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

THE PEOPLE OF THE STATE OF NEW YORK,	§	
-against-	§	Indictment No. 05393-2013; Indictment No. 00773-2014
ZACHARY WARREN, et al.,	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ZACHARY WARREN'S OMNIBUS MOTION

This memorandum of law is respectfully submitted in support of defendant Zachary Warren's omnibus motion in this case.

INTRODUCTION

On March 6, 2014, Zachary Warren, now a law clerk to a federal judge, was arraigned on two indictments for crimes that he allegedly committed more than five years ago, when he worked at Dewey & LeBoeuf, LLP, as a 24-year-old Client Relations Manager helping to collect monies owed to the firm by its clients. The arraignment marked the first time that Mr. Warren saw his co-defendants in this case -- Steven Davis, Stephen DiCarmine and Joel Sanders -- since July 2009, when he left Dewey & LeBoeuf to attend law school. In Indictment No. 05393-2013 ("the 2013 Indictment"), Mr. Warren is charged with five counts of Falsifying Business Records in the First Degree, in violation of Penal Law §175.10. In Indictment No. 00773-2014 ("the 2014 Indictment"), he is charged, together with his co-defendants, with one count of Scheme to Defraud, in violation of Penal Law §190.65(1)(b), and one count of Conspiracy, in violation of Penal Law §105.05(1). The charges in the two indictments have now been consolidated. This memorandum seeks dismissal of all seven counts against him.

POINT ONE

THE COURT SHOULD INSPECT THE GRAND JURY MINUTES, RELEASE THEM TO THE DEFENSE AND DISMISS THE CHARGES AGAINST MR. WARREN AS LEGALLY INSUFFICIENT

Pursuant to CPL §§210.20(1)(b) and 210.30, Mr. Warren moves this Court to examine the grand jury minutes to determine whether the evidence before the grand jury was legally sufficient to support the charges. Mr. Warren "is entitled to a review based on whether there was competent evidence which, if accepted as true, would establish every element of the offense charged and the defendant's commission of it." People v. Mikuszewski, 73 N.Y.2d 407, 411 (1989). As the Court of Appeals observed more than 65 years ago, "[i]t is a serious matter for any individual to be charged with crime whether the charge be true or false [and] it is . . . important to a person that he be fairly and justly accused." People v. Minet, 296 N.Y. 315, 322-23 (1947). For that reason, a "favorable ruling on [a] motion to inspect will be automatic, except in those exceptional cases in which the prosecution has asserted some 'good cause' ground for denial," People v. Harris, 82 N.Y.2d 409, 413 (1993), and no such ground exists here.

As noted above, Mr. Warren has been named in seven counts in two consolidated indictments: five counts of Falsification of Business Records in the First Degree (Counts 1, 3, 4, 5 and 6 of the 2013 Indictment) and one count each of Scheme to Defraud in the First Degree and Conspiracy in the Fifth Degree (Counts 1 and 106 of the 2014 Indictment). None of the counts, we submit, is supported by legally sufficient evidence. Moreover, Mr. Warren urges the Court to release the grand jury minutes to the defense to assist the Court in making its determination on the motion. See CPL §210.30(3)("[i]f the court, after examining the minutes, finds that release of the minutes, or certain portions thereof, to the parties is necessary to assist [it] in making its determination on the motion, it may release the minutes or such portions

thereof to the parties"). Release of the minutes is particularly apt when, as here, the court is "fac[ing] a written motion on legal sufficiency, and . . . [would benefit from] informed adversarial submissions from both sides." Att'y Gen. of State of N.Y. v. Firetog, 94 N.Y.2d 477, 482 (2000). Especially in cases like this which deal with "complex, civil-criminal matters involving documentation and business transactions," courts have released portions of the grand jury minutes to permit the defense to focus the issues for the Court's resolution. People v. Manfro, N.Y.L.J. 3/13/92 at 26 (S. Ct. Queens Co.); see also Marks, et al., New York Pre-trial Criminal Procedure §5.27 ("the prosecution should be required to make a particularized showing why disclosure in the case before the court would cause harm").[1]

A. Falsification of Business Records

The crime of Falsification of Business Records in the First Degree requires proof that the defendant, "with intent to defraud, . . . [made] or cause[d] a false entry in the business records of an enterprise." Penal Law §175.05(1). In its March 20, 2014 Bill of Particulars, the People identified the "enterprise" whose records were allegedly falsified as "Dewey & LeBoeuf." The business records at issue are these:

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[1] Mr. Warren also requests that the Court review the minutes to determine whether the grand jury was properly instructed on the elements of the crimes with which he is charged. See CPL §190.25(6)("[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it"). Although a Grand Jury "need not be instructed on the law with the same degree of precision that is required when a petit jury is instructed," the District Attorney must "provide[] the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime." People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980). Where a grand jury has not been properly instructed on the law and the error resulted in prejudice, the tainted indictment must be dismissed. People v. Caracciola, 78 N.Y.2d 1021 (1991).

Count	Disclosure
1	Reclassifying disbursement retainer, Elite batch GJ731207
3	One London Wall reverse premium, Elite batch VH010509NY, Entry 11276
4	Austin lease termination fee, Elite batch VH010509NY, Entry 11278
5	Reclassifying disbursement payments, Elite batch GJ736026
6	Reversing disbursement write-offs, Elite batch GJ743484

As discussed below, we believe that the evidence establishes that Mr. Warren's role in connection with the making of these five accounting entries was limited to being present at a meeting (or perhaps meetings) with Sanders and Frank Canellas at which the adjustments may have been discussed. There is no evidence that he made the entries or encouraged others to make them or knew that they were wrongful, if they were. As a non-accountant whose duties involved the collection of past due receivables, the entries were beyond his ken. With respect to these charges, we therefore ask the Court to review the grand jury minutes and dismiss these five counts.[2]

1. Making or Causing a False Entry

The grand jury could not have heard evidence that Mr. Warren "made" the five entries in the Elite accounting software because he had no access to the accounting system.[3] See People v. Sanchez, 101 A.D.2d 753 (1st Dept. 1984)(dismissing falsification count because defendant "did not make the entries on the cash journal"); People v. Taylor, 55 A.D.3d 640, 643 (2d Dept. 2008)(reversing false filing convictions where defendant did not "personally" file the documents at issue). Thus, the five counts can stand only if there was proof presented to the grand jury that Mr. Warren "cause[d]" the five entries to be made. But that, too, could not have

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[2] At the May 13, 2014 court proceeding, the People dismissed Count Two of the 2013 Indictment.

[3] "Elite" refers to the accounting software that Dewey & LeBoeuf used to make an entry or batch of entries in the firm's electronic records.

been shown. As the evidence makes clear, it was Sanders and Canellas, not Mr. Warren, who directed others to make the five entries. The accounting personnel who made the entries would not have taken directions from Mr. Warren, and he would not have given directions to them.

Closely on point is the decision in People v. Morris, 2010 WL 4679896 (N.Y. Sup. Ct. 2010). There, the defendant, Hank Morris, was the long-time political consultant for then-Comptroller Alan Hevesi. The evidence showed that Morris "with the aid of . . . senior official[s] of the Comptroller's Office . . . created a corrupt operation by which decisions . . . to invest [state pension money] in [private equity] fund[s] were based on whether such fund[s] had agreed to pay placement fees . . . [to] Morris . . . rather than solely on the prudent investor rule." His was a "pay to play scheme." Among the charges against Morris were five for Offering a False Instrument for Filing in the First Degree, in violation of Penal Law. §175.35. Those charges were predicated on compliance letters that five funds had submitted to the state, each of which falsely reported the placement fees that the fund was paying.

In dismissing the false filing charges, the court noted that the letters were "prepared and filed by the funds themselves, and not by Morris," and therefore that he could be culpable only if he caused the letters to be filed. And the proof on that score was wanting:

> That standard required a showing that Morris performed a positive act to urge or help the fund to prepare and file the disclosure letters. While Morris may have been aware that incorrect letters were prepared and filed, and that the filing of incorrect letters would be advantageous to him to cover up his activities, there was no evidence of Morris doing anything more than "standing by" when such letters were prepared or filed.

Id.[4]

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[4] Because Morris involved charges under Penal Law §175.35, the court applied §20.00 to determine whether Morris had accessorial liability for the submission of the false letters. Section 175.05, the falsifying business record statute, contains its own accessorial liability provision -- i.e., it applies to anyone who "cause[s]" a false entry. Otherwise, the analysis under the two

Here, the proof before the grand jury could show at most that Mr. Warren was "standing by" when false entries were made. Like Morris, he performed no "positive act to urge or help [others at the firm] to prepare" the false entries. He gave no directions or encouragement. See People v. Byrne, 77 N.Y.2d 460, 467 (1991)("where the Legislature has not clearly and specifically mandated otherwise, statutes defining criminal liability should . . . be construed to require some personal participation by the accused in the proscribed act")(emphasis added); People v. McGee, 49 N.Y.2d 48, 57 (1979)(rejecting Pinkerton liability: "one's status as a conspirator standing alone is [in]sufficient to support a conviction for a substantive offense committed by a coconspirator"). In sum, if we are correct that there was no proof before the grand jury that Mr. Warren "personal[ly] participat[ed]" in falsifying the five entries, then the false business record counts cannot stand.[5]

2. Falsity and Intent to Defraud

Even if there was evidence that Mr. Warren personally participated in the making of the false entries, the five counts should still not survive this Court's review. Simply stated, we are confident that the grand jury did not hear legally sufficient evidence that Mr. Warren knew that the entries were false, and, without such knowledge, he could not have had the requisite "intent to defraud." A threshold question, of course, is whether the entries were in fact false. That is to say, did the grand jury hear competent evidence (i) that a reverse premium and termination fee associated with the abandonment of lease property must be expensed and not

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sections is the same. Indeed, it bears note that the Morris court sustained five separate counts under §175.10 in which Morris prepared the record himself.

[5] In their opposition to our severance motion, the People claimed that Mr. Warren helped cover up the false entries. We reject that characterization, but even if it were true, it would not provide a basis for criminal liability. See Greenberg, et al., New York Criminal Law 3d §1.12 ("a person may not be found guilty of an offense . . . as an accomplice after the fact").

amortized under standard accounting principles and the pertinent financing agreements[6]; (ii) that client payments must be applied first to disbursements and then to fees and that a firm cannot reallocate such payments at year-end[7]; and (iii) that there is an immutable standard (such that a firm has no discretion) for determining when to write off a receivable, and therefore once a write-off is made, it can never be reversed?[8] We ask the Court to review the minutes to determine if the grand jury heard legally sufficient evidence on this threshold issue.

Even if such evidence was presented, the question remains: did Mr. Warren know that the entries were false? To be sure, there are some cases in which the falsity of an entry is obvious to anyone involved in its creation. See, e.g., People v. Kisina, 14 N.Y.3d 153, 156-57 (2010)(doctor applied for insurance reimbursement for medical tests she did not perform). But the entries here are not simple stuff. Can one presume that a 24-year-old college graduate with no accounting training knew that it was improper to amortize, and not expense, the reverse premium and lease termination fee (assuming that it was)? Could Mr. Warren be expected to

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[6] Counts 3 and 4 relate to the two abandoned leases. It bears note that reverse premiums are sometimes paid in British real estate transactions but are uncommon in this country. See http://www.hmrc.gov.uk/manuals/bimanual/BIM41050.htm. Moreover, as we noted in our severance motion, the accounting treatment for both forms of lease termination payments was the subject of dozens of emails that reference consultations with outside accountants; Mr. Warren was copied on none of them. See Warren Reply Mem. in Support of Motion for Severance at 6.

[7] Counts 1 and 5 relate to the treatment of fees and disbursements. The notion that applying client payments to disbursements has no effect on a firm's net income is not a fixed star in the accounting literature. Some client disbursements are commonly treated as expenses when incurred, so that a decision to apply client payments to them would increase a firm's net income (and a decision to write them off would have no effect on income). See Bailey, Law Firm Accounting and Financial Management, §18.04(2)(2013).

[8] Count 6 relates to reversing a write-off of an account receivable. There is no precise point at which a law firm is required to write-off its current account receivables as uncollectible. Rather, like many such matters, the decision is fact-intensive and subject to considerable discretion. See Bailey, Law Firm Accounting §18.04[2][b]("[i]n non-contingent matters . . . many of the disbursements are subject to the considerable, if not complete, discretion of the partner for the matter").

understand that it was inappropriate to apply client payments to outstanding fees before disbursements (assuming that it was)? And should he have appreciated that it was wrong to reclassify as current receivables certain disbursements that had previously been written off (assuming that it was)? The answer to each of these questions is "no." The accounting issues here are arcane, and Mr. Warren had neither the training nor experience to second-guess the judgments of others who did have that background and were his superiors. In short, this is not a case in which Mr. Warren "must have known" of the falsity of the entries.

What then was the proof that Mr. Warren knew that the five entries were false? As we have noted before, only one of the People's cooperating witnesses even mentions Mr. Warren in his guilty plea allocution. That witness is Frank Canellas, who has stated that "at least one" of his conversations with Sanders about "plausible rationales for the [accounting] adjustments" took place in Mr. Warren's presence. But as we understand it, Canellas did not testify before the grand jury in 2013. He did not sign his plea agreement until almost two months after Mr. Warren was indicted for the false business record crimes. If that is so, then there is every reason to believe that no witness testified (and no other evidence was presented) showing that Mr. Warren knew that the entries were false. Absent proof of guilty knowledge, the grand jury could not properly have found that Mr. Warren acted with intent to defraud.

In sum, the false business record counts should be dismissed because (i) there was no evidence that Mr. Warren made the false entries or caused them to be made and (ii) there was insufficient evidence that he acted with intent to defraud.

B. Scheme to Defraud and Conspiracy

Count One of the 2014 Indictment charges Mr. Warren, along with his three co-defendants, with having committed a Scheme to Defraud in the First Degree, in violation of

Penal Law §190.65(1)(b).[9] And Count 106 charges him with joining a conspiracy with his co-defendants "with intent that conduct constituting the crime of SCHEME TO DEFRAUD IN THE FIRST DEGREE be performed." See Penal Law §105.05(1)(Conspiracy in the Fifth Degree). Here, too, we believe the evidence presented to the grand jury was insufficient to sustain the charges.

1. Intent to Defraud

The law is settled that to "engage" in a scheme to defraud a defendant must have "intentionally participated in the fraudulent scheme." People v. Rosado, 28 A.D.3d 215, 216 (1st Dept. 2006). Proof of intent to defraud may be circumstantial, but it must exist. See Greenberg, et al., New York Criminal Law §19.20 ("an inference of an intent to defraud may . . . be drawn . . . from [d]efendant's knowledge of the misleading and deceptive nature of [the statements], as well as deceptive practices employed"). Mere presence during a meeting in which wrongful activity is discussed is not enough. To be criminally liable, a defendant must take some action to promote the venture with knowledge that he is advancing a fraud. See People v. Keschner, 110 A.D.3d 216, 226 (1st Dept. 2013)(defendant "is correct that certain evidentiary items . . . are insufficient to establish guilt -- particularly, his mere presence at the clinic"); Greenberg, et al., New York Criminal Law §1:12 ("[m]ere presence at the scene of a crime or association with its perpetrators is insufficient to establish . . . liability").

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[9] That section reads as follows:

> A person is guilty of a scheme to defraud in the first degree when he or she . . . (b) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons . . . .

Although we are not privy to the grand jury minutes, we believe what the grand jury heard was this: On December 30, 2008, Canellas sent an email to Sanders and Mr. Warren suggesting that they meet for dinner to "discuss a plan" for increasing the firm's net income. Mr. Warren was invited because he had the most knowledge about those clients that could be expected to pay their outstanding receivables before the year's end. In advance of the meeting, Mr. Canellas forwarded to Mr. Warren a copy of the firm's interim profit and loss statement, which included seven adjustments that would increase the firm's net income by approximately $28 million. Those adjustments -- which include four of the five items for which Mr. Warren was charged in the 2013 Indictment -- apparently had already been agreed upon by Canellas and Sanders in their prior discussions. See Email from Canellas to Warren 12/31/08 at 7:07 p.m. and attached spreadsheet. That is to say, the adjustments were conceived of and approved by Canellas and Sanders before the dinner meeting. After dinner, the three men adjourned to Mr. Warren's office to review anticipated year-end collections, where "plausible rationales" for some of the adjustments allegedly were also discussed.

As we understand it, that is the proof, and it inevitably raises these questions: Did Mr. Warren know that the adjustments so egregiously departed from accepted accounting principles (assuming they did) that making them was fraudulent? Did he know that the "plausible rationales" were, in fact, implausible and made with intent to deceive? Did he know that the firm's auditors would be lied to? In short, was there proof that Mr. Warren knowingly participated in the fraudulent scheme? If we are correct that the answer to these questions is "no," then the scheme to defraud and conspiracy charges must be dismissed.

To repeat what we have said before: to our knowledge, the only witness who may have testified adversely to Mr. Warren on these issues before the grand jury in 2014 is Canellas, and his plea allocution indicates only this:

> In the Fall of 2008, it became clear that the firm might not comply with the cash flow covenant contained in its various credit agreements. By the last week in December . . . Sanders told me . . . that DiCarmine and Davis said we had to meet the covenants. Sanders and I began discussing accounting adjustments that could be made to help us meet the covenant . . . . We considered and decided which appropriate and inappropriate accounting adjustments to make. During these discussions, Sanders and I considered how likely the various adjustments were to be caught by auditors and others . . . . For example, I recall that with disbursement write off reversals, Sanders instructed me . . . that if the reversals were questioned, I was to tell the auditors that we were attempting to collect those amounts. Both Sanders and I knew that was untrue. We also discussed plausible rationales for the adjustments, where plausible rationales were available, and what we'd say if partners and others questioned the adjustments. I remember that at least one of these conversations took place in Zach Warren's office, in Warren's presence. We had a flipchart in the office, and Sanders and I wrote down the adjustments we thought of. I later transferred these adjustments to an Excel spreadsheet that I reviewed with Sanders.

(Emphasis added). If that is what Canellas told the grand jury, then the proof was plainly insufficient.

2. Ongoing Scheme

These two counts are deficient for a second reason as well. Although the Scheme to Defraud statute was modeled on the federal mail fraud statute, it deviates from federal law by requiring that the scheme constitute a "systematic ongoing course of conduct" evidencing "some degree of uniformity over time." Greenberg, et al., New York Criminal Law §19:19. Whatever may be true as to the other defendants, the evidence before the grand jury could not have shown that Mr. Warren engaged in an ongoing scheme. His allegedly wrongful acts were limited to the period December 2008 to March 2009 at the latest. Indeed, most of what is at issue occurred in a

three-day period. Others may have engaged in conduct to defraud the firm's lenders in subsequent years, but Mr. Warren left for law school and a promising career.

Justice Rothwax's opinion in People v. Weiser, 127 Misc.2d 497 (Sup. Ct. N.Y. Co. 1985), is instructive. There, the court found an "identifiable pattern" in three transactions in which defendant Kaminsky induced wholesalers by various false representations to "entrust him with valuable merchandise on consignment . . . and once having obtained possession of the merchandise, converted it [wrongfully] to his own use." Id. at 502. Although the defrauded merchants sold different goods -- one sold sunglasses; the second jewelry; and the third coats -- there was an "over-all fraudulent design" and thus an ongoing scheme.

Importantly, however, the court dismissed the scheme to defraud count against two other defendants, Weiser and Carnevale, who participated only in the "coat scam" and had no knowledge of the two other frauds. They were bit players in a single criminal transaction. Id. at 504 ("[a]bsent proof that either defendant knew of or participated in any of the other transactions underlying the scheme to defraud . . . the evidence of their complicity in the over-all scheme is insufficient"). Mr. Warren is situated like Weiser and Carnevale. At most, he had a minor role in short-lived events. Because the evidence that he participated in the overall scheme was insufficient, Counts 1 and 106 should be dismissed.

3. Obtaining Property

An element of the crime of scheme to defraud is that the defendant "obtain[ed] property" from "one or more" of the alleged victims of the fraudulent scheme. Penal Law §190.65; see also Donnino, Practice Commentary, McKinney's Cons. Law of N.Y., Penal Law §190.60 ("[u]nlike the federal mail fraud statute . . . the consummated 'scheme to defraud' requires that the scheme have at least limited 'success'"). As to Mr. Warren, sufficient proof of

this element could not have been presented.[10] The point here is this: By his actions, Mr. Warren did not help Dewey & LeBoeuf to "obtain" property from the lending institutions. At most his conduct (and that of others at year end 2008) allowed the firm to "retain" property by convincing those institutions that the cash flow covenants had been met. Those words ("obtain" and "retain") have quite different meanings in common parlance and the law.[11]

Although Article 190 does not contain its own definition of "obtain," Article 155 (Larceny) does, and it reads as follows: "'Obtain' includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein." §155.00(2). Whatever else "obtain" may "include[]," it does not include the withholding of property that has been lawfully obtained. That concept is treated separately under New York law. See §155.05 (a defendant commits a larceny if he "wrongfully takes, obtains or withholds such property from an owner thereof")(emphasis added); see also Greenberg, et al., New York Criminal Law §12.3 ("'withhold' . . . implies that property can be stolen even if it originally comes into the thief's possession lawfully").

For a court to look to the definition of "obtain" in §155.00(2) to give meaning to the word in §190.65 is a familiar interpretative method. See Commonwealth of N. Mariana Is. v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55, 62-63 (2013)(interpreting the phrase "possession or custody" in CPLR §5225(b) by looking to other provisions of the CPLR that referred to "possession, custody or control" and concluding that the former phrase was

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[10] We follow Judge Rothwax in Weiser in believing that there must be proof that property was obtained during the period that Mr. Warren was engaged in the scheme. Similarly, the conspiracy count cannot be sustained unless Mr. Warren agreed to participate in a scheme to obtain property from at least one person.

[11] Compare "Obtain," The Random House Dictionary of the English Language (2d ed. 1987)("1. to come into possession of; get, acquire, or procure, as through an effort or by a request"), with "Retain," id. ("1. to keep possession of. 2. to continue to use, practice, etc.;. . . 3. To continue to hold or have").

necessarily narrower than the latter; "this Court is required to construe the entire CPLR in a manner that harmonizes the[] variations")(emphasis added); People v. Hedgeman, 70 N.Y.2d 533, 541-42 (interpreting phrase "aided by another person actually present" in §160.10(1) by looking to language in other sections). Simply stated, an entity that obtains property lawfully (as Dewey & LeBoeuf plainly did in obtaining loans prior to December 2008) but then retains the property by misrepresenting its financial status (as Dewey & LeBoeuf allegedly did in 2009) has not violated the scheme to defraud statute.

Were there any doubt on this score, it would be removed by the rule of lenity. It is well settled that where "two constructions of a criminal statute are plausible, the one more favorable to defendant should be adopted in accordance with the rule of lenity." People v. Golb, 2014 WL 1883943 (N.Y. 2014); see also Asheroff v. Parking Violations Bureau of Transp. Admin. of City of New York, 38 A.D.2d 474, 477 (1st Dept. 1972)("[s]tatutes which are penal in character must be narrowly and strictly construed and in manner not to embrace cases which do not clearly fall within their terms"); Scalia & Garner, Reading Law: The Interpretation of Legal Texts, § 49 (2012). To read "obtain" broadly to mean "retain" runs afoul of this settled rule.

In sum, the Scheme to Defraud and Conspiracy counts should be dismissed because (i) there was insufficient evidence that Mr. Warren acted with intent to defraud; (ii) there was insufficient evidence that he participated (or agreed to participate) in an ongoing scheme; and (iii) there was insufficient evidence that his conduct assisted the firm to wrongfully "obtain" property.

C. Conclusion

The importance of these motions to Mr. Warren cannot be overstated. He is at the outset of a promising legal career that will be delayed if this case proceeds to trial and could be

derailed if the jury cannot compartmentalize the evidence. He needs the careful scrutiny of a conscientious judge to protect him from the possibility of an unjust result. As one court has observed in a similar circumstance:

> Courts have, on occasion, reminded us of the old claim that a grand jury could indict a "ham sandwich." . . . However, standing as a bulwark against the harm a wrongful indictment can wreak is the obligation of a reviewing court to weigh the evidence presented to the grand jury for legal sufficiency. [This power allows] a reviewing court [to avoid] unnecessary trials at great expense and demand upon victims, witnesses, the public and the wrongly accused.

People v. Santiago, N.Y.L.J. 10/10/95 at 27 (Sup. Ct. N.Y. Co.). We continue to believe that Zachary Warren is wrongly accused and therefore seek the Court's intervention.

POINT TWO

THE CHARGES AGAINST MR. WARREN SHOULD BE DISMISSED IN THE INTERESTS OF JUSTICE

It is a rare case that presents circumstances so compelling that even if the charges were otherwise sustainable, the Court should dismiss them "in furtherance of justice." See CPL §210.40(1). But this is one of those rare cases. Here, "dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment . . . would constitute or result in injustice." Id. Section 210.40(1) "allow[s] the letter of the law gracefully and charitably to succumb to the spirit of justice." People v. Rickert, 58 N.Y.2d 122, 126 (1983). That spirit of justice counsels dismissal of the charges against Mr. Warren.

Section 210.40 "evolved from the common law power of nolle prosequi under which the prosecuting attorney, at his sole discretion, could choose not to prosecute a case even after indictment." People v. Shanis, 84 Misc.2d 690, 693 (Sup. Ct. Queens Co. 1975). Unlike

the traditional nolle prosequi power, however, under §210.40, the "power to dismiss a count of an indictment" is entrusted to the court. People v. Extale, 18 N.Y.3d 690, 694 (2012). Indeed, "[t]he power to discontinue prosecution of a crime" under §210.40 "has little or nothing to do with the legal or factual merits of the charge." Shanis, 84 Misc.2d at 695. Rather, "[s]uch a dismissal is concerned, as the statute states, solely with principles of justice." Id. It requires "a sensitive balancing of the interests of the individual and of the People." Rickert, 58 N.Y.2d at 127.

To aid in the articulation of those "interests," the statute provides a list of factors that a court should consider. Although "the statute does not compel catechistic on-the-record discussion" of each factor, id. at 128, it does require the court, "to the extent applicable," to "examine and consider, individually and collectively":

(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(h) the impact of a dismissal on the safety or welfare of the community;

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

CPL §210.40. In this case, virtually all of the factors militate in favor of dismissal of the charges.

1. History, character and condition of the defendant.

During the events at issue, Mr. Warren was 24 years old and less than two years out of Stanford University. His job was to help Dewey & LeBoeuf collect monies owed by its clients. Mr. Warren came to understand a significant amount about the firm's billing practices and the collectability of its receivables. But he knew little about the firm's accounting practices or the details of the covenants that it had made with its lenders. Those matters were outside the scope of his responsibilities, and, having never taken an accounting course, he lacked the background to evaluate them.

In July 2009, Mr. Warren left Dewey & LeBoeuf to attend Georgetown University Law Center, where he excelled. He finished in the top 5 percent of his class, was an Executive Articles Editor for the Georgetown Law Journal, and was active in the moot court program. During his second and third years, he interned at the United States Department of Justice, and, following his second year, he was a summer associate at Williams & Connolly in Washington, D.C. After graduating law school, Mr. Warren served for one year as a law clerk to Judge J. Frederick Motz of the United States District Court for the District of Maryland. In September 2013, he began a second clerkship with Judge Julia Smith Gibbons of the United States Court of Appeals for the Sixth Circuit. He remains Judge Gibbons' law clerk to this day. In short, Mr. Warren was well on his way to an outstanding legal career when these indictments were returned.

2. Purpose and effect of imposing upon the defendant a sentence authorized for the offense.

A conviction for any of the charges against him, or even for a lesser-included offense, could bring Mr. Warren's career to a halt. The sentencing recommendations that the People have agreed to for other former Dewey & LeBoeuf employees suggest that even if Mr. Warren were convicted of some offense, an incarcerative sentence would not be imposed. Even probation seems unlikely. For two former employees, Victoria Harrington and Lourdes Rodriguez, both trained in accounting and one a CPA, the People have agreed to recommend an unconditional discharge. For three others, Dianne Cascino, Ilya Alter, and David Rodriguez, the People have agreed to recommend a conditional discharge with community service. All five started working at Dewey & LeBoeuf (or a predecessor firm) years before Mr. Warren's arrival and remained at the firm until 2012. On any view of the evidence, they were more culpable than Mr. Warren for what occurred. Thus, this is not a case in which justice would be denied if there were a §210.40 dismissal.

3. Seriousness and circumstances of the offense, extent of harm caused by the offense, and evidence of guilt.

As detailed above, there are numerous reasons why the charges against Mr. Warren are legally and factually deficient. That consideration further counsels in favor of dismissal. See Rickert, 58 N.Y.2d at 130 (affirming dismissal in the interests of justice of charges where People's ability to obtain a conviction "was less than certain"); People v. Jacobs, 105 Misc.2d 616, 625 (Sup. Ct. N.Y. Co. 1980)(dismissing indictment where there was "a strong possibility that a jury would acquit"); Shanis, 84 Misc.2d at 697 (dismissing charges where "so

close to the borderline are the conclusions to be drawn from [the facts] that it can almost be said that a conclusion of guilt beyond a reasonable doubt could not be reached as a matter of law").[12]

4. Impact of a dismissal upon the confidence of the public in the criminal justice system.

Ordinarily, this factor serves to caution a court against dismissal lest it encourage others to take comparable actions. Here, by contrast, dismissal may buttress the public's faith in the criminal justice system. As the Court undoubtedly knows, the confidence of many in the legal profession and beyond has been shaken by Mr. Warren's prosecution. A §210.40(1) dismissal would reinforce the principle that prosecutors do not have unbridled discretion in New York State.

5. Impact of a dismissal on the safety or welfare of the community.

There is no risk to the "safety or welfare of the community" in dismissing the charges against Mr. Warren. Mr. Warren has demonstrated himself to be a valuable member of his community. The words of Judge Motz for whom he clerked speak volumes: "Zack is a wonderful person, a decent, fine young man." "I'm so sorry he's being put through what's happening. He worked very hard and was a wonderful person to have in the office. I trust him completely." James B. Stewart, A Dragnet at Dewey & LeBoeuf Snares a Minnow, N.Y. Times, 3/14/14. Others trust Mr. Warren as well, as exemplified by his continuing public service.

More than 50 years ago, a judge wrote these words, which resonate in this case:

> The criminal law is at best an imperfect instrument. Necessarily, it speaks in absolute terms and occasionally catches in its net one who, should he be convicted of an offense would suffer more grievously than justice would require, taking into consideration the nature of his offense, his background, and the possible future

[12] It bears note that the four major banks that had loaned the firm money in 2008 and 2009 were repaid in full in April 2010.

> consequences of such conviction. . . . [T]he instant case involving as it does a defendant of exceptional background and promising future and charged with a crime, conviction of which would sully the one and stifle the other, is a case crying out for the application of this most humane statutory provision.

Davis, 55 Misc.2d at 659-60. For these reasons, the Court should dismiss the charges against Mr. Warren in the interests of justice.

POINT THREE

THE COURT SHOULD ORDER THE PEOPLE TO PROVIDE BRADY MATERIAL

By letter dated July 8, 2014, we requested that the People disclose the following material pursuant to Brady v. Maryland, 373 U.S. 83 (1963):

1. The cooperating defendants who pleaded guilty in this case each signed a witness statement that was publicly filed at the time of his or her plea. We request any draft of such a witness statement that mentions Mr. Warren, was shown to the witness or provided to his or her counsel, and differs from the version that was filed.

2. Any statement of a person who did not plead guilty indicating that Mr. Warren was not involved in the misconduct alleged in the above-referenced indictment.

3. Any statement of any person or any documents indicating that Mr. Warren did not make entries in Dewey's accounting system or perform other accounting functions.

4. Any statement of any person indicating that Frank Canellas used the computer located in Mr. Warren's office.

5. Any other exculpatory evidence.

Letter of Paul Shechtman to Peirce R. Moser, 7/8/14.

Most of these requests are straightforward, and we expect that the People will comply with them. If not, we seek the Court's assistance in obtaining this material. One item requires brief explication. As the Court knows, the People's cooperating witnesses signed plea

allocution statements implicating themselves and others in allegedly criminal conduct. As we understand it, some witnesses may have felt pressured to implicate Mr. Warren in that conduct and may have declined to sign statements unless references to him were limited or removed. If that is so, then what the witnesses would not say is impeachment material to which the defense is entitled. Pushing a witness to say more is not uncommon (and not necessarily wrong), but if a witness balks, then the defendant should know it.[13]

CONCLUSION

For these reasons, Zachary Warren's omnibus motion should be granted.

Dated: New York, New York
July 11, 2014

Respectfully submitted,

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[13] We join the arguments of our co-defendants to the extent that they are applicable to Mr. Warren.