefront of the jury's determination of Mr. Barnaba's guilt or innocence.

For example, if the government attempts to prove that Mr. Barnaba admitted, during the proffer session, to intentionally engaging in wrongdoing while at Collins & Aikman, the defense will vigorously contest the point. The government will be forced to call Inspector Golden, Mr. Eichner or Mr. Peak to the stand to prove its allegation. Inspector Golden, as case agent, will already be

familiar to the jury as a member of the government team.[2] To make matters worse, the testimony of any of these witnesses will reveal that AUSA Cantwell participated in all three proffer sessions. The jurors may naturally assume that AUSA Cantwell agrees with the testifying agent or attorney, as to the alleged content of Mr. Barnaba's proffer statements, since she was present at the proffer sessions; is presenting the agent's or attorney's testimony at trial; and will not be disputing the testimony. This dynamic effectively turns AUSA Cantwell into an unsworn witness. She can wordlessly tell the jury that the testifying agent or attorney is more credible than Mr. Barnaba on an issue paramount to his defense. Her automatic, assumed authority, combined with her second role as proffer session witness, unfairly favors the government in a key credibility test.

Moreover, unlike the situation in typical proffer sessions, many of Mr. Barnaba's proffer statements were made in response to questions from AUSA Cantwell herself. The government may even contend that Mr. Barnaba's alleged admission of wrongdoing was made in response to a question from AUSA Cantwell. The defense maintains that Mr. Barnaba vigorously denied criminal or fraudulent intent in direct response to an accusation from AUSA Cantwell. Such credibility battles will only further highlight AUSA Cantwell's role, in the eyes of the jury, as a key participant in the disputed proffer sessions.

[2] This may be true as well of Mr. Eichner and Mr. Peak, as SEC officials often aid DOJ lawyers during securities-related prosecutions.

By filing this motion well in advance of trial, Mr. Barnaba has brought this issue to the Court's, and the government's, attention early in the proceedings. As of this filing, the government has provided less than 12% of the seven million pages of discovery it has in its possession, and cannot even guarantee a date by which the defendants will have all available electronic discovery in their hands. No substantive motions have been filed until now and presumably the government has yet to conduct pretrial witness interviews. The Court has set no trial date or motions deadlines. Realistically speaking, the trial is a long time away. The Southern District of New York is one of the largest and most prestigious U.S. Attorney's offices in the country, and has a long history of prosecuting complex white collar cases. The office has a plethora of brilliant, multi-talented and experienced white collar trial lawyers. To put it bluntly, the Southern District's fraud attorneys are essentially fungible. The government, therefore, has more than adequate time to find an AUSA who had no role in the proffer sessions to replace AUSA Cantwell.

More importantly, this is not just the typical case of a perjury prosecution conducted by the attorney who presided at the grand jury. This case presents a factual dispute of great consequence, regarding an alleged admission during the proffer session. The state of Mr. Barnaba's knowledge and intent during the period covered by the indictment goes to the heart of the government's case and Mr. Barnaba's defense. Issues of credibility, both Mr. Barnaba's and AUSA

Cantwell's, will be paramount in resolving whether Mr. Barnaba admitted to the *mens rea* of the offense during the proffer.

While prophylactic rules might, in some cases, limit the damage of a prosecutor's unsworn testimony, the chances of that happening in this case are remote given AUSA Cantwell's overwhelmingly dominant role in all three proffer sessions. And if some of Mr. Barnaba's proffer statements, in response to queries by government actors, can be used to rebut his defense on the issue of criminal intent, the statements of these same government actors can likewise be used to provide a fair, complete picture of the proffer sessions. For example, should his proffer statements become an issue, Mr. Barnaba will present evidence that, during the final session, AUSA Cantwell explicitly commended him for his honesty during the interviews. Mr. Barnaba will also present evidence that AUSA Cantwell threatened him with conviction and *life imprisonment* under the U.S. Sentencing Guidelines, specifically detailing how the Guidelines would be applied, if he did not plead guilty and cooperate against Codefendant Stockman.

In sum, the proffer sessions and AUSA Cantwell's integral role in arranging, conducting and leading them, are likely to become key points at trial, as they closely relate to the critical issue of Mr. Barnaba's alleged criminal intent.

A district court must often pass on conflict of interest issues, "not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly."

United States v. Orgad, 132 F.Supp.2d 107 (E.D.N.Y. 2001). Here, basic notions of due process and fundamental fairness demand (and time allows) for Mr. Barnaba's trial to be free of any possible taint caused by the presence of unsworn testimony, on a key issue, from the lead prosecutor. *See* U.S. CONST., amend. V.

Accordingly, for the foregoing reasons, Mr. Barnaba respectfully requests that his motion to recuse AUSA Cantwell be granted.

Respectfully submitted,

/s/ *Solomon L. Wisenberg*
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CERTIFICATE OF SERVICE

On July 17, 2007, I served a copy of this Motion to Recuse on the Attorney for the United States, Assistant U.S. Attorney Helen Cantwell, and on Counsel for the Codefendants by filing it electronically.

/s/ *Solomon L. Wisenberg*
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Attorney for Paul Barnaba