UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANT BARNABA'S MOTION TO SEVER
and Incorporated Memorandum of Law

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

I. Introduction.

Defendant Paul C. Barnaba now moves to sever his trial from that of his Codefendants. *See* FED. R. CRIM. P. 14(a). Barnaba bases this motion on the applicable law in combination with two important facts: first, Barnaba is ready to go to trial and his Codefendants are not; and second, Barnaba's purported involvement in the charged offenses pales in comparison to that of his Codefendants. This Motion is premised on the substantial risk that Barnaba's speedy trial and related trial rights will be compromised if his trial is not severed.[1]

II. The Relevant Facts.

[1] Barnaba reserves the right to assert additional grounds for severance in the future, if necessary. He does not intend to waive any additional arguments for severance based on other factors.

On April 3, 2008, Barnaba filed his "Motion to Dismiss Indictment with Prejudice Due to Government's Violation of Constitutional and Statutory Speedy Trial Rights, or, In the Alternative, Motion to Set a Trial Date." ("Speedy Trial Motion.") *See* Docket Entry 39. The facts set forth in the Relevant Facts section of Barnaba's Speedy Trial Motion are critical to the Court's consideration of his Motion to Sever. He therefore incorporates these factual recitations by reference, as if fully set forth in this pleading. *See* Speedy Trial Motion at 1-36.

In his Speedy Trial Motion, Barnaba informed the Court that he had completed his primary review of the Government's discovery and was ready for trial. At the most recent status conference on April 17, 2008, Barnaba again announced that he is ready for trial and asked, for the third time, for a trial date to be set. *See* April 17, 2008, Status Conf. at 6-7. The Government also announced ready for trial at the April 17, 2008, status conference, but did not press for a trial date, because "it doesn't appear that the defendants are in a position to have a trial date set at this point." *Id.* at 8.

Counsel for Codefendant David Stockman announced that Stockman was only one quarter through the first-level document review, and was far from ready for trial. *Id.* at 4-6. Stating that "great progress" had been made in reviewing discovery since January, Stockman nevertheless argued that setting a trial date would be premature, although "we could maybe talk about a motion schedule" at the next setting. *Id.* at 9-10. Stockman could not predict when his contract attorney team would be through reviewing discovery, but pledged "to try to get a

prediction" by July. *Id.* at 10. Counsel for Codefendants Michael Stepp and David Cosgrove agreed with Stockman's analysis. *Id.* Stockman, Stepp, and Cosgrove, along with the Government, asked for what has now become the standard three-month continuance until the next status conference. *Id.* at 9-10.

III. ARGUMENT

Barnaba presents compelling facts which, when considered against the backdrop of the applicable law, warrant that he be tried separately from his Codefendants.

Barnaba is ready to go to trial now, but his Codefendants are not. More than 14 months have passed since the Indictment against him was unsealed. In that 14 months, Barnaba's life, both personal and professional, has been essentially destroyed. Failure to sever Barnaba and allow him to stand trial as soon as possible will impair his constitutional and statutory right to speedy trial, his Sixth Amendment right to counsel, and his ability to mount an effective defense. Moreover, Barnaba's purported involvement in the charged offenses pales in comparison to that of his Codefendants. Since Barnaba's alleged criminal conduct is relatively limited, severing him will result in a shorter trial for Barnaba, and should not involve substantial duplication of effort in any later trial of his Codefendants.

Barnaba is well aware of the federal judicial system's preference for joint trials of jointly-indicted defendants, particularly where the defendants are alleged to have been involved in a common plan or scheme. *See Zafiro v. United States*,

506 U.S. 534, 537 (1992); *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (*per curiam*); *United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993); *United States v. Ramos*, 346 F. Supp. 2d 567, 569 (S.D.N.Y. 2004). Barnaba also knows that the decision whether to grant severance is committed to the trial court's sound discretion, and is very rarely reversed on appeal. *See United States v. Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991) (citing *Opper v. United States*, 348 U.S. 84, 95 (1954)); *see also United States v. Locascio*, 6 F.3d 924, 947 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Torres*, 901 F.2d 205, 230 (2d Cir. 1990); *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989); *United States v. Lanza*, 790 F.2d 1015, 1019 (2d Cir. 1986); *United States v. Potamitis*, 739 F.2d 784, 790 (2d Cir. 1984).

Nevertheless, Barnaba maintains 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 being able to suggest a possible trial date.

Federal Rule of Criminal Procedure 14(a) provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." *Zafiro* teaches 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." 506 U.S. at 539.

A. Severance Is Warranted To Preserve Barnaba's Speedy Trial Rights.

It is hard to imagine a more specific trial right than the right to speedy trial—the right to go to trial in the first place. Decisions involving motions to sever based on denial of speedy trial rights either state, or implicitly assume, that the right to speedy trial is a specific trial right for purposes of severance analysis. *United States v. Daniels*, 2008 WL 324123 *2 (E.D.Mich. Feb. 6, 2008); *United States v. Dean*, 2008 WL 168541, slip op. at 10 (N.D.Tex. Jan. 18, 2008); *United States v. Guerrero*, 2007 WL 776685, *3 (S.D.Tex. Mar. 9, 2007); *United States v. Harris*, 2006 WL 2077017, *8 (E.D.Pa. Jul. 21, 2006); *United States v. Stone*, 2006 WL 436012, *6-7 (E.D.N.Y. Feb. 22, 2006); *United States v. Warner*, 2005 WL 144125, *5 (N.D.Ill. Jan. 16, 2004); *United States v. Serafini*, 7 F.Supp.2d 529, 555 (M.D.Pa. 1998); *United States v. Weber*, 1997 WL 61442, *3 (W.D.Mo. Feb. 11, 1997); *United States v. Mortimer*, 1993 WL 439868 *3 (N.D.N.Y. Oct. 28, 1993).

Barnaba's Speedy Trial Motion is currently before the Court. There, he argues that the Government is to blame for the substantial post-Indictment delay in this case. The Court may disagree. The Court may determine that Barnaba's statutory and constitutional speedy trial rights have not yet been violated, or that the Government has acted with appropriate speed. But some

things cannot be denied: (1) Barnaba, as an accused defendant, "shall enjoy the right to a speedy and public trial" under the Sixth Amendment to the United States Constitution; (2) There 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; (3) Barnaba has consistently informed the Court of his desire to be ready for trial as soon as possible and has done everything reasonably possible to get himself ready for trial; (4) Barnaba will be prejudiced if he cannot obtain a speedy trial.

The text of the Sixth Amendment could not be clearer: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Constitution's Framers nowhere limited or balanced this right. It is important to distinguish between the Constitutional right to a speedy trial and the question of whether that right has been violated to the degree that an indictment must be dismissed or a conviction reversed. The constitutional right to speedy trial unquestionably exists, and Barnaba has unequivocally invoked it before this Court.

Barnaba's Codefendants are nowhere near ready to go to trial. They 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. Since

Barnaba has invoked his constitutional right to speedy trial, having repeatedly asked for a trial date on the record since October 2007, there is no doubt that his right to a speedy trial "would be compromised" by further substantial delay. Whether his constitutional right to speedy trial has already been violated, necessitating dismissal of the Indictment is one thing. Whether a delay of six months, nine months, one year, or more will seriously risk compromising his specific constitutional speedy trial right is not open to question.

Nobody can truthfully say that Barnaba has not done everything in his power to get ready for trial. The Relevant Facts sections of his Speedy Trial Motion and of this Motion make his diligence clear. Barnaba is the only Defendant who made use of the Government's CACI system for reviewing electronic documents. Barnaba assembled his own contract attorney review team and had them ready and waiting to use the EPIQ system on day one. Barnaba told the Court that he would have document review completed by April 15, 2008, and beat that self-imposed deadline. Barnaba consistently prodded the Government to pick up the pace of discovery. Barnaba objected to all substantial Speedy Trial Act "ends of justice" continuances from October 2007 forward. Barnaba has asked the Court to set a specific trial date at every status conference since October 2007. Barnaba has not merely invoked his constitutional and statutory speedy trial rights. He has proactively, concretely and vigorously endeavored to exercise those rights to the fullest.

Since Barnaba has established a serious risk that failure to sever his case from that of the Codefendants will compromise his speedy trial rights, it is not clear that he has to prove any additional prejudice. Nevertheless, he has no problem doing so. Certain kinds of prejudice are inherent in any denial of speedy trial rights; the uncertainty and strain of living in limbo, public disgrace and censure, and fading memories of potential witnesses. See, e.g., United States v. Salzmann, 548 F.2d 395, 399-400 (2nd Cir. 1976) ("As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired.") As shown in the Affidavit of Paul C. Barnaba, appended to this Motion as Exhibit A, Barnaba has suffered all of this prejudice and more. Immediately fired from his job upon being indicted, Barnaba was out of work for several months. He ultimately formed his own consulting group, working as a subcontractor in order to feed his family, but was recently fired from that job as well when the customer learned of the Indictment. In the Internet Age, one Google search can reveal an indictment to any prospective employer. The detrimental publicity, disgrace, and censure resulting from the charges have only been heightened in Barnaba's case by the prominence of Stockman, and by Stockman's decision to comment on the case in highly public forums.

Barnaba is going through a divorce and is down to his last $16,000.00 in savings. He has no other liquid assets and no guarantee of future employment, until these charges are resolved through trial. Once his savings run out, he will

be forced to dip into his modest 401(k) pension fund. He maintains a separate residence from his soon-to-be ex-wife, and has two small children to support.

The psychological and financial strains of his uncertain legal status are exacting a heavy toll. As Barnaba puts it in his sworn affidavit: "The delay in getting to trial in this case has caused, and continues to cause, excruciating stress in every aspect of my life. It is extremely difficult to exist in a state of uncertainty and limbo. The presumption of innocence may apply in the courtroom, but not in many other areas of life. I appear to be presumed guilty in the eyes of the business community, until proven innocent." Exhibit A at 3.

Barnaba cannot afford for the trial to be delayed for another year, or even several more months: "The thought of having to wait another year, or even several months, to go to trial is unbearable to me. I will be utterly destitute by then." Ex. A at 3. He cannot afford legal representation, absent the D&O Policy, and the proceeds of that policy are quickly dwindling. His memory of some of the events covered in the Indictment is beginning to fade, and he has "to believe this is also true for many of the potential witnesses." Ex. A. at 3. This is a particular problem in document heavy white-collar cases, where the significance of records can be over-emphasized in the event that memories begin to fade. *United States v. Blaustein*, 325 F. Supp. 233, 238 (S.D.N.Y. 1971).

If the proceeds of the D&O Policy are drained prior to or during trial, it will obviously hamper the ability of Barnaba and his legal team to mount a fully effective defense. Barnaba's legal team has been particularly alert to this danger

and has reminded the Court and the Government of the possibility of D&O Policy exhaustion at every status conference since July 2007. One of the reasons Barnaba has pushed his legal team to be ready for trial as soon as possible is his knowledge that the D&O Policy funds are finite and burning fast. Barnaba's legal team estimates, based on the recent burn rate, that the D&O Policy funds could easily be exhausted by the end of September and will last no longer than December 2008.

Barnaba's legal team has no intention of abandoning Barnaba. But even assuming that Barnaba's legal team does everything in its power to be ready for trial before insurance funds run out, a lengthy delay encompassing several months without the availability of such funds will obviously hamper its efforts to stay current and pay for additional experts, investigators, and other necessary personnel.

Since Barnaba 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.

But even if these usual rationales were not trumped, they have limited application in this case. The Second Circuit has noted that: "Joint trials serve the public interest in economy, convenience, and the prompt trial of the accused." *United States v. Turoff*, 853 F.2d 1037, 1039 (2d Cir. 1988). This Court quoted

Turoff approvingly when it denied severance in *United States v. Berger*, 22 F. Supp. 2d 145 (S.D.N.Y. 1998). Here, there can be no doubt that granting, rather than denying, severance will assure the accused's prompt trial.

Equally significant, as noted in the Introduction, is Barnaba's limited role in the alleged offenses. Although some duplicative effort will be required if the Government tries Barnaba separately, the duplication, like Barnaba's alleged conduct, will be limited in nature.

B. Barnaba's Limited Role in the Alleged Conduct Merits Severance.

The Indictment alleges four distinct sub-schemes as part of an overarching, abstract scheme "to defraud C&A's investors, banks, and creditors by manipulating C&A's reported revenues and earnings."[2] Indictment at 9. Barnaba is purportedly involved in only one of these detailed sub-schemes, namely, the Supplier Rebate Fraud Scheme. The other sub-schemes are: the Joan Fabric Rebate Fraud Scheme ("Joan Fabric Scheme"), the Liquidity Crisis/Scheme to Defraud GECC ("GECC Fraud Scheme"), and the False Statements to Investors Scheme ("False Statements Scheme"). Even within the Supplier Rebate Fraud Scheme, Barnaba's alleged role is more limited than Stockman's or Cosgrove's. The Government knows that Barnaba, a mid-level salaried executive far down the corporate chain from Stockman, Cosgrove and

[2] The grouping of these unrelated schemes into one alleged conspiracy, charged by the Government at a high level of abstraction, is itself dubious.

Stepp, had literally no role of any kind in the remaining charged sub-schemes.[3] There is no specific averment, anywhere in the Indictment, that Barnaba was even aware of the other charged sub-schemes or the facts behind them.[4] The prejudice to Barnaba stemming from the admission of evidence related to these other charged sub-schemes, at a joint trial, would be substantial. Were Barnaba tried separately, it is extremely doubtful that a Court would allow such evidence to come before the jury.

Not counting the forfeiture allegations, the Indictment contains 117 paragraphs. Only 22 of them reference Barnaba. More importantly, of the 50 paragraphs setting out the Joan Fabric Scheme, the GECC Fraud Scheme, and the False Statements Scheme, only one makes reference to Barnaba, and none allege that he aided or even knew of these sub-schemes.

Paragraphs 34-48 of the Indictment cover the alleged Supplier Rebate Fraud Scheme. It is the only charged sub-scheme in which Barnaba purportedly plays a part. According to the Indictment, "STOCKMAN, STEPP, COSGROVE, AND BARNABA schemed to inflate C&A's income by systematically recognizing 'rebates' from C&A's suppliers before those cost reductions had in fact been earned by C&A." Indictment at 16.

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[3] Barnaba came to work for C&A in late March 2002 and left on April 15, 2005. He was the third ranking employee within the Purchasing Department for most of his tenure at C&A. Barnaba was promoted to the number two position in Purchasing in late November 2004 and to Vice-President in charge of Purchasing in December 2004.

[4] Nor has Barnaba located one piece of evidence establishing his awareness of these other alleged schemes.

The Indictment alleges that the conspirators negotiated up-front, lump-sum rebates "contingent on C&A making future purchases from the supplier granting the rebate," but improperly booked the rebates before all the purchases were made. Stockman supposedly directed employees such as Barnaba "to seek COSGROVE's guidance in 'booking' the 'rebates' in the current quarter, despite knowing that it would be improper to book the 'rebates' in the current quarter because they were contingent on future events." Indictment at 17, 20. Stockman and Cosgrove also allegedly directed C&A employees "to obtain side letters or separate documents that falsely attributed the supplier rebate to past purchases." Indictment at 19. Purchasing employees, allegedly acting at Barnaba's direction, solicited the false side letters from C&A's suppliers. Cosgrove later reviewed these letters, "with knowledge that they did not accurately reflect the true nature of the 'rebates,' and edited false side letters for the purpose of removing references to future purchases." Indictment at 20.

The Indictment also charges that the Supplier Rebate Fraud Scheme was expanded in 2004 to the purchase of capital equipment. "STOCKMAN and COSGROVE, with STEPP's knowledge and approval, directed C&A employees, including BARNABA, to negotiate discounts on purchases of capital equipment and falsely document those discounts as 'rebates' for past purchases of non-capital items." The Supplier Rebate Fraud Scheme is in essence an alleged accounting fraud directly related to C&A's purchases of various items from its suppliers. Indictment at 21.

By way of contrast, the Joan Rebate Scheme is an alleged plan by Stockman, Stepp, and unnamed others to arrange a series of improper round-trip transactions between Collins & Aikman ("C&A") and Joan Fabrics, and to conceal the true nature of the transactions during a subsequent Audit Committee investigation. The scheme is purportedly tied to C&A's 2001 purchase of Joan Automotive Fabrics from Joan Fabrics, and allegedly began with a fourth quarter 2001 rebate. Indictment at 13-16.

None of the paragraphs describing this sub-scheme reference Barnaba. Both C&A's purchase of Joan Automotive Fabrics, and the initial Joan Fabrics rebate occurred before Barnaba came to work at C&A. There is no allegation that Barnaba ever learned any details of the alleged initial or subsequent round trip transactions, which occurred between 2001 and 2003. As the Government knows, from its proffer interviews with Barnaba and its own investigation, Barnaba had nothing whatsoever to do with any aspect of the alleged Joan Fabric Scheme. Barnaba did not even know that an Audit Committee investigation was taking place in 2004. Barnaba was not interviewed as part of the 2004 Audit Committee Investigation and is nowhere mentioned in the Audit Committee Report.

Although the alleged Joan Fabric Scheme includes rebates as one of its charged elements, these rebates are not tied to standard supplier purchases, as in the alleged Supplier Fraud Rebate Scheme. Rather, they are a part of, or relate back to, C&A's purchase of Joan Automotive Fabrics from Joan Fabrics.

Additionally, the Joan Fabric rebates were purportedly negotiated directly by Stockman and the Joan Fabrics CEO (who was also on C&A's Board of Directors) and never involved Purchasing Department personnel. There is no indication, from the discovery, or the Government's charges, that any of the Purchasing Department personnel allegedly involved in the Supplier Fraud Rebate Scheme engaged in or knew of the Joan Fabric Scheme.

The GECC Fraud Scheme, as charged in Paragraphs 49-61 of the Indictment, was "a fraudulent invoicing scheme" directed by Stockman "in order to increase the available liquidity under C&A's accounts receivable securitization facility." Indictment at 24. Not one of the GECC Fraud Scheme paragraphs references Barnaba. This alleged sub-scheme was purportedly directed by Stockman, and carried out by C&A's Treasury Department employees, with the intent to defraud C&A's banks. The GECC Fraud Scheme had nothing to do with C&A's Purchasing Department, where Barnaba worked. It also had nothing to do with the Supplier Rebate Fraud Scheme or with any rebates.

According to the Indictment, C&A's ability to borrow money from GECC was partially predicated on C&A's daily eligible receivables. In order to constitute an eligible receivable, "C&A had to be entitled to payment from the OEM once C&A generated an invoice and sent it to the OEM." Indictment at 26. The Government charges that, over the weekend of January 8-9, 2005, "with Stockman's knowledge and approval," C&A's Treasury Department employees "manually invoiced millions of dollars of [ineligible] receivables…for the sole

purpose of inflating the borrowing base and misleading GECC." Indictment at 29.

After this weekend, "Stockman and others continued to defraud GECC by intentionally including ineligible receivables in the borrowing base of the accounts receivable securitization facility to obtain cash and increase liquidity." Indictment at 30. It is obvious that nothing in this charged sub-scheme is connected in any way to Barnaba. And the Government knows that not one scintilla of evidence within the ten million pages of discovery can supply such a connection.[5]

The False Statements Scheme is covered in Paragraphs 62-90. These paragraphs at no point claim that Barnaba participated in the alleged False Statements Scheme. Only one of these 29 paragraphs even mentions Barnaba, and that mention is simply a reference back to the accounting associated with the charged Supplier Rebate Fraud Scheme.

The False Statements Scheme is broken into several components. Paragraphs 62-69 are entitled "C&A's Rebate Fraud Comes To Light." The Indictment charges that in March 2005 Stockman "reluctantly agreed to conduct an investigation of C&A's rebate accounting." Indictment at 32. In an effort to hide his and other senior C&A management's alleged involvement in the Supplier Rebate Fraud Scheme, Stockman "sought...to take control of the

[5] But the admission of evidence at a joint trial, highlighting Stockman's alleged weekend maneuvers to generate phony invoices, will have a predictably prejudicial effect on Barnaba.

investigation in order to minimize its scope and control its conclusions." Indictment at 32. This investigation, though not specifically identified as such in the Indictment, was known as Project Apple.

Paragraph 63 charges that "STOCKMAN, COSGROVE, and the other members of C&A's senior management limited the number of rebates examined and refused to restate certain improperly booked rebates." Stockman next prepared "conclusions" of Project Apple's findings, "which were presented to C&A's outside auditors with COSGROVE'S knowledge," and which "minimized the financial impact of the rebate accounting errors as 'separation of duties,' rather than the intentional fraud that it was." Indictment at 32-33.

Paragraph 64 states that on March 17, 2005, C&A issued a press release and Stockman participated in a public earnings call, during which he provided written slides, all of which disclosed "the existence of an internal investigation into improper accounting for supplier rebates." The Indictment further charges that during the earnings call, on the slides, and in the press release, "Stockman presented false and misleading information concerning the internal investigation into the supplier rebates." Indictment at 33.

Paragraph 66 continues, that "STOCKMAN'S description of the investigation of the improper accounting for supplier rebates in the March 17, 2005 press release was intended to mislead investors and the public by minimizing the size of the restatement of C&A's financial statements, and exaggerating the degree to which management had explored, quantified, and

rectified the rebate situation." First, the March 17, 2005 press release stated that Project Apple had "reviewed 2002 rebates, but did not indicate that a restatement was necessary." In actuality, "no meaningful review of the 2002 rebates was conducted, and 2002 rebates…were not restated even though STOCKMAN knew they were accounted for improperly." Indictment at 33-34. Second, the March 17, 2005 press release "understated the degree to which" improperly booked 2003 and 2004 rebates would force previous financial statements to be restated, because Project Apple, upon which the press release was based, "was designed to justify C&A's previous accounting, rather than account for the rebates properly." Indictment at 34. Third, "and most importantly, the press release attributed the improper accounting to a failure of 'controls' and 'procedures' and to 'other circumstances.'" According to Paragraph 68, "[t]his description was intended to give the impression that the improper accounting was inadvertent and at worst the result of negligence" rather than "intentional and the result of a concerted scheme by STOCKMAN, STEPP, COSGROVE, BARNABA, and other C&A employees." Indictment at 34-35.

These paragraphs nowhere allege that Barnaba had a hand in preparing or participating in: Project Apple's final conclusions; the March 17, 2005 press release; the March 17, 2005 earnings call; or, the slides for the earnings call. The reason for this omission is simple: Barnaba had no hand, as the Government well knows, in any of these matters. Barnaba, although interviewed during

Project Apple, and part of a Project Apple working group, did not prepare or aid in the preparation of Project Apple's final conclusions. Indeed, discovery produced by the Government establishes that the management team running Project Apple, consisting of Stockman and Cosgrove, among others, used the Project Apple results to accuse Barnaba of incompetence in front of C&A's outside auditors, KPMG.

Paragraphs 70-90 of the Indictment cover "Other Misleading Disclosures In 2005" as part of the False Statements Scheme. Paragraphs 70-75 outline the "March 17, 2005 Earnings Call" and do not charge or reference Barnaba. According to these paragraphs Stockman, in that call, "made at least three material misstatements or omissions regarding C&A's results of operations and financial condition." First, Stockman provided a first quarter 2005 EBITDA forecast "that he knew would not be attained." Second, Stockman represented that 2005 capital expenditures would be limited to $30 million quarterly "as a sign that C&A was conserving cash" when, allegedly, he knew "that C&A would spend more than $50 million in the first quarter of 2005 and knew that C&A had actually already spent more than $30 million in capital expenditures during January and February 2005." Finally, Stockman purportedly misled investors about C&A's liquidity crisis, falsely answering "no" to the earnings call question whether "intra quarter are you tapping out your liquidity?" Indictment at 33-45. Again, Barnaba had nothing to do with any of these alleged misstatements, which did not relate to supplier rebates. At no time during his employment at

C&A did Barnaba ever participate in an earnings call or in the preparation for such a call.

Paragraph 76 charges that Stockman repeated the same three earnings call misrepresentations, concerning EBITDA forecasts, capital expenditures, and liquidity, in a March 23, 2005 presentation to Mackay Shields, holders of C&A's bonds. Paragraphs 77-80 allege the same three misrepresentations in a March 24, 2005 conference call with creditors JP Morgan Chase and Credit Suisse, among others, which call was made "for the purpose of securing a waiver of compliance with C&A's financial covenants in its credit agreements." Paragraph 81 alleges that in a March 24, 2005 press release, C&A, with Stockman's knowledge and approval, "repeated its earlier [misleading] disclosures concerning the rebate accounting problem." Paragraphs 82-85 charge that, in an April 3, 2005 due diligence conference call with Credit Suisse, which call was made as part of an effort to secure additional financing, "STOCKMAN reiterated many of the same false statements he had made on the March 17, 2005 and March 24, 2005 calls described above." Those purportedly false statements concerned EBITDA forecasts, capital expenditures and liquidity, and caused Credit Suisse to lend C&A an additional $75 million in financing.

Paragraphs 86 through 88 charge that C&A issued a press release on April 4, 2005, which touted the Credit Suisse financing and allegedly reported false liquidity figures of $81 million as of March 31, 2005, and $86 million as of December 31, 2004. The liquidity figures were "false and misleading for several

reasons," none of them having anything to do with Barnaba. Paragraphs 89 and 90 charge that Stockman repeated his purportedly false statements, concerning EBITDA, capital expenditures, and liquidity, in an April 22, 2005 conference call with GECC.

Neither the Indictment nor the Government-provided discovery establishes that Barnaba had anything to do with the myriad alleged false public statements made or directed by Stockman. The Government knows that Barnaba was not involved, as part of his job or in any manner, with C&A's press operations, public earnings calls, or efforts to obtain financing from banks.[6]

Examining the Indictment dispassionately, it is clear that Barnaba quite literally had no role in three of the four alleged sub-schemes. All of these non-Barnaba sub-themes are clearly distinct in nature from the Supplier Rebate Fraud Scheme, two of theme markedly so. In a joint trial, evidence relating to these other sub-schemes would dwarf the evidence of alleged supplier rebate fraud—and none of it relates to Barnaba.

Most importantly, however, the Indictment and the discovery fail to show that the four alleged sub-schemes are really part of one conspiracy. The Indictment obviously charges one conspiracy at a highly abstract level. Stockman allegedly "orchestrated a scheme, joined by COSGROVE, STEPP, BARNABA, and others, to defraud C&A's investors, banks, and creditors by manipulating

[6] The prejudicial spillover effect from the allegations in Paragraphs 62-90 is obvious, however. In a joint trial, the Government would introduce example after example of allegedly false statements by Stockman, inevitably tainting Barnaba in the jury's eyes.

C&A's reported revenues and earnings in an effort to, among other things, (1) enable C&A to avoid violating covenants in its credit facilities agreements and thus C&A's financial ruin; and 2) raise additional capital in the debt markets to assist C&A in solving its business problems." Indictment at 9-10.

But the Government can allege virtually anything at such a high level of generality. The Government must also, at some point in time, fill out its charges with specifics. And nowhere does the Government cite specifics supporting the proposition that Barnaba knew about the Joan Fabrics Scheme, the GECC Fraud Scheme or the False Statements Scheme, or knew that these charged sub-schemes were somehow related to the alleged Supplier Rebate Fraud Scheme. Nowhere does the Government cite specifics showing that Barnaba should have been aware of these schemes or consciously avoided such awareness. Nowhere does the Government cite specifics showing Barnaba's knowledge of C&A's credit facilities or the covenants within those facilities. Nowhere does the Government cite specifics showing that Barnaba had knowledge of EBITDA, capital expenditure, and liquidity forecasts in earnings calls and press releases.

These omissions are critical. While it is true that a conspirator need not know all of his co-conspirators or every aspect of a conspiracy, he must at least know that the charged conspiracy exists. For example, a low-level member of an alleged drug conspiracy, such as an off-loader, can be assumed to know that a larger conspiracy exists, comprising many aspects and roles beyond his own.

But the Indictment in this case is different; it alleges financial crimes. There is no reason for anyone to assume that the third-ranking employee in the Purchasing Department of such an enormous and complex corporation would be aware of the large scale, multi-faceted financial conspiracy alleged in the Indictment. And the Indictment never fills in the gap with specific averments that Barnaba really knew of this alleged conspiracy.

It appears that no conscientious Court, mindful of the Rules of Evidence, would allow evidence pertaining to the other charged sub-schemes to be admitted in a separate trial against Barnaba. This means that the Government can, and in all likelihood will, be forced in a separate trial to present its case against Barnaba without introducing evidence of the other charged sub-schemes.

Undoubtedly, all of the Defendants are charged with participating in the Supplier Rebate Fraud Scheme. If two separate trials are held, there will likely be some evidentiary overlap. But Barnaba is the only Purchasing Department employee charged in the Indictment. If he is severed, a subsequent trial of the other defendants will not be burdened by Barnaba's efforts to mount a defense, based on either his own, or the Purchasing Department's, lack of involvement in the alleged Supplier Rebate Fraud Scheme. Additionally, Barnaba's separate trial should be vastly shorter than the trial of Stockman and the other Codefendants, because of the limited nature of the allegations against Barnaba. What evidentiary overlap does exist is more than outweighed by the substantial risk to

Barnaba's speedy trial rights entailed by failing to sever him from his Codefendants.

IV. CONCLUSION

Wherefore, premises considered, 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/

SOLOMON L. WISENBERG
ADRIENNE U. WISENBERG

Wisenberg & Wisenberg, PLLC
1711 N Street NW; 2d Floor
Washington, DC 20036
Telephone: (202) 261-3649
Facsimile: (202) 293-0701

Attorneys for Paul C. Barnaba

CERTIFICATE OF SERVICE

On May 7, 2008, I served a copy of this Motion to Sever and Incorporated Memorandum of Authorities 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.

/S/
SOLOMON L. WISENBERG
Attorney for Paul Barnaba

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	§	
	§	
	§	
V.	§	No. 07 CR 0220
	§	
PAUL C. BARNABA,	§	
Defendant.	§	
	§	

ORDER GRANTING MOTION TO SEVER

Upon consideration of Defendant Paul Barnaba's MOTION TO SEVER and Incorporated Memorandum of Law, said Motion is hereby GRANTED. Mr. Barnaba is granted a separate trial, and his case is hereby scheduled for trial on the following date: _____.

So Ordered on this the _____ day of _____, 2008.

_____
BARBARA S. JONES
U.S. District Judge