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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY L. REYES, Defendants.	CR 06-0556 CRB THE UNITED STATES' RENEWED MOTION TO UNSEAL THE DECLARATION OF GREGORY REYES DATED CIRCA MARCH 15, 2007 Date: December 19, 2007 Time: To Be Scheduled Location: Courtroom 8 Judge: Hon. Charles R. Breyer

The United States of America, by and through its undersigned counsel, hereby renews its motion to unseal the Declaration of Gregory Reyes in Support of Defendant Stephanie Jensen's Motion for Severance dated circa March 15, 2007 (the "Reyes Declaration").[1]

[1] The Reyes Declaration was filed under seal. Therefore the government does not know the precise date of the declaration.

The trials of both defendants Gregory Reyes and Stephanie Jensen have now been concluded. Therefore, the original purpose served by sealing the Reyes Declaration has been fulfilled and no longer applies.

Defendant Jensen's only stated reason for objecting to the pre-trial disclosure of the Reyes Declaration was that "[she] should not be forced to reveal potential defense witness testimony to the Government" in advance of the trial. Defendant Stephanie Jensen's Reply to Government's Response to Motion for Severance dated March 23, 2007 at 8 (attached as Exhibit A). Greg Reyes never testified at either his trial or Stephanie Jensen's trial. Therefore, the stated reason for sealing the declaration is now moot.

For the reasons articulated in our original July 1, 2007 motion (attached as Exhibit B), the government believes that defendant Reyes may have taken positions during his trial that are contradicted by the sworn statements made in the Reyes Declaration.

We request that the Reyes Declaration be unsealed so that we may investigate, among other issues, whether the defendant's suspected inconsistent positions constitute obstructive conduct for the purposes of U.S.S.G. § 3C1.1 (obstructing or impeding the administration of justice by, for example, "providing materially false information to a judge or magistrate").

The government respectfully requests that the Reyes Declaration be unsealed and produced to the government.

DATED: December 6, 2007

Respectfully submitted,

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STEPHANIE JENSEN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY L. REYES and STEPHANIE JENSEN,

Defendants.

Case No. CR 06-00556 CRB (EMC)

DEFENDANT STEPHANIE JENSEN'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR SEVERANCE

Date: Wednesday, March 28, 2007
Time: 2:15 p.m.
Location: Courtroom 8

Judge: Hon. Charles R. Breyer

Trial Date: June 18, 2007

I. INTRODUCTION

Stephanie Jensen's case presents exactly the situation Rule 14 is designed to address. A joint trial would deny Ms. Jensen the right to present a crucial witness on her own behalf—the only person other than herself who has direct knowledge of much of the conduct alleged in the indictment, including alleged agreements and supposed coordinated activity that form the very basis of the crimes charged. Only a separate trial can preserve Ms. Jensen's fundamental trial rights and enable her fully to confront the charges against her. The Government does not—and cannot—deny that Ms. Jensen has the fundamental right to call witnesses on her own behalf and that this right would be curtailed in a joint trial. The Government further concedes that severance is proper where "a joint trial would compromise a specific trial right of one of the defendants." Government's Response to Defendant Stephanie Jensen's Motion for Severance at 3 ("Response") (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)).

In short, the Government offers nothing to justify denying Stephanie Jensen's Motion for Severance. Instead, it argues around the edges, and the authorities it discusses actually support the need for separate trials here. Moreover, in its zeal to preserve a joint trial, the Government overstates the law and misconstrues the holdings of authorities upon which it relies.[1]

Stephanie Jensen's motion for severance should be granted.

II. ARGUMENT

A. The Law Requires Severance Here

In its Response, the Government places great weight on the preference for joint trials in the federal system. While there may well be such a preference (as Ms. Jensen acknowledged in her moving papers), that preference must yield where a joint trial would compromise a defendant's fundamental trial rights. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). This is so even where joinder is otherwise appropriate under Rule 8(b). *Id*. The right of a defendant to present witnesses in her own defense is one of the core trial rights that must be preserved.

[1] In the first sentence of its Response, the Government also misstates a fundamental fact. Jensen was not indicted on July 20, 2006, as the Government claims. *See* Response at 2. In fact, the indictment was returned on August 10, 2006. The last page of the Indictment, bearing the signatures of former-AUSA Christopher Steskal and Criminal Division Chief Mark Krotoski is

Taylor v. Illinois, 484 U.S. 400, 408 (1988). Indeed, "[f]ew rights are more fundamental." *Id.*

The Government acknowledges that severance is proper where a joint trial compromises a defendant's trial rights, and that defendants are unfairly prejudiced if unable to present crucial exculpatory evidence in a joint trial. *See* Response at 3 (quoting *Zafiro*, 506 U.S. at 539). Against this uncontested backdrop of fundamental trial rights, due process concerns regarding a defendant's ability to mount a full and adequate defense, and the firmly-rooted exceptions to joint trials, the Government argues only that "judicial economy … favor[s] the denial of any severance in this case." Response at 4. Judicial economy, however, must yield to fundamental rights in this case.

B. Denying Ms. Jensen The Right To Present Reyes' Testimony Is Improper, And The Government Misstates The Threshold For Severance Here

Ms. Jensen does not claim merely that some witness *might* testify on her behalf in a separate trial. Ms. Jensen does not simply guess that a witness *might* say something that exculpates her. And, Ms. Jensen does not premise her motion on some witness with only a cursory connection to the case or the alleged conduct. Instead, Ms. Jensen has established that (1) Mr. Reyes **will** testify on her behalf if her case is severed;[2] (2) Mr. Reyes **will** provide specific, detailed testimony that is exculpatory;[3] and (3) Mr. Reyes **has** direct knowledge of the facts to which he would testify—facts that go to the heart of the allegations against Ms. Jensen in this matter.[4] Ms. Jensen's submission here also includes proposed testimony negating the intent to commit a criminal act. This situation demands severance, and the Government's authorities do not hold otherwise. In fact, those authorities support Ms. Jensen's position.

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misdated and bears a date three weeks earlier, July 20, 2006.

[2] *See* Defendant Stephanie Jensen's Notice of Motion and Motion for Severance Pursuant to Rule 14 of the Federal Rules of Criminal Procedure ("Motion") at 2-3; Declaration of Gregory Reyes in Support of Defendant Stephanie Jensen's Motion for Severance ("Reyes Decl.") at ¶3 (filed *ex parte* and under seal pursuant to 3/15/07 Court Order, Docket #139).

[3] *See* Motion at 5-7; Reyes Decl. at ¶¶4-12; Addendum to Memorandum of Points and Authorities in Support if Defendant Stephanie Jensen's Notice of Motion and Motion for Severance Pursuant to Rule 14 of the Federal Rules of Criminal Procedure ("Addendum") at 1-4 (filed *ex parte* and under seal pursuant to 3/15/07 Court Order, Docket #139).

[4] *Id.*; *see also generally* Indictment.

As set forth in detail in Ms. Jensen's moving papers, Mr. Reyes' proposed testimony is substantially exculpatory. For example:

- Mr. Reyes can establish that Ms. Jensen did not participate in a conspiracy to backdate stock and can provide important exculpatory testimony regarding Ms. Jensen's role in the granting of stock options at Brocade. *See* Motion at 5-6; Reyes Decl. at ¶¶ 6, 7, 9; and

- Mr. Reyes can also provide important exculpatory testimony regarding the knowledge and intent elements necessary to find Ms. Jensen guilty of securities fraud. Specifically, Mr. Reyes' proffered testimony undercuts the Government's claims that Ms. Jensen knowingly and intentionally caused Brocade's financial statements to be materially false or misleading. *See* Motion at 6-7; Reyes' Decl. at ¶¶8, 10, 11.

In her moving papers, Ms. Jensen discussed the law that demands severance where such testimony is at issue and she need not repeat that analysis here. The Government's authorities by contrast do not support its contentions and thus merit discussion.

United States v. Reese, 2 F.3d 870 (9th Cir. 1993), cited in Response at 4, supports this Motion. In *Reese* the proffered testimony lacked the specificity and detail contained in the Reyes Declaration. There, the proposed testimony "essentially consisted of a series of denials that the testimony of certain government witnesses was true." *Reese*, 2 F.3d at 892. Here, however, Ms. Jensen has presented a far more exacting proffer. *See* Reyes Decl. at ¶6, at lines 19-25, ¶7 at lines 1-7 and lines 4-6, ¶8 at lines 10-20, ¶9 at lines 23-25, ¶10 at lines 1-6, ¶11 at lines 9-11, and ¶12 at lines 12-14. Simple denials may not merit severance, but specific exculpatory testimony such as that offered here does.

United States v. Mariscal, 939 F.2d 884, 885 (9th Cir. 1991), cited in Response at 5, further demonstrates why Ms. Jensen's motion should be granted. The Court explained why the facts below did not justify reversal. There, "the joint trial was already under way, Mariscal did not present an affidavit from Rojas-Oquita swearing that Rojas-Oquita would testify at a separate trial and the suggested testimony would serve only to contradict one government witness." *Mariscal*, 939 F.2d at 886. Here, (1) no trial has begun; (2) Reyes himself has sworn that he will testify on Ms. Jensen's behalf in a separate trial; and (3) the proffered testimony goes directly to the heart of the charged conduct—far beyond merely rebutting a single potential government witness.

Many of the Government's other cited authorities actually demonstrate why severance **is** appropriate here.

- In *United States v. Hernandez*, cited in Response at 4, the Court affirmed denial of severance, noting that the proposed testimony "lacked probative value as to the offenses charged" and "would have been at least partly cumulative." 952 F.2d 1110, 1116 (9th Cir. 1991). Here Reyes' testimony is clearly probative and would not be cumulative—all of the allegations against Ms. Jensen involve Mr. Reyes and only Mr. Reyes knows what (if any) agreements he and Ms. Jensen entered into. *See, e.g.*, Indictment ¶¶ 32-52.

- In *United States v. Castro*, cited in Response at 4, the appellant "asserts only that it was likely that Castro would testify. There is no showing that Castro offered or agreed to testify on [appellant's] behalf, or that he would have so testified if the trials had been severed." 887 F.2d 988, 998 (9th Cir. 1989). Here, however, Reyes has offered to testify and sworn that he will do so if the trials are severed. Reyes Decl. ¶3.

- In *United States v. Jenkins*, cited in Response at 4, the defendant offered only a "bare assertion that [his co-defendant's] testimony would have been favorable" and the defendant had earlier raised a *Bruton* claim based on the contention that his codefendant actually implicated him in grand jury testimony. 785 F.2d 1387, 1394 (9th Cir. 1986). Here, Reyes's proposed testimony is clearly exculpatory. Reyes Decl. ¶¶6-12; *See generally* Motion at 5-7; Addendum at 1-4.

- Ms. Jensen's motion neither suggests nor is premised upon any particular order of separate trials and Reyes does not so condition his proposed testimony. Therefore, the Government's citations at page 5 of the Response to *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir. 1992) and *Mariscal*, 939 F.2d at 886, are not on point.

- Similarly, *United States v. Gay*, cited in Response at 5, addressed a "conditional offer to present exculpatory testimony." 567 F.2d 916, 920 (9th Cir. 1978). There, the motion for severance was made on the first day set for trial and included a demand by the putative testifying defendant that his trial go first. *Id*. at 917. It was these "games" that the court rejected. Here, again, there is no conditional offer to testify.

Moreover, the Government again mischaracterizes the law by claiming that "[i]f the proffered testimony of co-defendant Reyes is non-incriminating and simply denies all the charges, then it does not exculpate the defendant and the motion to sever should be denied." Response at 6. The Government cites no controlling authority holding that only self-incriminating testimony by a co-defendant justifies severance. Ms. Jensen is aware of no Ninth Circuit cases so holding, and the case the Government relies on for this claim hold no such thing. In fact, *Reese* explains that the district court should grant a severance where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Reese*,

2 F.3d at 891. The *Reese* Court further explained that the threshold severance showing at the district court level is: "(1) that [the moving defendant] would call the [co-]defendant at a severed trial, (2) that the codefendant would in fact testify, and (3) that the testimony would be favorable to the moving party." *Id*. at 892 (internal citation omitted). The case says **nothing** about any supposed requirement that the codefendant's testimony be incriminating.

The Government's Fifth Circuit authority similarly **does not hold** that a co-defendant's testimony must be self-incriminating in order to win severance. Rather, in *United States v. Jobe*, 101 F.3d 1046, 1060 (5th Cir. 1996), the proffered affidavit was "conclusory" and "did not contain any specific exculpatory testimony." The Court did observe that the affidavit was "self-serving" and "non-incriminating," but it made no holding related to whether non-incriminating affidavits can justify severance. *See id*.

Additionally, *United States v. Seifert*, 648 F.2d 557 (9th Cir. 1980), cited in Response at 6-7, squarely demonstrates why Ms. Jensen's motion **should** be granted, while failing to support the Government's musings about "reliance on corporate structures."[5] *See* Response at 6. In the *Seifert* case, appellant Seifert sought to introduce exculpatory testimony by a man named Ehrlich, his co-defendant in the case and business partner in the company at the heart of the alleged scheme to defraud. Ehrlich's proffered testimony was **not** self-incriminating, but did exculpate Seifert. *Seifert*, 648 F.2d at 563. It also went directly to the issue of intent, of "Seifert's knowing participation in the scheme." *Id*. at 564. The trial court denied the motion to sever, which came mid-trial, at the close of the government's case. *Id*. at 563.

The Ninth Circuit reversed the denial of severance. First, it laid out the standard for winning severance based on the need for a codefendant's testimony:

> [T]he defendant must show that he would call the codefendant at a severed trial, that the codefendant would in fact testify and that the testimony would be favorable to the moving defendant.

Id. Ms. Jensen has amply satisfied this test.

Additionally, "[t]he trial court must also consider the possible weight and credibility of

[5] Moreover, the Reyes Declaration goes beyond mere statements about corporate structure.

the testimony and the economy of the severance at the point the motion was made." *Id.* Here, too, Ms. Jensen must prevail. Reyes's testimony is entitled to significant weight and credibility. As in *Seifert*, he is "in a position to rebut directly the government evidence of [Ms. Jensen's] knowing participation in the [alleged] scheme." *See id.*; Reyes Decl. ¶¶6-12; Addendum at 1-4; Indictment ¶¶32-52.

Ms. Jensen's motion should be granted and nothing in the Government's Response demands otherwise.

C. Ms. Jensen's *Ex Parte* Submissions Were Proper And Present No Basis For Denial Of The Motion For Severance

The *ex parte* submission of the Reyes Declaration and Addendum were proper and this Court is fully capable of making any evidentiary determinations required to rule on severance. Claiming that the *ex parte* submissions in support of this Motion were improper, the Government relies on a single case from a far-off district. Not only is that case not controlling here, it actually holds no such thing, and in fact supports Ms. Jensen's position. In *United States v. Lea W. Fastow*, Judge Hittner denied Ms. Fastow's <u>*scheduling*</u> (*not* severance) motion, which requested "that her trial be scheduled to take place after her husband's trial." 269 F. Supp. 2d 905, 906 (S.D. Tex. 2003). Ms. Fastow submitted an *ex parte*, sealed affidavit from her husband that proffered testimony he would offer on her behalf *if he was tried first*. *Id*. at 907. The district court held that the proffered testimony "lacks sufficient credibility under the law of this circuit" and denied the motion. *Id.* at 910.

While the district court observed, *in dicta*, that "the Government [was] deprived of the opportunity to meaningfully address the factors related to the testimony itself." *Id*. It did not say, or even imply, that Ms. Fastow's *ex parte* submission was in any way improper. Instead, the court considered the *ex parte* submission in its ruling "[w]ithout divulging the substance of the testimony." *Id*. Thus, the *Fastow* case demonstrates that district courts *are* perfectly capable of considering such matters on an *ex parte* basis.

The Southern District of Texas is not alone in accepting *ex parte* submissions in this situation. As the Central District of California recognized, severance requests (among many

other motions) are "made routinely on an *ex parte* basis." *In re Intermagnetics Am.*, 101 B.R. 191, 194 (C.D. Cal. 1989). And, courts in this district have recognized that district judges may consider evidence on an *ex parte* basis in certain situations. *See, e.g., United States v. Rosendin Electric, Inc.*, 122 F.R.D. 219, 223-24 (N.D. Cal. 1987) (*in camera*, *ex parte* review of grand jury materials); *cf. United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998) (*ex parte* review of classified material under Confidential Information Procedures Act).

The Government's other cited cases similarly do not help it here. In *United States v. Jobe*, cited in Response at 8, a co-defendant affidavit was "submitted *in camera*" in conjunction with a motion to sever. 101 F.3d 1046, 1060 (5th Cir. 1996). The Government claims that the submission was not *ex parte*, but the opinion actually is silent on that point. Regardless of whether the Fifth Circuit used the term *in camera* to mean out of view of both public and government or merely non-public, the case says nothing about the propriety of *ex parte* submissions of proposed defense testimony. Likewise, *United States v. Neal*, 27 F.3d 1035 (5th Cir. 1994), does not define "*in camera*," is silent on whether it also means *ex parte*, and says nothing about whether or not *ex parte* submissions are permitted by the court. The *Neal* case does, however, reverse a denial of severance, holding that the proffered affidavit by a co-defendant (and leader of the alleged conspiracy) "quite obviously, is essential to both [other defendants'] claims of innocence." *Id*. at 1047. The Fifth Circuit held that the defendants met the test for severance by establishing: "a bona fide need for [the] testimony, the substance of that testimony and its exculpatory nature, and that [the co-defendant] would in fact testify [if severance was granted]." *Id*.

The Government's final citation in this section is to *United States v. Cova*, 585 F. Supp. 1187 (E.D. Mo. 1984). There, the court not only allowed the defendant to submit proposed testimony *ex parte*, the court actually "granted defendant Cova's request for an *ex parte* and *in camera* hearing on the question of severance," (*Id*. at 1191) thus demonstrating courts are perfectly able to make these determinations without divulging proffered defense testimony to the Government.

Given that "[t]he determination of risk of prejudice [of a joint trial]… [is left] to the sound discretion of the district courts," *Zafiro*, 506 U.S. at 540, there is no reason why this Court cannot weigh the *ex parte* submissions itself in deciding the pending motion. *See also Reese*, 2 F.3d at 891-92 ("the district court carefully weighed the [defendants'] allegations that they would be prejudiced by a joint trial."). Ms. Jensen should not be forced to reveal potential defense witness testimony to the Government at this time. *See United States v. Barrientos*, 485 F. Supp. 789, 790 n.2 (E.D. Pa. 1980) ("Recognizing that it would have been inappropriate for the Government to be apprised of the … anticipated testimony of defense witnesses at this pre-trial stage, the Government agreed that [the court] should conduct that phase of the hearing in camera and with no Government attorneys present.").

III. CONCLUSION

For the foregoing reasons, and those presented in our moving papers, the Court should allow Ms. Jensen the fundamental right to present Mr. Reyes as a witness in her own defense by granting this Motion. As Justice Story long-ago advised, courts should exercise their discretion on questions of severance "with all due regard and tenderness to the prisoners, according to the known humanity of our criminal jurisprudence." *United States v. Marchant & Colson*, 25 U.S. 480, 485 (1827). Ms. Jensen's Motion for Severance should be granted.

Dated: March 23, 2007

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY L. REYES, Defendants.	CR 06-0556 CRB THE UNITED STATES' MOTION TO UNSEAL THE DECLARATION OF GREGORY REYES IN SUPPORT OF DEFENDANT STEPHANIE JENSEN'S MOTION FOR SEVERANCE DATED CIRCA MARCH 15, 2007 Date: July 2, 2007 Time: To Be Scheduled Location: Courtroom 8 Judge: Hon. Charles R. Breyer

The United States of America, by and through its undersigned counsel, hereby moves to unseal the Declaration of Gregory Reyes in Support of Defendant Stephanie Jensen's Motion for Severance dated circa March 15, 2007 (the "Reyes Declaration").[1]

[1] The Reyes Declaration was filed under seal. Therefore the government does not know the precise date of the declaration.

The government is entitled to the Reyes Declaration because the counsel for defendant Reyes has taken positions during the trial that are likely contradicted by the sworn statements of the defendant himself and because the purposes served by originally sealing the declaration have now been fully satisfied.

I. THE DEFENDANT'S PRESUMED POSITION IN SUPPORT OF SEVERANCE: *THERE WERE NO LOOK-BACKS* BECAUSE I MET WITH MYSELF

Based on the representations made in the Reyes Declaration, the Court found that Mr. Reyes' testimony would substantially exculpate his co-defendant, Stephanie Jensen. The Court therefore granted the severance so that Mr. Reyes could testify at defendant Jensen's trial.

The government presumes that defendant Jensen persuaded the Court that the testimony defendant Reyes would provide was unique. Otherwise, there would have been no need for a severance.

The government further reasons that the only unique testimony that defendant Reyes could provide that would ostensibly exculpate defendant Jensen would be if defendant Reyes said, in essence, that there were no look-backs to price the employee stock options grants because I really did meet with myself and price the stock on those dates.

In her December 15, 2004 interview with counsel from Morrison & Foerster, this was precisely the claim that defendant Jensen made. She stated that:

> [N]ine times out of ten, she would personally talk to Mr. Reyes. When asked whether she provided him with the stock price history, she said "Yes, he'd want to see the facts." She said she might say, "Here's the low price, did you have a meeting with yourself on that day?" And he would respond *yes, he had a meeting with himself.*

Declaration of AUSA Adam A. Reeves in Support of the Responses by the United States to the Defendants' Motions *in Limine* dated May 23, 2007 at Exhibit R (Morrison & Foerster December 15, 2004 Interview with Stephanie Jensen) at 6 (emphasis added).

The government therefore presumes that the unique testimony that defendant Reyes can provide for defendant Jensen that supported the severance was some version of the claim by Reyes that there were no look-backs using historical stock prices because I really did meet with myself and decided to price the option on the dates as they appear on the grant minutes.

II. DEFENDANT'S ARTICULATED TRIAL DEFENSE: *THERE WERE LOOK-BACKS* BUT THEY WERE IN FULL VIEW OF THE FINANCE DEPARTMENT

If the government's assumption about the substance of the Reyes Declaration is correct, then the defendant has taken a totally contradictory position at trial.

Rather than claim *there were no look-backs*, the defendant now seems to contend that *there were look-backs* to price the option grants using historical stock performance information. The defendant insists, however, that the look-backs were done in full view of the finance department. According to the defense, the defendant's purported reliance on the accountants and finance officers at Brocade negates his criminal intent.

This position was recently clearly stated by counsel for the defendant on June 26, 2007:

> MR. MARMARO: Best price was the policy of the company. The policy of the company, to the extent that it could do so for the employees, was to find the best price. That's point three.
>
> Which leads into the single most important point, which is point four, that the pricing was generally done in the early years towards the end of the quarter. And I showed that conclusively in the February 6th email. Let me finish.

> So now we have a situation where finance, Elizabeth Moore, Bob Bossi and later Richard Deranleau, know that the price is not being selected contemporaneous with the date of the document. That's what this case is all about.
>
> The government's case is saying, that document which says October 30th, 2001, that's a fraud because it wasn't priced until February 6th, 2002. And they are half right. They are right that it wasn't priced until February 6th, but it wasn't priced until February 6th in full view of the finance department.
>
> That's this case, your Honor. That's what they call criminal backdating.
>
> THE COURT: Fine. Then you say, everybody knew about it. Your defense as to that aspect, as to that aspect is that everybody knew about it. Finance knew about it. She's -- you know, she's finance. Finance knew about it. Other people knew about it. There was no attempt to conceal.
>
> MR. MARMARO: It's more than that, your Honor. There is no intent to defraud. This was a pricing practice that was believed to be okay.

June 26, 2007 Transcript of Proceedings at 1101-1102.

For these reasons, the government believes the defendant has taken fundamentally inconsistent positions in proceedings before the Court. On the one hand, we think the defendant contended in March 2007 that there were no look-backs because he really did meet with himself and yet in June 2007 the trial defense articulated in the opening and throughout cross-examination is that there were look-backs but that they were in full view of the finance department. These two positions are fundamentally inconsistent.

Finally, the government doubts that the Reyes Declaration asserts that there were look-backs but that they were in full view of the finance department because then there would have been nothing unique about the testimony of defendant Reyes that would warranted severance. In

this scenario, both defendants Reyes and Jensen could simply have asserted an advice of accountants defense and there would have been no necessity for two trials.

III. THE REYES DECLARATION SHOULD BE UNSEALED

A criminal defendant often may take contradictory positions and assert inconsistent defenses. What makes this situation different is that the defendant himself chose to submit a sworn statement to the Court in a sealed proceeding to gain a tactical advantage. Having unilaterally chosen to submit his sworn declaration to the Court and the Court having relied on its assertions to grant the severance, the defendant cannot now assert a completely contradictory defense without the government being permitted to test the defendant's sworn assertions.

The Reyes Declaration should be unsealed and produced now. First, the Reyes Declaration is relevant and admissible evidence that is probative of the truthfulness of the defendant's trial defenses.

Second, the purposes served by sealing the declaration have been fulfilled. No longer can there be any concern about premature disclosure of the defendant's trial strategy. That strategy has now been fully articulated in the opening, cross-examinations and in other court proceedings.

Third, no litigant can take positions at trial that fundamentally contradict his own sworn submissions with impunity. To allow such an outcome would undermine the public's confidence in our courts and threaten the basic integrity of our judicial system.[2]

[2] If the defendant testifies in his own defense, there can be no question that the government is entitled to the production of the Reyes Declaration as *Jencks* material.

CONCLUSION

For these reasons, the government respectfully requests that the Reyes Declaration be unsealed and produced to the government.

DATED: July 1, 2007

Respectfully submitted,

SCOTT N. SCHOOLS
United States Attorney

/S/
_____

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TIMOTHY P. CRUDO
Assistant United States Attorneys