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

PEOPLE OF THE STATE OF NEW YORK,

- against -

STEVEN DAVIS,
STEPHEN DICARMINE,
JOEL SANDERS, and
ZACHARY WARREN,

Defendants.

Ind. No. 773/2014

SUPPLEMENTAL MEMORANDUM OF JOEL SANDERS
IN SUPPORT OF THE MOTION TO DISMISS THE INDICTMENT

Counsel for defendant Joel Sanders submits this Memorandum of Law and the annexed Notice of Motion to supplement the Omnibus Motion submitted on behalf of himself and co-defendants Steven Davis and Stephen DiCarmine. The joint Omnibus Motion and Memorandum of Law set forth the legal principles governing this motion and the reasons the charges in the indictment are deficient as a matter of law. This separate submission addresses the particular sufficiency issues with respect to the prosecution's case against Mr. Sanders.

INTRODUCTION

The story of Dewey & LeBoeuf LLP ("D&L") and its collapse is one of a newly merged law firm, born in the midst of a post-recession economy, which struggled to reconcile the financial obligations of a business with the monetary needs and desires of an insatiable partnership. This is not the story of a financial fraud, as alleged in the indictment, but the story of a clash of company cultures that ultimately resulted in the failure of a merger.[1] A fair and accurate presentation of the evidence before the grand jury would show that Mr. Sanders was the

1. *See* James B. Stewart, *The Collapse*, The New Yorker, October 14, 2013. (The 2007 merger between Dewey Ballantine and LeBoeuf, Lamb, Greene & MacRae, was historically the largest merger of two New York firms. Many characterized the merger as "Dewey married money, LeBoeuf married up.")

Chief Financial Officer ("CFO") of D&L and served in that capacity, to the best of his ability, to meet the needs of competing but legitimate aspects of the firm's business.

A fair and thorough reading of the evidence to the grand jury would show that, although CFO, Mr. Sanders was not a CPA or even an accountant, and had no special training in law firm accounting. The evidence would show that as a non-practicing lawyer, Mr. Sanders was *not* a partner at D&L, but a contract employee with a fixed salary and bonus, who had no incentive to steal for the benefit of an equity partnership. Finally, the evidence would show that Mr. Sanders worked tirelessly to bring in money that was legitimately owed to the firm and essential to meeting the firm's financial obligations, as he struggled with partners who repeatedly failed to meet their projected collection targets and with clients (also struggling in the midst of the Great Recession) who failed to make timely and complete payments for the legal services they received. Ultimately those efforts were thwarted by the individual greed of some of D&L's partners who abandoned the firm during a time when solidarity was necessary to keep it alive. The grand jury returned this indictment based on an incomplete and inaccurate presentation by the prosecution. Because of this, the Court should reconsider the validity of the indictment as it regards Mr. Sanders and carefully examine the evidence presented and the prosecution's instructions to the grand jury.

The materials underlying the allegations against Mr. Sanders and his co-defendants, made widely available for public and media consumption by the prosecution, further support our position. Those materials include the indictment, the "Statement of Facts," and the cooperators' plea agreements and written allocutions. Because the prosecution has chosen to highlight these materials as its strongest evidence, we must infer that the prosecution presented this now well-publicized evidence to the grand jury as well. However, to the extent that this material is

indicative of the prosecution's case, it is does not amount to legally sufficient evidence to support the charges against Mr. Sanders.

ARGUMENT

A. Cooperator Statements and E-mails

Rather than allege specific instances of misconduct about what Mr. Sanders said or instructed others to do, the cooperators' proffered statements and allegations are replete with hearsay and innuendo. Furthermore, the content described in these allegations generally consists of normal and perfectly lawful conduct typical of a person functioning as CFO of a law firm (*e.g.*, maximizing income and minimizing financial losses, and ensuring that unpaid fees and costs are diligently pursued and collected rather than being written off). The attachment of a criminal intent to such conduct is unfounded.

Generally the cooperators fail to identify any specific statement by Mr. Sanders, instead stating that they "understood," or that they knew "in substance," that Mr. Sanders was aware of their alleged illicit acts, while admitting that in many cases they had little to no contact with Mr. Sanders on a daily basis. Those statements suggest that the evidence presented to the grand jury regarding Mr. Sanders' role at the firm was both prejudicial and inaccurate.

B. Hearsay Statements of Cooperators

At least two of the cooperator statements, those of Diane Cascino and David Rodriguez, rely on hearsay to implicate Mr. Sanders in the crimes alleged in the indictment. Ms. Cascino's statement asserts that while she "technically reported to Sanders," she "dealt most frequently with Frank Canellas." The bulk of Ms. Cascino's statement shows that she "was asked by [Canellas] to make certain adjustments," that Canellas assigned her to perform illicit tasks, and Canellas "usually instructed" her to make the allegedly improper adjustments. As to Mr.

Sanders' involvement, Ms. Cascino is only able to assert that she "understood" that Canellas was "instructed by" or "worked with" Mr. Sanders to create the adjustments. According to her statement, Ms. Cascino has no direct knowledge of any involvement by Mr. Sanders in the allegedly improper accounting adjustments, much less that Mr. Sanders knew any such adjustments were illegal. Ms. Cascino's one attempt to directly implicate Mr. Sanders in a specific instance of the conduct she describes is diminished by the fact that she cannot even remember whether it was Mr. Sanders or Canellas who was involved.[2]

Similarly, cooperator David Rodriguez does not allege that Mr. Sanders told him to make inappropriate adjustments. The only evidence Mr. Rodriguez provides to support an inference of Mr. Sanders' intent or knowledge rests on Mr. Rodriguez's unsubstantiated claim that he "recognized" Mr. Sanders' handwriting on a schedule that he witnessed Canellas take home with him overnight.[3] Of course, the fact that a person's handwriting appears on a schedule that another person works on at home is not criminal. Other cooperator assertions about Mr. Sanders are classic hearsay as to Mr. Sanders. The Court should examine the minutes to identify whether these cooperators testified before the grand jury and ensure the prosecution provided complete and correct instructions concerning their testimony.

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2. Ms. Cascino's cooperation agreement alleges that she "was instructed by *Frank or Joel* not to write off invoices until they were a year old, even if the firm's Billing and Collections Committee instructed [her] to write them off" (emphasis added). She adds, "[m]y department kept a folder of invoices that needed to be written off but were not yet a year old." Not only does Ms. Cascino's statement fail to definitively identify Mr. Sanders as the one giving the instruction, but it is not evident that the statement describes criminal or improper conduct at all. Naturally, one of the primary responsibilities of the finance department is the tenacious pursuit of client money owed to the firm. There is no basis to allege that the practice of taking a year to pursue the collection of unpaid fees before writing them off as losses — whether or not the Collections Committee has approved a write-off — is criminal.

3. Mr. Rodriguez also asserts that Canellas instructed him to reclassify a portion of another defendant's distribution as a return of capital, and that at one point he "overheard" Mr. Sanders ask over the phone if the firm could make more salaried partner adjustments. Again, the prosecution has provided no basis for alleging that such conduct was criminal.

Similar defects in evidence exist regarding the e-mails the prosecution has used to present its case against Mr. Sanders. Several e-mails referenced in the indictment do not involve Mr. Sanders at all, and thus cannot constitute legally sufficient evidence against Mr. Sanders. The prosecution must provide evidence — independent of these e-mails — sufficient for the grand jury to determine that a conspiracy existed, and that Mr. Sanders knowingly engaged in a conspiracy. Furthermore, e-mails indicating that Mr. Sanders desired to meet the firm's financial reporting requirements can hardly be said to be criminal. Rather, those e-mails exhibit the very real pressures and duties that Mr. Sanders faced as CFO of the firm. Absent evidence before the grand jury demonstrating that Mr. Sanders knew that the information he reported was criminal, the prosecution should not be permitted to make blanket statements that call into question the legality of Mr. Sanders' otherwise legitimate actions as an employee of the firm.

The Private Placement

The Court should additionally question the validity of the grand jury presentation regarding Mr. Sanders' alleged involvement in the April 2010 Private Placement. Based on that transaction, the indictment alleges thirteen counts of grand larceny in the first degree against Mr. Sanders and the other defendants.[4] However, such allegations are groundless in light of all of the facts at the prosecution's disposal.

D&L's Executive Committee approved the $150 million private placement of securities as a legitimate means of refinancing the firm's term debt. As demonstrated in the private placement memorandum itself, the Executive Committee was comprised of D&L equity partners — partners who not only possessed the same access to and knowledge of the firm's financial

4. The joint Omnibus Motion demonstrates the insufficiency of evidence before the grand jury indicating that Messrs. Davis, DiCarmine or Sanders intended to deprive the insurance companies of their property permanently (or virtually permanently). That lack of evidence is equally fatal to the charges based on the Private Placement.

position as Mr. Sanders, but who additionally held a personal stake in the firm's financial success. Mr. Sanders did not have the authority to approve such a serious and complicated transaction on his own, nor did he possess the same personal motivations that these equity partners possessed to refinance the firm's debt.

Although Mr. Sanders played a role in providing financial information to the banks and investors regarding the private placement, his role in the transaction was limited. In addition to the firm's outside counsel, at least two other lawyers, one of whom was a D&L partner and Executive Committee member, reviewed and drafted the documents associated with the Private Placement. Another D&L partner and Executive Committee member attended and fielded diligence questions at the Investor Roadshow presentation. Yet another D&L partner, the firm's general counsel, reviewed the documents submitted in connection with the private placement. Those lawyers worked extensively to craft the terms of the Note Purchase Agreement and verified that the supporting documents — including the Private Placement Memorandum — accurately portrayed the firm's condition and were otherwise proper.

The information provided by the cooperators in support of the prosecution's allegations with regard to the Private Placement further erode the credibility of the prosecution's overall presentation to the grand jury. Again, the statements constitute unreliable hearsay attributed to Mr. Sanders. For instance, cooperator Canellas asserts "Sanders, Mullikin and I, along with others provided financial statements and other information to the banks and private placement investors that we knew to be false and intentionally failed to provide information that we knew would be of interest to the banks and investors." Such broad, blanket statements fail to allege any specific instance of a fraudulent misrepresentation by Mr. Sanders and constitute baseless speculation as to Mr. Sanders' purported knowledge of any falsity and intent to mislead.

In no way does Mr. Mullikin's statement implicate Mr. Sanders in knowingly providing fraudulent representations to investors. Surely the District Attorney would have included a statement by Mr. Mullikin corroborating Canellas' allegations that Mr. Sanders participated in the alleged misrepresentations if Mr. Mullikin had relevant facts to provide.

The prosecution's inconsistency in both weighing and presenting the evidence is increasingly evident when considering the fact that the Executive Committee members and in-house attorneys involved in the transaction have entirely escaped all culpability. As counsel for Mr. DiCarmine correctly points out in their supplemental motion, the Executive Committee members who approved and authorized the Private Placement and the lawyers who represented D&L, all of whom were responsible for verifying that all legal and necessary disclosures were made, have not been charged. It is inconceivable that an employee like Mr. Sanders, who did not function as an attorney in connection with the Private Placement and who did not own an equity stake in the transaction, could be held responsible when members of the Executive Committee charged with the transaction's legal execution were not. The evidence should show that a leading partner in D&L's corporate department, familiar with private placements and disclosure rules (and a member of the firm's Executive Committee) negotiated on behalf of D&L in the transaction, having full access to the firm's financial information and operative documents. As a partner owed money due to the firm's "overhang" problem, that partner was well aware of the firm's financial position and was best situated to make any legal disclosures to the investors that he deemed necessary.

The evidence before the grand jury should show that other members of the Executive Committee, like the aforementioned equity partner, had the authority to make final disclosures regarding the Private Placement. The evidence should further show that such decisions were not

left to the discretion of firm employees such as Mr. Sanders. If the prosecution truly believes a crime was committed in omitting to inform investors of money owed to the partnership, such a burden cannot fall on the shoulders of Mr. Sanders. Such contradictions emphasize the necessity for further, careful review of the grand jury proceedings.

Tensions tend to run high when economic enterprises fail, and it is often tempting to search for a scapegoat. Mr. Sanders worked with vigorous dedication to keep D&L afloat, in the face of the great economic downturn and political turmoil amongst the firm's partnership. In light of the bankruptcy, the ultimate outcome of the D&L merger was tragic to say the least, but it in no way should have resulted in the criminal indictment of an employee trying to do his job to the best of his ability.

CONCLUSION

For reasons stated herein and in the accompanying joint Omnibus Motion, we respectfully submit that the Court should dismiss this indictment as to Mr. Sanders.

HUGHES HUBBARD & REED LLP

New York, New York
Dated: July 11, 2014

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SUPREME COURT OF THE STATE OF NEW YORK
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NOTICE OF MOTION

PLEASE TAKE NOTICE that on September 15, 2014 at 9:30 a.m., or as soon thereafter as counsel may be heard, upon the accompanying Affirmation and Memorandum of Law dated July 11, 2014, and upon all the prior pleadings, submissions and proceedings in this action, defendant Joel Sanders will move this Court before the Honorable Robert M. Stolz, Justice of the Supreme Court, in Part 72 of the Supreme Court, 100 Centre Street, New York, New York, for an order granting Mr. Sanders' motion for inspection of the grand jury minutes, dismissal of the indictment, release of the grand jury minutes to the defendants and the additional relief set forth in the defendants' joint omnibus motion, together with such other and further relief as the Court deems just and proper.

HUGHES HUBBARD & REED LLP

New York, New York
Dated: July 11, 2014

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AFFIRMATION IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS

MARC A. WEINSTEIN, an attorney duly admitted to practice law before the courts of the State of New York, affirm the following to be true under the penalties of perjury:

1. I am a partner with the law firm of Hughes Hubbard & Reed LLP, counsel for defendant Joel Sanders. As such, I am fully familiar with the relevant facts of the case. I submit this affirmation and the accompanying memorandum of law (which is incorporated by reference) in support of Mr. Sanders' motion to dismiss the indictment.

2. Mr. Sanders' motion is a supplement to the omnibus motion submitted on behalf of himself and co-defendants Steven Davis and Stephen DiCarmine, which collectively seek the following relief:

(a) Inspection of the grand jury minutes and, upon inspection, dismissal of the indictment under Criminal Procedure Law ("CPL") §§ 190.15, 190.30, 190.65, 210.20, 210.25 and 210.30;

(b) Releasing the grand jury minutes to defense counsel so counsel may assist the Court in addressing the issues underlying the defendants' motions;

(c) Granting the additional relief set forth in the defendants' joint omnibus motion (which is incorporated by reference); and

(d) Granting such other and further relief the Court deems just and proper.

HUGHES HUBBARD & REED LLP

New York, New York
Dated: July 11, 2014

By: 
Marc A. Weinstein