SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiff,	:	Indictment Number 773/2014
-against-	:	
STEVEN DAVIS, STEPHEN DICARMINE, JOEL SANDERS, and ZACHARY WARREN,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT STEPHEN DICARMINE'S MOTION TO DISMISS THE INDICTMENT

This Memorandum of Law is submitted on behalf of defendant Stephen DiCarmine, individually, as a supplement to the Omnibus Motion separately submitted on behalf of defendants Steven Davis, Joel Sanders and Mr. DiCarmine jointly. This motion asks the Court to inspect the grand jury minutes pursuant to CPL §§ 210.20 (1)(a)(b) & (c) and 210.25(1) and 210.30, and upon that inspection to dismiss the indictment based on the legal insufficiency of the evidence before the grand jury as to Mr. DiCarmine. The motion also asks the Count to inspect the grand jury minutes pursuant to CPL §§ 190.30(1), 210.20 (1)(a), 210.25(1), 210.30 and 210.35(5), and to dismiss the indictment if the District Attorney failed to give, or gave incorrect, incomplete or otherwise misleading legal instructions to the grand jury.[1]

[1] Mr. DiCarmine adopts the arguments made in separate motions by co-defendants to the extent that those arguments apply to Mr. DiCarmine and redound to his benefit.

The governing legal principles are set forth in the Memorandum of Law that is submitted in support of the joint Omnibus Motion. As set forth in our joint Omnibus Motion, Messrs. Davis, DiCarmine and Sanders did not commit the crimes charged in the indictment. This separate motion, submitted on behalf of Mr. DiCarmine alone, underscores some of our individual concerns about this prosecution.

INTRODUCTION

This is a scapegoat prosecution. At its core, this indictment alleges financial fraud. But if the presentation to the grand jury was fair and thorough, the evidence before it would show that Dewey & LeBoeuf's ("D&L") former executive director Steve DiCarmine was in charge of operations, not finances and that he oversaw matters such as recruiting, marketing and office space, not books and records. Moreover, the evidence would show that he was a contract employee, not a partner; his contract pre-dated the events that underlie the indictment; he had no motive to steal for the benefit of the equity partners who owned the firm. Indeed, the insatiable greed of some of those partners and the decision of some partners to jump ship when the going got rough were major causes of D&L's collapse, not Steve DiCarmine's actions. Since the grand jury returned this indictment in the face of these facts, the Court should be very wary of the validity of this indictment as to Mr. DiCarmine and should examine carefully the evidence before, and the prosecutor's instructions to, the grand jury.

Our concern about the presentation to the grand jury is heightened by the material the prosecutors have placed on the public record and by the inferences they apparently have drawn from it. Obviously, we do not have access to the grand jury minutes. Moreover, we recognize that the indictment, cooperators' plea materials and the discovery that we have received to date

(to the extent that we have been able to review it) may not provide a complete picture of the evidence before the grand jury. However, the fact that the prosecution has highlighted certain material, such as the cooperators' statements, by making them public and certain emails by featuring them in the indictment, suggests that the prosecutors consider these materials strong evidence in support of their case and may have presented this evidence to the grand jury. And there is the rub. To the extent that this material is representative of the prosecution's evidence, it does not amount to legally sufficient evidence to support these charges against Mr. DiCarmine.

ARGUMENT

We are particularly concerned because of the perception apparently held by some that Mr. DiCarmine "ran the firm" "so he had to know everything." The "he had to know" theory of culpability may be good enough for diverting cocktail party conversations at bar association events, but is not legally sufficient evidence to support an indictment. While two of the prosecution's artfully drafted cooperators' statements do their best to appear to inculpate Mr. DiCarmine, a careful reading shows that they do nothing of the sort. Some examples taken from the statements annexed to two cooperators' (Ilya Alter and Francis Canellas) Plea Agreements illustrate our concern.[2] First, the statements are riddled with hearsay as to what Mr. DiCarmine purportedly said. Second, in many instances the content of what is attributed to Mr. DiCarmine is completely benign.

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[2] We have received statements from seven cooperators. However, according to the statements annexed to their Plea and Cooperation Agreements, four of the cooperators – Dianne Cascino, Jyhjing "Victoria" Harrington, David Rodriguez and Lourdes Rodriguez – had nothing to say to the District Attorney about Mr. DiCarmine. Thomas Mullikan did mention Mr. DiCarmine to report that, "During my tenure at Dewey LeBeouf, I dealt only infrequently with Sanders, and dealt even less frequently with Steve DiCarmine, the firm's executive director." It is hard to believe that if these cooperators had something negative to say about Mr. DiCarmine, the District Attorney would not have included it in their statements.

The Use of Hearsay. A few examples will illustrate our point. Frank Canellas asserts that another defendant told Canellas that Mr. DiCarmine was aware of inappropriate adjustments. Ilya Alter's statement asserts that Alter "understood from" another defendant that Mr. DiCarmine was often unwilling to implement certain policies. Standing alone, those assertions about Mr. DiCarmine are hearsay as to Mr. DiCarmine. If these cooperators testified in the grand jury, the Court should examine the minutes to make sure that the prosecutors gave full and correct instructions with respect to their use.

Although the District Attorney apparently draws incriminating inferences from some of the cooperators' statements, the content of some of the hearsay attributed to Mr. DiCarmine is completely benign. For example, Alter asserts that, as he understood it from one defendant, Mr. DiCarmine was often unwilling to implement policies that would legitimately reduce expenses by further reducing headcount, and as a result *Alter and others* (not Steve DiCarmine) would look for inappropriate ways to reduce expenses. If at a certain point in time Mr. DiCarmine objected to further reducing the firm's headcount, there was nothing illegal about that position; there comes a point, even during the Great Recession that contributed to the firm's collapse, when further cuts in a law firm's legal and support staff become counter-productive.[3] In another example, Canellas's statement reports that when it became apparent that the firm would not meet a covenant, a defendant told Canellas that Mr. DiCarmine said the firm had to meet the covenant. Assuming Mr. DiCarmine had made that statement, there is nothing criminal about that opinion.

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[3] The allegation about Mr. DiCarmine's reluctance to reduce headcount is somewhat bemusing; he usually is applauded or castigated for cutting deeply. *See, e.g.*, James B. Stewart, The Collapse, The New Yorker, October 14, 2013, p. 87 (In 2009 Mr. DiCarmine was responsible for inducing more than seventy partners to leave the firm).

Analogous dangers infect building a case against Mr. DiCarmine based on the emails we have reviewed to date. Emails written from one person to another person, but not involving Mr. DiCarmine, are not legally sufficient evidence unless and until the evidence before the grand jury establishes, independent of those emails, that a conspiracy existed and that Mr. DiCarmine was a member of it. Other emails about financial reporting from which the District Attorney draws a nefarious inference are benign with respect to Mr. DiCarmine absent evidence before the grand jury that demonstrates Mr. DiCarmine knew that the reporting was criminal. Still other emails are ambiguous.

The Private Placement. Another major cause of concern about the grand jury presentation arises from the charges based on the April 2010 Private Placement that is at the heart of the indictment.[4] Thirteen counts of the indictment charge Steve DiCarmine with grand larceny in the first degree based on the Private Placement. It is impossible to understand how those charges could be leveled against Mr. DiCarmine, given his role in connection with the Private Placement.

Private Placements are complex and sophisticated transactions. That is why entities that engage in them have sophisticated lawyers represent them. That is why sophisticated bankers are involved. On the other hand, not everyone who played any role in connection with a Private Placement is liable if something goes awry. If the presentation to the grand jury was thorough and fair, it would show that doing the Private Placement was not Mr. DiCarmine's idea. The

[4] The joint Omnibus Motion sets forth the insufficiency of the evidence before the grand jury with respect to demonstrating that Messrs. Davis, Sanders or DiCarmine had intent to deprive the alleged insurance companies and bondholders of their property permanently or for as long a period as to be virtually permanent, and therefore that these defendants did not commit grand larceny with respect to the Private Placement.

D&L Executive Committee authorized the Private Placement, not Mr. DiCarmine.[5] At least two firm lawyers, one of whom was an Executive Committee member, with expertise in this area of law, participated in drafting and reviewing the documents that effectuated the Private Placement, not Mr. DiCarmine. These firm lawyers interacted with counsel for the prospective purchasers, not Mr. DiCarmine. D&L had a General Counsel who presumably reviewed the matter.

The evidence would also show that Mr. DiCarmine did not function as a lawyer in connection with the Private Placement. Mr. DiCarmine did not sign the operative documents. Mr. DiCarmine did not create the financial disclosures that went into the operative documents. Mr. DiCarmine did not decide what financial disclosures were to be made in connection with the Private Placement. Mr. DiCarmine had no responsibility for the financial disclosures that were or were not made to the prospective note purchasers, and had no authority to control decisions others made about financial disclosure.[6]

Our concern about *bona fides* of these charges is further underscored by what appears to be the District Attorney's schizophrenic attitude toward the Private Placement. Mr. DiCarmine, who had no responsibility for making financial disclosures to prospective note purchasers, has been charged with thirteen counts of grand larceny in the first degree based on this transaction. But with the exception of one co-defendant in this case, the Executive Committee members who approved and authorized it have not been charged with any wrongdoing. Moreover, the lawyers who represented D&L in connection with the deal – and who would have had the responsibility

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[5] Curiously, the District Attorney apparently has given the entire Executive Committee, including the partner who represented D&L in the Private Placement transaction, a pass.

[6] The evidence may show that Mr. DiCarmine took prospective investors on a tour of the firm's New York City office. Mr. DiCarmine arranged and attended a dinner for the prospective note purchasers and some D&L representatives.

for ensuring that all appropriate and legally required disclosures were made – have not been charged. It is hard to understand how an employee, who had no responsibility for making financial disclosures in connection with that transaction, was indicted because of it when those who did have that responsibility were not.

In addition to that anomaly, our concern about the quality and sufficiency of the evidence before the grand jury is highlighted by a portion of Canellas's statement annexed to his guilty plea. In it Canellas asserts that Mr. DiCarmine, another defendant and Mr. Canellas "*decided*" that the "overhang," which consisted of back pay owed to partners, should not be disclosed in connection with the Private Placement. Now, maybe Canellas actually believes that he and the others actually made that decision for the firm. But the assertion that Steve DiCarmine *decided* on behalf of the firm whether to disclose the overhang to prospective purchasers is patently preposterous. The evidence before the grand jury should show that Mr. DiCarmine did not have the authority to make that decision. The evidence before the grand jury should also show that the Executive Committee members who approved the deal and the partners in general knew about the overhang: after all, they were the ones who were owed the money.

Perhaps more significantly, the evidence should show that a D&L partner and Executive Committee member, who was a banking lawyer familiar with private placements and disclosure rules and requirements, represented D&L in connection with the Private Placement, negotiated on behalf of the firm, and reviewed and contributed to the operative documents. The evidence should show that this D&L partner knew about the overhang when he was performing these tasks, not only as a member of the Executive Committee and the firm's Compensation Committee, but also because money he was owed was part of the overhang. The evidence should show that this lawyer would have decided – perhaps alone, perhaps in conjunction with

other Executive Committee members and other lawyers working on the deal – whether to disclose the "overhang." This was his job and his responsibility. And he had the authority to make that decision for the firm, not Steve DiCarmine. If, as it appears to be the case, the District Attorney thinks Canellas and Mr. DiCarmine made the ultimate decision about disclosing the overhang, that bespeaks a fundamental misunderstanding of how these things work in the real world and the responsibilities of the lawyers in charge of the transaction. This raises very substantial questions about the sufficiency of the evidence before the grand jury, the legal instructions given to the grand jury and the fundamental fairness of the proceeding. It suggests befuddlement. This is very basic law school stuff.

Now, apparently this experienced lawyer did not believe that the failure to disclose the overhang was a crime since he knew about the overhang and he decided not to disclose it. And although the District Attorney apparently believes that the failure to disclose the overhang is a crime committed by Canellas, and also is a crime committed by Mr. DiCarmine and his co-defendants, the District Attorney apparently does not believe that the failure to disclose the overhang was a crime committed by this lawyer since – as far as we know – he has not been charged with any crime based on his failure to disclose. These singularly peculiar circumstances further highlight the need for a very careful review of the grand jury proceedings.

No one worked harder – lawfully – to make D&L a success despite the Great Recession and the behavior of some of its partners than Steve DiCarmine. The fact that some former partners want scalps should not have resulted in this indictment against him.

CONCLUSION

WHEREFORE, for reasons stated herein and in the accompanying joint Omnibus Motion, the Court should dismiss this indictment as to Stephen DiCarmine.

Dated: New York, New York
July 11, 2014

BRYAN CAVE LLP

By:_____

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