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

THE PEOPLE OF THE STATE OF NEW YORK -against- STEVEN DAVIS, STEPHEN DICARMINE, JOEL SANDERS, ZACHARY WARREN, Defendants.	Ind. No. 773/2014

PEOPLE'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' OMNIBUS MOTIONS

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Introduction and Procedural History

1. Facts

a. Background

Dewey & LeBoeuf LLP ("Dewey" or the "Firm") was an international law firm headquartered in New York County. Grand Jury Exhibit (hereinafter, "GJ Exh.") B-052. It was formed in the Fall of 2007, through the combination of two existing law firms, Dewey Ballantine LLP and LeBoeuf, Lamb, Greene & MacRae LLP. Grand Jury Transcript (hereinafter, "GJ Tr.") 1616:16-25; GJ Exh. B-052. At its height, approximately 1,300 partners and employees worked in the Firm's Manhattan office and approximately 3,000 partners and employees worked for the Firm worldwide. GJ Exh. B-011. The partners at the Firm were primarily equity partners, with a few non-equity partners. The Firm also employed salaried lawyers who were deemed to be "Of Counsel." GJ Tr. 616:8 – 629:5; 1034:8 – 1063:1; 1620:19 – 1623:9; 1639:11 – 1640:14; 2228:8 – 2229:21; 3215:7 – 3219:15; GJ Exhs. 213 – 215; Q-23 – Q-28; Q-155; Q-156; Q-205. In 2012, the Firm collapsed and declared bankruptcy. GJ Tr. 30:11 – 30:15; 78:1 – 78:8.

Defendant Steven Davis was the Firm's Chairman, and later, member of the Office of the Chair, GJ Tr. 79:6 – 80:24; 131:12 – 135:8; 3153:9 – 3153:23; defendant Joel Sanders was the Firm's Chief Financial Officer, GJ Tr. 84:14 – 87:15; 103:17 – 105:8; 559:15 – 559:20; 3150:25 – 3152:8; defendant DiCarmine was the Firm's Executive Director, GJ Tr. 103:17 – 105:8; 560:6 – 560:20; 3152:9 – 3153:8; and

defendant Zachary Warren was the Firm's Client Relations Manager in 2008 and 2009, when he left the Firm. GJ Tr. 3154:21 – 3156:5.

Defendants Davis, DiCarmine, and Sanders were in regular communication, GJ Tr. 3374:16 – 3378:7, and controlled the operations of the Firm. GJ Tr. 1410:18 – 1414:8; 1623:10 – 1624:18; 1627:1 – 1627:10. They also tightly controlled information concerning the firm's financial condition. GJ Tr. 1357:5 – 1358:4; 3234:15 – 3240:7.

b. The Scheme

The Firm's first full year of operations was 2008. The merger, coming just before the financial crisis, was troubled from the start, GJ Tr. 3338:16 – 3343:25; GJ Exh. 296, and the Firm's first year financial performance was severely below expectations. GJ Tr. 110:13 – 113:19; 580:12 – 580:15; 1534:10 – 1534:14; 1632:4 – 1632:11; 2196:1 – 2197:2; 2200:16 – 2202:12; 3165:5 – 3170:10; GJ Exhs. Q-035; Q-165. By the end of that year, the Firm had more than $100 million in term debt outstanding and available lines of credit of more than $130 million with four banks: JPMorgan Chase, Citibank, Wells Fargo, and Barclays. GJ Exhs. B-035; E-40; F-009; I-006. The Firm's credit agreements with these banks contained several covenants, including a cash flow covenant (the "Cash Flow Covenant") requiring the Firm to maintain a minimum defined year-end cash flow. GJ Tr. 567:2 – 570:14; GJ Exh. B-006. Because of its poor financial performance, the Firm was unable to meet this covenant in 2008. GJ Tr. 299:2 – 306:20; 580:23 – 586:24; 3167:9 – 3176:11; 3391:10 – 3393:16; GJ Exhs. Q-009; Q-010; Q-011; Q-012; Q-186; Q-270; Q-299.

The defendants and others at the Firm were aware that the failure to meet the Cash Flow Covenant during the 2008 credit crisis could have disastrous effects on the Firm. GJ Tr. 294:21 – 299:1; 580:12 – 582:15; 3159:11 – 3165:4; 3390:18 – 3391:9; GJ Exhs. Q-008; Q-289; Q-296; Q-298. To avoid this, the defendants and others at the Firm (individually and collectively, the "Schemers") engaged in a scheme (the "Scheme") to defraud the Firm's lenders and others by, among other things, misrepresenting the Firm's financial performance and compliance with the Cash Flow Covenant. GJ Tr. 160:2 – 162:16; 275:7 – 277:23; 293:12 – 294:20; 580:23 – 586:24; 630:18 – 631:10; 641:2 – 643:17; 681:6 – 685:16; 692:22 – 697:25; 2123:4 – 2125:8; 3161:24 – 3163:13; 3214:22 – 3216:25; 3221:22 – 3222:9; 3223:3 – 3223:17; 3226:11 – 3227:17; 3413:6 – 3416:12; GJ Exhs. B-012; Q-001; Q-003; Q-007; Q-011; Q-012; Q-031; Q-037; Q-155; Q-188; Q-274; Q-277. The Scheme ran into 2012. GJ Tr. 1894:19 – 1895:21; 3290:5 – 3294:20; GJ Exhs. Q-272; Q-304; R-209. In later years, among other things, the Schemers continued to misrepresent the Firm's financial performance and condition and that the Firm was in compliance with the Cash Flow Covenant and other covenants and defrauded additional lenders and investors using similar misstatements. GJ Tr. 711:21 – 738:11; 739:21 – 740:20; 759:23 – 779:18; GJ Exhs. B-016; B-026; Q-022; Q-042; Q-044; Q-048; Q-059; Q-061; Q-063; Q-069.

As part of the efforts to ensure the success of the Scheme, the Schemers lied to and otherwise misled the Firm's partners, GJ Tr. 1259:1 – 1262:16; 2218:11 – 2234:5; 3233:16 – 3240:7; 3393:17 – 3398:7; GJ Exhs. Q-202 – Q-204; Q-204 – Q-205; Q-206 – Q-207; Q-270; and auditors, GJ Tr. 698:12 – 700:21; 1284:8 – 1286:20;

1290:13 – 1292:17; 1503:22 – 1505:10; 1534:16 – 1542:3; 1589:13 – 1593:17; 1905:13 – 1915:1; 3176:14 – 3177:5; 3186:22 – 3188:17; 3240:10 – 3244:21; 3302:21 – 3303:24; GJ Exhs. B-012; C-019; Q-012; Q-013; Q-038; Q-269; as well as others. GJ Tr. 548:11 – 548:19; 580:23 – 583:17; 715:2 – 716:7; 1503:22 – 1505:10; 1534:16 – 1542:3; 1589:13 – 1593:17; 1920:14 – 1926:2; 2173:23 – 2175:16; 2258:1 – 2259:22; 2261:6 – 2261:13; 3143:9 – 3143:23; 3165:5 – 3166:4; 3175:5 – 3176:8; 3183:19 – 3184:16; 3229:4 – 3231:16; GJ Exhs. B-012; B-015; C-019; Q-012; Q-170 – Q-173; Q-187. The Schemers, themselves or working through others, withheld information and affirmatively concealed the Scheme when they were questioned by partners, including members of the Firm's Executive Committee, auditors, or others. *Id.*

c. The Fraudulent Methods

Around the end of 2008, the Schemers created a document they called the "Master Plan" that described certain fraudulent accounting adjustments that the Schemers decided to pursue as part of the Scheme. GJ Tr. 3167:9 – 3187:19; GJ Exhs. Q-153; Q-154; Q-186; Q-190; Q-191; Q-193; Q-194. From about the end of 2008 until the Firm's bankruptcy in 2012, the Schemers input numerous of these and other fraudulent adjustments, and engaged in other fraudulent conduct, most of which made it appear that the Firm had either increased revenue, decreased expenses, or limited distributions to partners. GJ Tr. 2196:12 – 2197:2; 2213:10 – 2239:22; GJ Exhs. Q-058; Q-198; Q-199; Q-202 – Q-207. Some of these fraudulent adjustments and acts were:

1. *Reversing disbursement write-offs* – From 2008 through 2011, the Schemers improperly reversed millions of dollars of write-offs of client disbursements that

the Firm had no intention or reasonable expectation of collecting. GJ Tr. 1851:17 – 1876:17; 2213:10 – 2239:22; 3165:5 – 3167:8; 3399:25 – 3400:19; GJ Exhs. Q-058; Q-153; Q-155; Q-157 – Q-160; Q-165; Q-198; Q-199; Q-202 – Q-207; R-060.

2. *Reclassifying disbursement payments* – From 2008 through 2011, the Schemers improperly reclassified millions of dollars of payments that had been applied to client disbursements during the year and applied the payments instead to outstanding fee amounts. GJ Tr. 1885:13 – 1903:20; GJ Exhs. Q-154; Q-165 – Q-166; Q-221; R-207 – R-210.

3. *Reclassifying Of Counsel payments* – From 2008 through 2011, the Schemers reclassified millions of dollars of compensation to Of Counsel lawyers as equity partner compensation. GJ Tr. 510:5 – 520:17; 1191:21 – 1205:20; 1218:5 – 1224:8; 1224:9 – 1241:21; GJ Exhs. Q-017; Q-082 – Q-083; Q-085; Q-089 – Q-090. Historically, Of Counsel compensation had been treated as an expense in the Firm's financial statements. GJ Tr. 629:6 – 630:17; 3219:16 – 3221:17; GJ Exh. Q-086.

4. *Reversing credit card write-offs* – In 2008 the Firm initially properly wrote off more than $2.4 million in charges from an American Express card associated with defendant Sanders that had not previously been expensed and were not chargeable to clients. GJ Tr. 596:7 – 607:24; 3215:7 – 3216:10; GJ Exhs. Q-019 – Q-021; Q-155 – Q-156. For year-end 2008, the Schemers fraudulently reversed this write-off and hid the amount in the Firm's books as an unbilled

client disbursement receivable. GJ Tr. 2228:8 – 2228:11; 2232:21 – 2238:11; 3215:7 – 3216:10; GJ Exhs. Q-058; Q-155 – Q-156; Q-205. Each subsequent year, the Schemers initially wrote this amount off, but then reversed the write-off at year-end. GJ Tr. 596:7 – 607:24; 760:23 – 761:14; 776:18 – 779:18; 782:16 – 783:16; 2228:8 – 2228:11; 2232:21 – 2238:11; GJ Exhs. C-011; Q-019 – Q-021; Q-022; Q-058; Q-205. The amount remained on the Firm's books as an unbilled client disbursement receivable at the time of the bankruptcy. GJ Tr. 1547:11 – 1552:22; GJ Exhs. Q-018; Q-022.

5. *Reclassifying salaried partner expenses* – In 2008, the Schemers improperly reclassified as equity partner compensation millions of dollars in compensation paid to, and amortization of benefits related to, two salaried, non-equity partners. GJ Tr. 2228:8 – 2229:21; GJ Exh. Q-023. Similar amounts had previously been treated as expenses on the Firm's financial statements, so the reclassification had the effect of reducing Firm expenses. GJ Tr. 3205:6 – 3209:10; GJ Exhs. Q-293 – Q-294. This change in treatment was neither disclosed to the Firm's auditors nor disclosed on the Firm's audited financial statements. GJ Tr. 3205:6 – 3209:10; GJ Exhs. Q-293 – Q-294. In later years, the compensation paid to these two salaried partners was classified as equity partner compensation. GJ Tr. 3217:1 – 3219:15; GJ Exh. Q-28.

6. *Seeking backdated checks* – During at least two year-ends from 2008 through 2011, the Schemers sought backdated checks from clients to post to the prior year. GJ Tr. 1346:9 – 1352:25; 1354:10 – 1365:21; 1380:1 – 1381:1; 2298:20 – 2301:21;

GJ Exhs. Q-114 – Q-116; Q-117; Q-220. At the end of each of the Scheme years the Schemers engaged in efforts to hide the date on which checks were received by the Firm. GJ Tr. 1905:13 – 1915:1; GJ Exh. Q-168. These efforts minimized the risk that the Firm's auditors would discover that December checks received in January, including backdated checks, were being posted to the prior year. GJ Tr. 1905:13 – 1915:1; GJ Exh. Q-168.

7. *Applying partner capital as fee revenue* – For year-end 2009, more than $1 million that had been contributed by a partner to satisfy his capital requirement was applied as a fee payment for the client of a different partner. GJ Tr. 1928:21 – 1936:13; 3268:2 – 3269:7; GJ Exhs. Q-178; R-210. This amount was backed out of fees and applied to the partner's capital account during 2010, but for year-end 2010 it was again applied as a fee payment for the same client. GJ Tr. 1928:21 – 1936:13; GJ Exhs. Q-178; R-210.

8. *Applying loan repayments as revenue* – In 2008, pursuant to defendant Davis's authorization, the Firm took on $2.4 million in bank loans that benefitted defendants DiCarmine and Sanders. GJ Exhs. B-040 – B-045. In early 2012, defendants DiCarmine and Sanders repaid the Firm the final $1.2 million owed under the loans but structured the transaction so the loan repayment would increase the Firm's revenue for 2011. GJ Tr. 3290:5 – 3294:20; GJ Exhs. Q-272; Q-304.

d. Covenant Misstatements

In February 2009, the Firm reported to its lenders that it had satisfied the Cash Flow Covenant at year-end 2008 by a little more than $4 million. GJ Tr. 260:23 – 263:19; GJ Exh. B-012. In fact, the Firm was able to achieve this result only by making millions of dollars of fraudulent accounting entries, including, among others, those described above. GJ Tr. 3229:4 – 3240:7; GJ Exhs. Q-197; Q-270.

The Firm's fortunes did not improve in future years. To misrepresent compliance with the Cash Flow Covenant and other covenants, the Schemers continued to make fraudulent accounting entries like those listed on the Master Plan, as well as other fraudulent entries, throughout the Firm's existence. GJ Tr. 1919:24 – 1924:1; 3205:6 – 3209:10; 3262:14 – 3268:1; GJ Exhs. Q-170 – Q-171; Q-293 – Q-294; Q-295.

In fact, the Firm's financial condition was so poor in 2009 that defendants Davis, Sanders, and DiCarmine realized that, despite planning millions of dollars in fraudulent adjustments for that year, they would be unable to come up with enough fraudulent adjustments by year-end to show compliance with the Cash Flow Covenant. GJ Tr. 1367:15 – 1373:5; 1902:11 – 1903:20; 2247:6 – 2250:21; 3248:5 – 3256:15; 3287:18 – 3290:1; 3381:3 – 3389:11; 3398:10 – 3407:4; 3408:5 – 3412:21; GJ Exhs. Q-080; Q-213 – Q-215; Q-255; Q-278; Q-282. As a result, defendant Sanders sought a waiver of the covenant from the Banks. The Cash Flow Covenant floor was reduced from $290 million to $246 million, but the Banks placed burdensome

conditions on the Firm, which caused additional financial pressure. GJ Tr. 232:8 – 238:22.

The Firm was unable to meet even the reduced Cash Flow Covenant level, and the Schemers made fraudulent adjustments to the Firm's accounting records falsely to show compliance with the Firm's covenants in 2009. GJ Tr. 1339:25 – 1346:7; 3229:4 – 3231:16; 3254:11 – 3260:6; GJ Exhs. Q-112 – Q-113. In 2010 and 2011, the Schemers continued making additional fraudulent adjustments falsely to show compliance with covenants, or to reduce the impact of a covenant breach. GJ Tr. 1876:20 – 1879:21; 1936:14 – 1926:20; 2239:1 – 2257:24; 3222:10 – 3226:18; 3229:4 – 3231:16; 3258:8 – 3260:1; 3324:19 – 3338:15; 3344:1 – 3349:7; GJ Exhs. Q-161; Q-173 – Q-174; Q-179 – Q-180; Q-209 – Q-218; Q-291.

These and other fraudulent activities were engaged in, among other things, to conceal the Firm's breach of several of its covenants, and otherwise to hide the true financial condition of the firm. GJ Tr. 1884:7 – 1885:10; 3254:11 – 3258:7; GJ Exhs. Q-164; Q-279.

e. The Private Placement and the Revolving Line of Credit

In April 2010, the firm refinanced its debt with a $150 million private placement of securities with 13 insurance companies and a $100 million revolving line of credit with a syndicate of banks. GJ Tr. 241:24 – 242:17; 244:6 – 245:9; 253:4 – 255:25; GJ Exhs. B-018; Q-297. To obtain this financing, the Schemers, among other things, misrepresented the Firm's financial condition and practices to potential investors and lenders. GJ Tr. 212:7 – 232:7; 279:22 – 281:15; 2603:24 – 2616:16; GJ

Exhs. B-035; B-050; Q-234; Q-237. For example, the Schemers provided potential investors and lenders with financial statements that falsely represented, among other things, that the Firm had complied with its covenants. GJ Tr. 2175:6 – 2175:16; 2189:14 – 2189:25.

As another example, as part of the private placement process the Schemers provided potential investors with an offering memorandum that contained numerous misstatements. GJ Tr. 2606:23 – 2609:17; 3274:7 – 3278:14; GJ Exhs. Q-233; Q-237. Some of the misstatements contained in the offering memorandum are as follows:

1. The offering memorandum purported to disclose all the Firm's debt. It did not. GJ Exh. B-052, at 12.
2. The offering memorandum stated, in substance, that departing partners received their capital during the three years following their departure from the Firm. GJ Tr. 3207:11 – 3209:10; GJ Exh. B-052, at 40. But in fact, the Schemers fraudulently reclassified draws and distributions paid to departing partners during their final year of employment as returns of capital, in order to enable the Firm to appear to meet another of its covenants. GJ Tr. 737:13 – 738:6; 772:19 – 774:21; 3269:8 – 3270:22; GJ Exh. Q-069.
3. The offering memorandum stated, in substance, that "[c]lient disbursement receivables are written-off when deemed uncollectible. . . . ." GJ Exh. B-052. In fact, as described above, millions of dollars in client disbursement receivables that had been deemed uncollectible and written-off during 2008 were

fraudulently reversed and put back on the Firm's balance sheet in order to reduce 2008 expenses. GJ Tr. 1851:17 – 1876:17; 2213:10 – 2239:22; 3165:5 – 3167:8; 3399:25 – 3400:19; GJ Exhs. Q-058; Q-153; Q-155; Q-157 – Q-160; Q-165; Q-198; Q-199; Q-202 – Q-207; R-060. These amounts had been budgeted to be written off in 2009 instead. GJ Tr. 2218:11 – 2234:5; GJ Exhs. Q-202 – Q-207. Millions of dollars worth of client disbursement receivable write-offs were reversed for year-end 2009. GJ Exhs. 940; 941.

f. The Bankruptcy

By in or about March 2012, the Scheme had collapsed in on itself. GJ Tr. 257:16 – 260:16. For years, the Schemers had been fraudulently claiming revenue that the Firm did not have and pushing expenses and financial obligations off into the future. GJ Tr. 111:11 – 117:2; 129:14 – 136:15; 2211:19 – 2212:7; 2238:22 – 2247:1; 3231:17 – 3238:20; GJ Exhs. Q-197; Q-204; Q-205; Q-208 – Q-212; Q-270. The Firm could no longer pay partners enough to prevent their departure, and the Schemers could no longer fool the Firm's lenders, investors, and others. The Firm declared bankruptcy; thousands lost their jobs; and the Firm's creditors were left owed hundreds of millions of dollars. GJ Tr. 30:11 – 30:15; 78:1 – 78:8; 166:24 – 167:17; 2449:18 – 2450:1; 2473:1-22; 2511:18 – 2512:11; 2555:11-16; 2595:13 – 2596:6; 2966:23 – 2967:19; 3073:23 – 3074:9; GJ Exh. B-031.

2. Procedural History

In the latter half of December 2013, the Grand Jury returned Indictment 5393/2013 (the "2013 Indictment"), charging defendant Warren alone with six counts

of falsifying business records in the first degree, in violation of Penal Law § 175.10.[1] In late February 2014, the Grand Jury returned Indictment 773/2014 (the "Indictment") charging all four defendants with one count of scheme to defraud in the first degree, in violation of Penal Law § 190.65(1)(b) and one count of conspiracy in the fifth degree, in violation of Penal Law § 105.05(1). The Indictment also charges defendants Davis, DiCarmine, and Sanders with fifteen counts of grand larceny in the first degree, in violation of Penal Law § 155.42, one count of violation of the Martin Act, General Business Law § 352-c(5), and various multiple counts of falsifying business records in the first degree, in violation of Penal Law § 175.10. Five of the falsifying business records counts in the 2013 Indictment relate directly to falsifying business records counts in the Indictment. On March 6, 2014, the defendants were arraigned on the two indictments.

On May 13, 2014, the Court granted the People's unopposed oral motion to consolidate the 2013 Indictment into the Indictment for trial. On that same date, defendant Warren moved in writing for a severance. The severance issue has been fully briefed, and the Court has reserved judgment.

On July 11, 2014, the defendants filed their omnibus motions. Defendants Davis, DiCarmine, and Sanders filed a joint Memorandum in Support of Omnibus Motion (the "Joint Memorandum"), and each of the three defendants filed a supplemental memorandum in support of his individual motion to dismiss the

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[1] On May 13, 2014, the Court granted the People's unopposed oral motion to dismiss the second count of the 2013 Indictment.

indictment (the "Davis Memorandum," "DiCarmine Memorandum," and "Sanders Memorandum"). Defendant Warren filed a Memorandum of Law in Support of Defendant Zachary Warren's Omnibus Motion (the "Warren Memorandum").

Standard of Review

A grand jury may indict when the evidence before it is legally sufficient to establish, and the grand jury finds reasonable cause to believe, that the defendant committed an offense. *See* C.P.L. § 190.65(1). "'Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof . . . ." C.P.L. § 70.10(1). In deciding whether to dismiss a count in an indictment, a court may review the evidence for legal sufficiency but may not review for reasonable cause. "A reviewing court may not examine the adequacy of the proof to establish reasonable cause, a determination that involves the weight or quality of the proof. All questions as to the quality or weight of the proof should be deferred." *People v. Hyde*, 302 A.D.2d 101, 104 (1st Dept. 2003) (internal citations and quotation marks omitted).

To be legally sufficient, evidence presented to the grand jury need only "set forth *prima facie* proof of the crimes charged." *People v. Garson*, 6 N.Y.3d 604, 613 (2006). Legally sufficient evidence, for grand jury purposes, does not constitute proof "beyond a reasonable doubt." *People v. Mayo*, 36 N.Y.2d 1002, 1004 (1975). "The test of legal sufficiency in this context is whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would be sufficient to warrant conviction by a trial jury." *People v. Manini*, 79 N.Y.2d 561, 568-69 (1992); *People*

v. Jennings, 69 N.Y.2d 103, 114-15 (1986). In other words, evidence "may be legally sufficient although it does not even provide 'reasonable cause' to believe that the defendant committed the crime charged." *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 299 (1980) (internal quotation marks omitted), *cert. denied*, 450 U.S. 1031 (1981). "Thus, a reviewing court must determine whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference." *People v. Grant*, 17 N.Y.3d 613, 616 (2011) (internal quotation marks omitted).

Argument

1. **The People consent to *in camera* review of the Grand Jury minutes, but nothing in the proceedings before this Grand Jury or the defendants' motions necessitates release of any part of the minutes to the defense.**

The People consent to the Court's *in camera* inspection of the Grand Jury minutes and have previously provided to the Court the transcript of the Grand Jury proceeding. Inspection will reveal that the evidence before the Grand Jury amply supports the offenses charged, that the Grand Jury was properly instructed on the law, and that the integrity of the proceedings was unimpaired. The People deny all allegations to the contrary.

All the defendants further ask the Court to release all or portions of the Grand Jury minutes to the defense. Section 210.30(3) of the Criminal Procedure Law provides, in relevant part:

> If the court, after examining the [Grand Jury] minutes, finds that release of the minutes, or certain portions thereof, to the parties is necessary to assist the court in making its determination on the motion, it may release

> the minutes or such portions thereof to the parties. Provided, however, such release shall be limited to that grand jury testimony which is relevant to a determination of whether the evidence before the grand jury was legally sufficient to support a charge or charges contained in such indictment. Prior to such release the district attorney shall be given an opportunity to present argument to the court that the release of the minutes, or any portion thereof, would not be in the public interest.

Defendants Davis, DiCarmine, and Sanders ask the Court to release the Grand Jury minutes "so that they may assist the Court in making its determination on this motion." Joint Memorandum, at 8. Defendant Sanders seeks release of the Grand jury minutes "so counsel may assist the Court in addressing the issues underlying the defendants' motions." Defendant Sanders's Affirmation in Support of Supplemental Motion to Dismiss, at ¶ 2(b). Defendant Davis seeks release of the minutes in order to make "further legal arguments," Davis Memorandum, at 1, and defendant Warren argues that the minutes should be released because the Court "would benefit" from the resulting adversarial submissions.[2] Warren Memorandum, at 3.

These arguments for release of the Grand Jury minutes because the defendants want to be helpful, want to find other arguments to make, and think their views on the minutes might be beneficial to the Court must be rejected. More is needed to overcome the "predominant confidentiality of Grand Jury proceedings." *Att'y Gen. of State of N.Y. v. Firetog*, 94 N.Y.2d 477, 483 (2000); *see, e.g., People v. Lewis*, 98 A.D.2d

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[2] Defendant Warren's argument is particularly remarkable. Purporting to quote from *Att'y Gen. of State of N.Y. v. Firetog*, 94 N.Y.2d 477, 482 (2000), he writes that release "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.'" Warren Memorandum, at 3 (alterations in original). But this misstates *Firetog*. The *Firetog* court, tracking the statute, wrote that the statute "nowhere prohibits the court from ordering the release of Grand Jury minutes when it subsequently will face a written motion on legal sufficiency, and concludes that it *needs* informed adversarial submissions from both sides." 94 N.Y.2d at 482 (emphasis added). There are undoubtedly many instances under which a court could conclude that although it might "benefit" from adversarial submissions, it does not "need" them.

853, 854 (3d Dept. 1983) (rejecting a defense bid to inspect the Grand Jury minute book to "determine whether there were any grounds to move against the indictments because of a wished-for aberration in the Grand Jury proceedings"). Secrecy of Grand Jury minutes remains the overarching rule, and the presumption is against release. *See People v. Fetcho*, 91 N.Y.2d 765 (1998). Here, the defendants have not made the necessary showing of a "compelling and particularized need" warranting disclosure, particularly under these circumstances, where neither the Grand Jury record nor the defendants' motions raises any novel or complex issues. *See People v. Robinson*, 98 N.Y.2d 755, 756 (2002). Nothing in the proceedings before this Grand Jury or the defendants' motions necessitates release of all or any part of the minutes to the defense.

2. Legally sufficient evidence before the Grand Jury supports each of the charges in the Indictment.

a. The defendants misstate the mental culpability required for the offenses charged.

Defendants Davis, DiCarmine, and Sanders argue that:

> For a defendant to be criminally liable . . . the prosecution must show that he had the requisite intent. For example, these defendants could not have committed grand larceny if they did not know that they were acting or did not intend to act "wrongfully." P.L. § 155.05(1). Nor could they have stolen money by false pretenses or falsified business records or engaged in a scheme to defraud by false or fraudulent pretenses if they did not know that representations or entries were "false" or "fraudulent." P.L. §§ 155.5(2)(A); 175.05; 190.60.

Joint Memorandum, at 20. Defendant Warren likewise argues, with respect to the falsifying business records counts, 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.'" Warren

Memorandum, at 6. The defendants cite no authority for their propositions, except the statutes, which actually do not support them.

The larceny statute, for example, requires that the defendant act "with intent to deprive another of property or to appropriate the same to himself or another person." P.L. § 155.05(1). There is no requirement that a defendant "*know* that [he is] acting or . . . intend to act 'wrongfully,'" as the defense argues. While the word "wrongfully" appears in the statute, it is used only to describe theft as a wrongful act. *See* P.L. § 155.05(2) ("Larceny includes a wrongful taking, obtaining, or withholding of another's property . . . committed in any of the following ways . . . ."). Indeed, P.L. § 155.05(2) reiterates that the defendant must act "with the intent prescribed in subdivision one." It does not contain – or require proof of – a knowledge element.

The crime of falsifying business records in the first degree requires an "intent to defraud [that] includes an intent to commit another crime or to aid or conceal the commission thereof." P.L. § 175.10. Again, there is no "knowledge" requirement.

Finally, scheme to defraud in the first degree requires that the defendant act with "intent to defraud more than one person," or "intent to obtain property from more than one person by false or fraudulent pretenses, representations or promises." P.L. § 190.65(1)(b); *See People v. Wolf*, 284 A.D.2d 102, 103 (1st Dept. 2001); *People v. Reynolds*, 174 Misc.2d 812, 829 (S. Ct. N.Y. Co. 1997). The Martin Act likewise requires an "intent to defraud ten or more persons" or an "intent to obtain property from ten or more persons by false and fraudulent pretenses, representations and promises." Gen. Bus. Law § 352(c)(5). Defendants argue that they could not have "engaged in a

scheme to defraud by false or fraudulent pretenses if they did not know that representations or entries were 'false' or 'fraudulent.'" Joint Memorandum, at 20. Unfortunately for defendants, this is not the law. "'As under the federal cases, fraud would appear to include *disregard* to the truth of representations made to the victim.'" *People v. Ford*, 88 A.D.2d 859, 861 (1st Dept. 1982) (*quoting* Givens, Additional Commentary, McKinney's Cons Laws of N.Y., Book 39, Penal Law, § 190.60, 1981-1982 Pocket Part, p 114) (emphasis added). Of course, here the defendants did far more than disregard whether entries were truthful, they intended for false entries to be made and they participated in the process.

b. Legally sufficient evidence before the Grand Jury supports the charge of scheme to defraud in the first degree.

Defendants Davis and Warren argue that there was legally insufficient evidence before the Grand Jury to support the charge of scheme to defraud in the first degree against them. *See* Davis Memorandum, at 10-12; Warren Memorandum, at 8-14. Additionally, defendants Davis, DiCarmine, and Sanders ask the Court to dismiss any count against any defendant where there was insufficient evidence of the required mental culpability. Joint Memorandum, at 20-21.

As stated, scheme to defraud requires that a defendant act with "intent to defraud more than one person," or "intent to obtain property from more than one person by false or fraudulent pretenses, representations or promises." P.L. § 190.65(1)(b). While direct evidence of intent often is unavailable, the defendant's intent may be inferred from his conduct. *See People v. White*, 101 A.D.2d 1037, 1039 (2d

Dept. 1984). "Fraudulent intent is usually not susceptible of proof by direct evidence and must ordinarily be inferred from circumstantial evidence such as the defendant's knowledge of the misleading or deceptive nature of the particular business practices employed." *People v. Sala*, 258 A.D.2d 182, 189 (3d Dept. 1999), *aff'd*, 95 N.Y.2d 254 (2000). For instance, an inference of intent to defraud may be drawn from the repeated use of misrepresentations or other repeated fraudulent conduct. *See, e.g., People v. Kaminsky*, 127 Misc.2d 497, 502; *People v. Block & Kleaver, Inc.*, 103 Misc. 2d 758, 765 (Co. Ct. Monroe Co. 1980). "Defendant's knowledge of the misleading and deceptive nature of his [conduct], as well as deceptive practices employed by [others], is highly probative on the issue of his intent." *White*, 101 A.D.2d at 1039. Intent to defraud can be inferred from conduct demonstrating a "disregard" for or "reckless indifference" to the truthfulness of the representations the defendant makes. *See Ford*, 88 A.D.2d at 861. The record is replete with evidence that the financial institutions and insurance companies were defrauded into giving Dewey money; the only real question is whether these defendants acted with the requisite intent.

The Grand Jury heard competent evidence from which it could rationally infer that the defendants were aware that the Firm was required to meet certain covenants under its credit agreements:

- Defendant Davis: GJ Tr. 3163:20 – 3165:4; GJ Exhs. Q-278; Q-282; Q-290.
- Defendant DiCarmine: GJ Tr. 3338:16 – 3343:25; GJ Exhs. Q-278; Q-282; Q-296.

- Defendant Sanders: GJ Tr. 293:12 – 299:1; 3161:24 – 3163:13; 3163:20 – 3165:4; 3338:16 – 3343:25; 3390:18 – 3391:9; GJ Exhs. Q-007; Q-008; Q-278; Q-282; Q-290; Q-296.
- Defendant Warren: GJ Tr. 2123:22: - 21:25:8; GJ Exh. Q-188.

The Grand Jury heard competent evidence that the defendants were informed that the Firm would be unable to meet its covenants:

- Defendant Davis: GJ Tr. 299:2 – 306:20; 3391:10 – 3393:16; GJ Exhs. Q-009; Q-012; Q-112 – Q-113; Q-270; Q-278; Q-286; Q-298.
- Defendant DiCarmine: GJ Tr. 299:2 – 306:20; 3391:10 – 3393:16; GJ Exhs. Q-009 – Q-010; Q-012; Q-112 – Q-113; Q-278; Q-291; Q-298.
- Defendant Sanders: GJ Tr. 299:2 – 306:20; 1339:25 – 1346:7; 3391:10 – 3393:16; GJ Exhs. . Q-009 – Q-010; Q-012; Q-112 – Q-113; Q-270; Q-278; Q-286; Q-298.
- Defendant Warren: GJ Tr. 2123:4 – 2123:21; 2130:16 – 2131:19; 3183:19 – 3186:21; GJ Exh. Q-153; Q-154; Q-186; Q-187; Q-192.

The Grand Jury also heard competent evidence that the defendants were aware that false and fraudulent entries were being made to the Firm's books to make it appear that the Firm had met its covenants, when in fact it had not:

- Defendant Davis: GJ Tr. 1902:11 – 1903:20; 3205:6 – 3209:10; 3244:22 – 3246:21; 3248:5 – 3256:15; 3381:3 – 3389:11; 3398:10 – 3407:4; 3408:5 – 3412:21; 3413:6 – 3416:12; GJ Exhs. Q-080; Q-278; Q-293 – Q-294.

- Defendant DiCarmine: GJ Tr. 1895:24 – 1898:10; 1902:11 – 1903:20; 3165:5 – 3167:8; 3205:6 – 3209:10; 3248:5 – 3256:15; 3381:3 – 3389:11; 3398:10 – 3407:4; 3408:5 – 3412:21; GJ Exhs. Q-001; Q-003; Q-080; Q-165; Q-278; Q-293 – Q-294.
- Defendant Sanders: GJ Tr. 1367:15 – 1373:5; 1380:1 – 1381:1; 1876:20 – 1879:21; 1895:24 – 1898:10; 1902:11 – 1903:20; 2197:3 – 2205:4; 2213:10 – 2218:10; 3165:5 – 3167:8; 3176:14 – 3177:5; 3192:19 – 3195:20; 3231:17 – 3240:7; 3248:5 – 3256:15; 3381:3 – 3389:11; 3399:25 – 3400:19; GJ Exhs. Q-001; Q-003; Q-080; Q-161; Q-165; Q-195; Q-198 – Q-201; Q-216; Q-220; Q-270; Q-278.
- Defendant Warren: GJ Tr. 1876:4 – 1876:17; 1871:10 – 1875:8; 1899:15 – 1901:20; 1916:12 – 1919:23; 2108:17 – 2116:232699:13 – 2699:25; 3183:19 – 3186:21; 3211:14 – 3212:15; 3213:20 – 3214:21; GJ Exhs. Q-160; Q-187; Q-166.

The Grand Jury also heard competent evidence that the defendants participated in making or causing false entries; solicited, requested, commanded, importuned, or intentionally aided the making or causing of false entries; or otherwise engaged in misleading or deceptive conduct or used misrepresentations in furtherance of the Scheme:

- Defendant Davis: GJ Tr. 1346:9 – 1352:22; 3167:9 – 3170:17; 3172:1 – 3176:11; 3214:22 – 3216:25; 3254:19 – 3258:7; 3282:5 – 3283:1; GJ Exhs. Q-115 – Q-117; Q-155 – Q-156; Q-237; Q-277; Q-297.

- Defendant DiCarmine: GJ Tr. 238:23 – 244:5; 1895:24 – 1898:10; 2218:11 – 2234:5; 2618:12 – 2619:7; 3172:1 – 3176:11; 3214:22 – 3216:25; 3221:22 – 3222:9; 3223:3 – 3223:17; 3226:11 – 3227:17; 3262:14 – 3268:1; 3274:7 – 3278:14; 3282:5 – 3283:1; 3290:5 – 3294:20; 3399:25 – 3400:19; GJ Exhs. Q-117; Q-155 – Q-156; Q-165; Q-204 – Q-205; Q-272; Q-295; Q-304.
- Defendant Sanders: GJ Tr. 238:23 – 250:11; 698:12 – 700:21; 1346:9 – 1352:25; 1354:10 – 1365:21; 1895:24 – 1898:10; 2196:12 – 2210:3; 2218:11 – 2234:5; 2247:6 – 2248:4; 2618:12 – 2619:7; 3165:5 – 3170:17; 3172:1 – 3176:11; 3205:6 – 3209:10; 3209:16 – 3212:15; 3214:22 – 3216:25; 3221:22 – 3222:9; 3223:3 – 3223:17; 3226:11 – 3227:17; 3240:10 – 3244:21; 3254:19 – 3258:7; 3262:14 – 3268:1; 3274:7 – 3278:14; 3282:5 – 3283:1; 3287:18 – 3290:1; 3290:5 – 3294:20; 3324:19 – 3338:15; 3344:1 – 3349:7; 3399:25 – 3400:19; GJ Exhs. Q-013; Q-038; Q-114 – Q-115; Q-117; Q-153 – Q-156; Q-164 – Q-166; Q-186; Q-188; Q-190 – Q-191; Q-193 – Q-195; Q-202 – Q-207; Q-213; Q-221; Q-237; Q-272; Q-277; Q-279; Q-293 – Q-295; Q-304.
- Defendant Warren: GJ Tr. 1871:10 – 1875:8; 3167:9 – 3170:17; 3172:1 – 3176:11; 3186:12 – 3187:4; 3211:14 – 3212:15; GJ Exhs. Q-153; Q-154; Q-160; Q-166; Q-186; Q-188; Q-190; Q-191; Q-193; Q-194; Q-300; Q-301.

Consequently, the Grand Jury could rationally infer that the defendants acted with the requisite intent.

Defendant Warren also argues that the scheme to defraud count must be dismissed as to him because "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 from December 2008 to March 2009 at the latest."[3] Warren Memorandum, at 11. Defendant Warren's focus on the *duration* of his involvement is misplaced. "[I]in requiring a 'systematic ongoing course of conduct,' the Legislature was 'refer[ring] to a scheme involving more than one isolated act, rather than to the scheme existing over any period of time.'" Greenberg, *et. al.*, NEW YORK CRIMINAL LAW § 19:19, n.10 (*quoting* Givens, Additional Commentary, McKinney's Cons. Laws of NY, Book 39, Penal Law § 190.60, 1984-1985 Pocket Part, p 195).

> Certainly, on its face, the statute would not apply to episodic or individual acts, unless they are part of a coherent continuing system or plan. While isolated ad hoc acts are not cognizable under the scheme to defraud statute, the details of the separate transactions alleged to comprise parts of the scheme do not have to be identical in every respect, as long as the fact finder is satisfied that there are, among all the transactions, common elements by which each transaction may be identified as having been undertaken pursuant to an over-all fraudulent design. What is essential is that there be a single, unitary over-all scheme to defraud.

Reynolds, 174 Misc. 2d at 830.

The competent evidence before the Grand Jury supporting the Scheme described in the Facts section of this Memorandum was sufficient for the Grand Jury to infer that the Scheme was a unitary, over-all scheme to defraud, even at year-end

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[3] As with any conspiracy or act based on accomplice liability, because defendant Warren participated directly in the scheme to defraud, he is responsible for his own conduct and that of his coconspirators, so he is mistaken to limit his period of culpability to late 2008 and early 2009. Nonetheless, even during that period, there was competent evidence before the Grand Jury that defendant Warren was part of an ongoing scheme.

2008 and into 2009. Further, there was competent evidence before the Grand Jury, as listed above, that defendant Warren participated in the Scheme and acted with the required mental culpability.

Finally, defendant Warren argues that he "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." Warren Memorandum, at 13. This argument must be rejected.

The scheme to defraud statute requires the People to prove that the defendants "obtained property with a value in excess of one thousand dollars." P.L. § 190.65(1)(b). There was competent evidence before the Grand Jury to satisfy this element. The Grand Jury heard that Dewey had both term loans and lines of credit. GJ Exhs. B-035; E-40; F-009; I-006. There was likewise competent evidence that, subsequent to Dewey providing false compliance certificates to its lenders on February 17, 2009, *see, e.g.*, GJ Exh. B-012, the Firm drew on its lines of credit at least in the following amounts prior to defendant Warren's departure from the Firm:[4]

- March 30, 2009 $10M
- April 1, 2009 $10M
- April 2, 2009 $7.5M
- April 17, 2009 $5M
- April 29, 2009 $10M
- May 4, 2009 $6.5M
- June 2, 2009 $7M

[4] There is no magic to the date defendant Warren left the Firm; he is likewise responsible for draws after he left. It would simply be unwieldy – and unnecessary for present purposes – to list all draws here.

GJ Tr. 1753:1 – 1758:9; 2007:13 – 2008:14; 2024:15 – 2027:10; 2054:9 – 2055:4; GJ Exhs. E-050; F-038; I-022. Indeed, the draw on June 2, 2009 is listed as overt act 22 in the conspiracy count of the Indictment. By any stretch, over $1,000 was obtained in the Scheme.

c. Legally sufficient evidence before the Grand Jury supports the charges of grand larceny in the first degree.

Counts Two through Sixteen of the Indictment charge defendants Davis, DiCarmine, and Sanders with grand larceny in the first degree, related to the 2010 refinance of Dewey's debt. Counts Two through Fourteen relate to thirteen insurance companies that purchased bonds in the $150 million private placement, and Counts Fifteen and Sixteen relate to two financial institutions that participated in the $100 million line of credit. Defendants Davis, DiCarmine, and Sanders ask the Court to dismiss these grand larceny counts because, according to them, "[t]he evidence before the grand jury could not possibly satisfy the intent element of grand larceny." Joint Memorandum, at 9.

i. Larcenous intent does not require permanent deprivation or appropriation, and the Grand Jury rationally could have inferred that the defendants intended to withhold or exercise control over the property for a sufficiently long period to satisfy the larcenous intent element.

Larceny is committed when, among other things, the defendant acts "with intent to deprive another of property or to appropriate the same to himself or to a third person." P.L. § 155.05(1). Defendants Davis, DiCarmine, and Sanders argue that evidence of intent was wanting before the Grand Jury, because the larceny statute

requires an "intent to deprive the owner of its property permanently," Joint Memorandum, at 9, and there could have been no evidence before the Grand Jury that, at the time the insurance companies invested in the private placement, "these three defendants intended that the money would not be repaid with interest when due." *Id.* at 11. Davis makes similar claims in his separate filing. *See* Davis Memorandum, at 14 – 15.

The defendants' view of the intent requirement is not supported by the larceny statute, which applies equally to lengthy deprivations and appropriations. Under the statute, "to 'deprive' another of property means … to withhold it or cause it to be withheld from him permanently *or for so extended a period or under such circumstances that a major portion of its economic value or benefit is lost to him.*" P.L. § 155.00(3) (emphasis added). Likewise, "[t]o 'appropriate' property of another to oneself or a third person means … to exercise control over it, or to aid a third person to exercise control over it, permanently *or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit.*" P.L § 155.00(4) (emphasis added). Defendants' assertion of a permanency requirement simply ignores half the statutory definition.

The defendants' stilted view of deprivation and appropriation is based, at least in part, on a misreading of *People v. Jennings*, 69 N.Y.2d 103 (1986). That case examined Chemical Bank's cash counting practices. Chemical "bulk counted" deposits made by its commercial clients, meaning that it counted the bundles of bills deposited. It contracted with one of the defendants, Sentry, to pick up the deposits and "fine count" them by breaking the bundles and counting each bill. Sentry was required to

deliver the fine counted cash to Chemical's account at the Federal Reserve within 72 hours. *Id.* at 116. It took Sentry only 24 hours to perform its tasks, so it began depositing the cash for the remaining 48 hours into its own escrow account with Hudson Valley National Bank at the Federal Reserve. Hudson Valley would then transfer the money to Chemical's Federal Reserve account. Sentry earned interest on these short-term deposits, but the cash was always deposited with Chemical within the 72 hours required under the Chemical-Sentry agreement. *Id.* at 117.

The Court of Appeals likened Sentry's use to a joy-riding case and held that Sentry did not hold onto Chemical Bank's money long enough to satisfy the intent requirement: "The *mens rea* element of larceny, however, is simply not satisfied by an intent *temporarily* to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's *short-term* use." *Id.* at 119 (emphasis added).

In loan cases where the deprivation or appropriation is longer than a mere 48 hours, lack of permanency is not an issue. *See, e.g., People v. Swift*, 278 A.D.2d 110 (1st Dept. 2000) (holding, in a case where the defendant "appl[ied] for a personal bank loan while impersonating one of her clients and provid[ed] information she either fabricated or had knowledge of due to the contractual relationship," that "[d]efendant's larcenous intent could be readily inferred from the evidence"); *People v. Ponnapula*, 266 A.D.2d 32 (1st Dept. 1999) (holding that, in the context of a loan obtained through misrepresentations, "[t]here was ample evidence of larcenous intent"); *People v. Zimmerman*, 81 N.Y.2d 979, 980 (1993) (upholding a larceny conviction where a

"coconspirator intentionally made false representations and misstatements on loan applications"); *People v. Termotto*, 178 A.D.2d 1025, 1025 (4th Dept. 1991), *aff'd*, 81 N.Y.2d 1008 (1993) (upholding larceny convictions where the defendant "obtained loans from various banks by false pretenses," by, among other things, "producing a personal financial statement, tax returns and pay stubs that artificially inflated his income").

In fact, in two recent cases in this courthouse, justices who were confronted with permanency arguments have refused to dismiss larceny counts involving loans, *even though the loan payments were current.* When the loans at issue are being repaid and are current, there really can be no argument that the intent was to deprive or appropriate the loan money permanently. In both cases, the only remaining possibility is that the intent was to deprive or appropriate for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit.

In *People v. DaSilva*, Ind. No. 2945/2010, which was before Justice Richard Carruthers, the defendant submitted false documents in support of loan applications that she obtained on behalf of her employer, a church. Defendant DaSilva contended that the grand larceny counts should be dismissed because there was no evidence that she intended to permanently deprive the lending bank of property. In support of this argument, the defendant alleged that, regardless of how the loan proceeds were obtained, the church made all required loan payments; all of the loans at issue were current; the defendant and church intended to make all loan payments;

and all of the loan proceeds had been used for their stated purpose. Justice Carruthers denied the defendant's motion, entirely rejecting the argument that because the loans were performing there was insufficient proof of an intent to deprive or appropriate. *See* People's Affirmation of Peirce R. Moser in Opposition to Defendants' Omnibus Motions, dated August 15, 2014, at ¶ 12; Exh. 41(hereinafter, "Moser Aff.").

In *People v. Abacus Federal Savings Bank*, Ind. No. 2480/2012, currently pending before Justice Renee A. White, the defendant bank and others have been accused of originating fraudulent mortgage loans that were then sold to Fannie Mae but that continued to perform. The defendants were charged with grand larceny, among other counts. Defendant Abacus Federal Savings Bank argued in part that the grand larceny charges should be dismissed because there was no intent permanently to deprive, as evidenced by the bank's indemnification and repurchase obligations and the fact that the loans were being repaid and that Fannie Mae has suffered no actual financial loss or deprivation. Justice White rejected this argument, as Justice Carruthers had done in *DaSilva*. *See* Moser Aff., at ¶ 13; Exhs. 42; 43.

The short-term use of money in *Jennings* is a far cry from the facts before the Grand Jury in this case. Even by the defendants' own reckoning, the insurance companies ceded their investment money to Dewey for between three and ten years. *See* Joint Memorandum, at 10, n.2. This is supported by the evidence before the Grand Jury. GJ Exh. B-020. The two financial institutions committed funds to Dewey for two

years. [5] GJ Exh. B-018. This was not some joy-ride; the insurance companies and financial institutions were, even under the best of circumstances, to be separated from their money for years based on Dewey's misstatements. These lengthy periods are far more akin to the periods at issue in *DaSilva* and *Abacus Federal Savings Bank*, and by any standards were long enough – even had Dewey not gone into bankruptcy – that a major portion of the economic value or benefit of the money was lost to the insurance companies and financial institutions.

ii. Because the insurance companies and financial institutions parted with their money in reliance on Dewey's misstatements, the economic value or benefit of that money was lost to them.

Defendants Davis, DiCarmine, and Sanders also argue that "when an entity has ceded possession of its money to another, it has no right to the 'economic value or benefit' of the money during the period the other had its use." Joint Memorandum, at 10. In substance, they appear to argue that there can be no larcenous intent here, because the insurance companies and financial institutions handed the economic value or benefit of the money at issue over to Dewey. But this argument again misapprehends the law. It also fails to account for the fact that these entities

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[5] The defendants additionally argue that the Grand Jury could not have found they possessed the requisite intent with respect to the financial institutions that participated in the line of credit because "drawdowns on the lines of credit occurred as required yearly." Joint Memorandum, at 14. Presumably, by "drawdowns," the defendants are referring to a provision in the line of credit that required Dewey to limit the total amount of its borrowings for a thirty-day period each year, *see, e.g.*, GJ Exh. B-018 at 24, more typically referred to as a clean-up or clean-down provision. The defendants and others at Dewey obtained the lines by supplying false information to the financial institutions and continued to supply false information to keep the lines up, until the firm collapsed and each of these financial institutions lost millions of dollars. GJ. Tr. 244:1 – 255:25; 261:2 – 264:22; 1583:3 – 1584:19; 1753:1 – 1758:9; 2007:13 – 2008:14; 2024:15 – 2027:10; 2054:9 – 2055:4; 3229:21 – 3231:16; GJ Exhs. B-008 – B-016; B-024 – B-030; E-050; F-038; I-022. As with both *DaSilva* and *Abacus*, the fact that payments were made along the way does not defeat larcenous intent.

didn't just hand money over for a time; they each lost millions of dollars. GJ Tr. 2089:20 – 2091:1; 2449:18 – 2450:1; 2473:1-22; 2511:18 – 2512:11; 2555:11-16; 2595:13 – 2596:6; 2691:6 – 2692:7; 2966:23 – 2967:19; 3073:23 – 3074:9.

The defendants again rely on *Jennings* for their erroneous legal proposition. But *Jennings* doesn't stand for the proposition that an entity loses its right to the economic value or benefit of its property *every* time it hands that property over to another. *Jennings* only stands for the fairly obvious proposition that the entity loses that right in the absence of fraud or deceit. Indeed, there was no suggestion in *Jennings* that Sentry engaged in any fraud or deceit to get Chemical Bank to hand over its money for 72-hour periods; Sentry was a legitimate bailee for hire. *See Jennings*, 69 N.Y.2d at 120. The larceny charges were based on Sentry's use of the money during the 48-hour period it was not being counted. *See id.* at 117. But there is no suggestion in the opinion that the Court would not have determined that there was a larceny if Chemical Bank had been induced to part with its money through fraud or deceit, even if it were compensated through interest or the like. As Justice Learned Hand once observed: "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a *quid pro quo* of equal value." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932).

Here, the defendants, as principals and accomplices, wrongfully obtained investments and loan proceeds for Dewey by, among other things, inducing the insurance company investors and financial institution lenders to part with money based upon false statements. GJ Tr. 744:7 – 758:24; 2079:21 – 2086:3; 2411:4 – 2450:1;

2470:6 – 2472:25; 2482:20 – 2510:16; 2545:8 – 2553:18; 2576:14 – 2594:9; 2645:18 – 2652:21; 2654:13 – 2659:20; 2616:17 – 2627:19; 2670:12 – 2690:22; 2953:6 – 2966:6; 3079:18 – 3089:2; 3143:9-23; 3205:1 – 3209:10; 3274:7 – 3282:4; GJ Exhs B-051 – B-055; D-003 – D-17; F-032; G-003 – G-008; G-016 – G-017; J-004 – J-005; J-007; J-009; J-107; K-003 – K-007; L-005 – L-007; L-009; M-002 – M-005; N-001 – N-017; N-019; N-023 – N-033; Q-050 – Q-053; Q-056; Q-238 – Q-249; Q-252 – Q-253; Q-293 – Q-294; S-002 – S-006. Accordingly, Dewey was not in lawful possession of any of the proceeds, the full or nearly full economic value and benefit of which it immediately extracted in each instance by using the money to pay off other loans. The insurance companies and financial institutions no longer enjoyed the economic benefit of that money. Indeed, banks are in the business of making "good" loans, and insurance companies are in the business of making "good" investments; their reputations are based in part on their ability to do so. The deceit involved in this case not only impugned those reputations, but it deprived those entities of the ability to make "good" loans and investments with the hundreds of millions of dollars they were tricked into giving to Dewey, much of which they eventually lost.

iii. An unrealistic hope of eventual repayment does not negate larcenous intent, and there is competent evidence from which the Grand Jury rationally could have inferred that any hope of eventual repayment was unrealistic, satisfying the larcenous intent element.

Even assuming defendants Davis, DiCarmine, and Sanders "intended that the money would . . . be repaid with interest when due," Joint Memorandum, at 11, the speculation or hope that Dewey's financial condition might have improved to

the point that the investors and financial institutions could have been repaid does not purge defendants of their larcenous intent or otherwise render them innocent of the crime. For over a century, New York law has precluded defendants from defeating larceny charges by the mere speculation or hope that they can repay money that was wrongfully taken. In *People v. Shears*, 158 A.D. 577 (2d Dept. 1913), *aff'd*, 209 N.Y. 610 (1913), for example, the defendant was convicted of grand larceny in the first degree for embezzling funds by misapplying a check. During the trial, defense counsel sought a ruling that "if the defendant, when he diverted the check which he received as trustee, had an intent of making subsequent restoration, reparation or restitution of the proceeds thereof, he could not be convicted of larceny, because under such circumstances there was an absence of criminal intent, and hence no larceny." *Id.* at 579. The trial court refused to grant the ruling. *Id.*

On appeal, the Second Department "assume[ed] that there was sufficient evidence from which the jury might infer that the defendant had a present intention of making future restitution at the time he misapplied the check." *Id.* But the defendant "had then no present ability to make reparation or restitution, and his intention, if such he had, was based upon simple hope or expectation." *Id.* at 580. The court upheld the conviction, stating:

> It is true enough that in many cases there are declarations that to constitute a criminal intent to commit common-law larceny and even statutory embezzlement there must have been an intent to deprive the true owner of his property "permanently." But this did not mean that a concurrent intent to make restitution some time or somehow thereafter purged a deliberately unlawful taking and misappropriation of criminality.

Id. at 583. *See also People v. Meadows*, 199 N.Y. 1, 7 (1910) ("Evidence of a criminal intent to defraud [the victim] of his property was not wanting. [Defendant's] firm was heavily involved, the pressure of debt very great and the bank balance very low. The jurors were warranted in inferring that the defendant yielded to the temptation of relieving the pressure by diverting the funds received from [the victim] to his own purposes; hoping, if not believing, that, during the latter's absence from the country, an opportunity might be afforded for restoration.").

This remains the rule today. In *People v. Mishkin*, 134 A.D.2d 529 (2d Dept. 1987), the Second Department upheld the defendant's conviction on five counts of grand larceny in the second degree. *Id.* at 529. There, the defendant "took trust and estate assets entrusted to him and transferred them to certain investment companies which he controlled and from which he derived substantial personal financial support through salary payment, expense reimbursement and loans."[6] *Id.* The court concluded that the defendant's "intention was not to return the funds. The possibility that he may have hoped to be able to replace the funds at some later date does not suffice to avoid a finding of larcenous intent." *Id.*

In *People v. Halloran*,131 Misc. 2d 901 (S. Ct. N.Y. Co. 1986), the defendants, who were indicted on, among other things, two counts of grand larceny in the second degree for having engaged in a check-kiting scheme, moved to dismiss the

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[6] Notably, the Second Department did not demand that the victims be permanently deprived of the property. It held that the defendant "purposefully withheld those funds from their beneficiaries, the rightful owners, for such extended periods as to both deprive those owners of the major portion of the economic benefit of the funds and to acquire that economic benefit for himself." *Mishkin*, 134 A.D.2d at 529.

indictment. The defendants argued that the evidence before the Grand Jury "establishe[d] that they always intended to repay the money and therefore lacked the requisite intent to permanently deprive." *Id.* at 905, n.4. Justice Berkman quickly dispensed with this argument, holding that "the 'simple hope or expectation' of repayment, without the present ability to do so, will not defeat a larceny prosecution." *Id.* She added: "At best for the defendants, this issue will present a jury question." *Id.*

Finally, in *People v. Argentieri*, 66 A.D.3d 558 (1st Dept. 2009), the defendant, who had cashed a bad check, was convicted after trial of grand larceny in the third degree and criminal possession of stolen property in the third degree. *Id.* at 559. In her final charge, Justice Berkman instructed the jury that:

> It is a major issue in this case whether the People have proved beyond a reasonable doubt that the defendant intended to permanently deprive the bank or permanently withhold the money.
>
> *Understand, however, that the factual and unrealistic hope of eventual repayment is not necessarily inconsistent with the permanent intent required for this crime* ...
>
> In the final analysis, whether or not the People have proved to your satisfaction, beyond a reasonable doubt, that the defendant acted with the intent required for the commission of a crime, is a question of fact for you to be decided on the basis of all the evidence in the case.

Moser Aff., at Exh. 44 (emphasis added and footnote omitted).[7] On appeal, the defendant argued that the underlined instruction was inappropriate and relaxed the *mens rea* requirement. *Id.* The First Department properly rejected this argument, holding that Justice Berkman's "instruction to the effect that an unrealistic hope of eventual

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[7] The omitted footnote makes clear that the transcript of Justice Berkman's instruction literally read, "not necessarily consistent." Both the People and the defense maintained that the transcript was in error, and Justice Berkman said, "not necessarily *in*consistent" *See* Moser Aff., at Exhs. 44; 45 The First Department's ruling is consistent with the parties' shared view.

repayment does not necessarily negate larcenous intent was appropriate in the context of the evidence and the entire charge, and it did not shift the burden of proof."[8] *Argentieri*, 66 A.D.3d at 559.

Here, there was competent evidence before the Grand Jury that Dewey was in severe financial straits at the time the refinancing took place in April 2010,[9] a situation of which all three defendants were aware. GJ Tr. 160:2 – 162:16; 1339:25 – 1346:7; 1354:10 – 1365:21; 1367:15 – 1373:5; 1902:11 – 1903:20; 2247:6 – 2250:21; 3205:6 – 3209:10; 3248:5 – 3256:15; 3274:5 – 3283:1; 3287:18 – 3290:1; 3381:3 – 3389:11; GJ Exhs. Q-001; Q-003; Q-080; Q-112 – Q-113; Q-117; Q-170 – Q-171; Q-213 – Q-214; Q-255; Q-278; Q-282; Q-293 – Q-294. Given this evidence, the Grand Jury reasonably could have inferred that any intent the defendants may have harbored to repay the money was unrealistic, as supported by Dewey's eventual default.

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[8] The defendants' reliance on *People v Bolden*, 194 A.D.2d 834 (3d Dept. 1993), is misplaced. In that case, the defendant, who attempted to obtain a mortgage on property by falsely listing himself and the true owner as joint owners of the property, was charged with attempting to steal from the true owner of the property, rather than the bank. In overturning Bolden's conviction for attempted grand larceny, the court relied primarily on two facts: First, because Bolden applied as a co-applicant for the mortgage, there was no evidence the true owner had any greater right to the loan proceeds. *Id.* at 836. Second, "a forged mortgage would have been ineffective to encumber [the true owner's] interest in the property." *Id.* Additionally, in the *Bolden* decision, unlike here, there is no indication that the defendant was in any kind of financial difficulty at the time he sought the loan. Under those particular facts, the court found that it was "purely a matter of speculation" whether Bolden intended to repay the mortgage. *Id.*

[9] Indeed, although this evidence was not before the Grand Jury, the Liquidating Trustee for the Dewey & LeBoeuf Liquidation Trust has taken the position in the Bankruptcy Court that Dewey was insolvent at least by January 1, 2009, a full fifteen months before the 2010 refinance. *See* Moser Aff., at Exh.39, at ¶¶ 33-36.

iv. Competent evidence before the Grand Jury establishes the defendants' criminal liability for false statements made in the process of securing the private placement.

Defendants DiCarmine and Sanders argue that they cannot be held responsible for any charges arising from the 2010 private placement, because the transaction was complicated and approved by others, including lawyers with experience in the area. *See* DiCarmine Memorandum, at 5-8; Sanders Memorandum, at 5-6. The People need not delve into an analysis of each unsworn – and often inaccurate – factual assertion made by these defendants. There was ample evidence that the three defendants, acting directly and by "solicit[ing], request[ing], command[ing], importune[ing] or intentionally aid[ing]" others, P.L. § 20.00, made material misstatements to the insurance companies in the process of obtaining the private placement investments. Among other things, and as discussed throughout this memorandum, there was competent evidence that the three defendants were aware of the falsity of financial and other information that was provided to the financial institutions and insurance companies. Moreover, there was competent evidence that each of the three defendants directly participated in obtaining the 2010 refinance.[10] GJ Tr. 238:23 – 250:11; 2418:13 – 2419:3; 2523:13-18; 2531:10 – 2532:14; 2576:21 – 2577:8; 2583:7 – 2584:2; 2603:24 – 2616:16; 2618:12 – 2619:7; 2625:18 – 2626:10; 2623:8 – 2626:10; 2627:14 – 2629:13; 2643:22 – 2644:2; 2649:1 – 2651:21; 3282:5 –

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[10] This same evidence establishes legal sufficiency for the Martin Act count. *See* Davis Memorandum, at 15-17.

3283:1; GJ Exhs. B-050; Q-233 – Q-236; Q-237; Q-240; Q-243 – Q-246; Q-249 – Q-251; Q-297.

d. Legally sufficient evidence before the Grand Jury supports the charges of falsifying business records in the first degree

Counts 17 through 104 of the Indictment and Counts One and Three through Six of indictment 5393/2013 variously charge the four defendants with falsifying business records in the first degree, in violation of section 175.10 of the Penal Law. Counts 17 through 71 of the Indictment and all remaining counts of indictment 5393/2013 generally relate to entries made in Dewey's accounting system. Counts 72 through 74 of the Indictment generally relate to management representation letters provided to Ernst & Young LLP ("EY"). Counts 75 through 77 of the Indictment generally relate to Dewey's 2008 through 2010 financial statements. Counts 78 through 104 of the Indictment generally relate to compliance certificates provided by Dewey to financial institutions and private placement investors.

i. There was competent evidence before the Grand Jury that the defendants intended to defraud, including an intent to commit, aid, or conceal another crime.

A person commits the crime of falsifying business records in the first degree when, among other things, he acts "with intent to defraud," P.L. § 175.05, that "includes an intent to commit another crime or to aid or conceal the commission thereof."[11] P.L. § 175.10. With respect to Counts 17 through 71 of the Indictment and

[11] Defendants Davis, DiCarmine, and Sanders complain that the People would not identify the other crime at issue in the falsifying business records counts in response to their request for a bill of particulars. *See* Joint Memorandum, at 15, n.4. Their request for a bill of particulars does not directly seek the other crimes. In any

all remaining counts of indictment 5393/2013 – which generally relate to entries made in Dewey's accounting system – each of the defendants argues, in substance, that he lacked the requisite intent to defraud because he lacked sufficient knowledge to understand each of the accounting adjustments at issue. *See* Joint Memorandum, at 20-21; Warren Memorandum, at 6-8. As previously discussed, knowledge is not the culpable mental state required under the scheme to defraud provisions of the penal law. And the defendants are not charged with personally making the entries that falsified Dewey's books. Instead, there was competent evidence that the defendants "solicit[ed], request[ed], command[ed], importune[ed], or intentionally aid[ed]," P.L. § 20.00, the making of or caused false entries to be made in Dewey's accounting records in order to "commit[,] . . . aid or conceal," P.L. § 175.10, the scheme to defraud, the larcenies, the conspiracy, and other crimes. GJ Tr. 238:23 – 250:11; 698:12 – 700:21; 1346:9 – 1352:25; 1354:10 – 1365:21; 1895:24 – 1898:10; 2196:12 – 2210:3; 2218:11 – 2234:5; 2247:6 – 2248:4; 2618:12 – 2619:7; 3165:5 – 3170:17; 3172:1 – 3176:11; 3205:6 – 3209:10; 3209:16 – 3212:15; 3214:22 – 3216:25; 3221:22 – 3222:9; 3223:3 – 3223:17; 3226:11 – 3227:17; 3240:10 – 3244:21; 3254:19 – 3258:7; 3262:14 – 3268:1; 3274:7 – 3278:14; . 3282:5 – 3283:1; 3287:18 – 3290:1; 3290:5 – 3294:20; 3324:19 – 3338:15; 3344:1 – 3349:7; 3399:25 – 3400:19; GJ Exhs. Q-013; Q-038; Q-114 – Q-117; Q-153 – Q-156; Q-164 – Q-166; Q-186; Q-188; Q-190 – Q-191; Q-193 – Q-195; Q-202 – Q-207; Q-213; Q-221; Q-237; Q-272; Q-277; Q-279; Q-293 – Q-295; Q-304.

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event, the other crimes at issue are scheme to defraud in the first degree, conspiracy in the fifth degree, and grand larceny in the first degree, among others.

Under these circumstances, it was not necessary that the defendants be intimately familiar with each of the false entries. It was enough that they intended for false entries to be made, and that they were made.[12]

ii. The business records in counts 72 through 74 and 78 through 104 were business records of the entities identified in the Indictment.

The crime of falsifying business records in the first degree requires that the record at issue be a business record, meaning that it must be "kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity." P.L. § 175.00(2). Defendants Davis, DiCarmine, and Sanders argue that the Court must dismiss counts 72 through 74 – which charge defendants Davis and Sanders with falsifying the business records of EY and relate to management representation letters signed by defendants Davis and Sanders and maintained in EY's records – because "those letters plainly reflect the financial condition and activity of [Dewey] and not of [EY]." Joint Memorandum, at 18. They further argue that the Court must dismiss counts 78 through 104 – which charge defendant Sanders alone with falsifying the business records of several financial institution lenders and insurance company investors or their investment management companies, and relate to compliance

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12 That said, there was competent evidence before the Grand Jury from which it could rationally infer that the defendants were sufficiently familiar with at least some of the individual accounting adjustments to know that these adjustments, in particular, were wrong. There was competent evidence from which the Grand Jury could infer that the defendants knew that following adjustments, among others, were wrong: defendant Sanders knew all the charged adjustments were wrongful; defendant Davis knew adjustments involving a backdated check, reversing disbursement write-offs, reclassifying disbursement payments, reclassifying payments as return of capital, reclassifying foreign payroll, and reversing credit card write-offs were wrongful; defendant DiCarmine knew that adjustments involving applying loan repayments as revenue, fictitious client payment adjustment, reversing disbursement write-offs, reclassifying disbursement payments, reversing credit card write-offs, One London Wall reverse premium, and Austin lease termination fee were wrongful; and defendant Warren knew that adjustments involving reversing disbursement write-offs, reclassifying a disbursement retainer, and reclassifying disbursement payments were wrongful.

certificates prepared by Dewey and maintained in the records of these entities – because "the compliance certificates did not reflect the financial condition of the Banks or Bondholders." Joint Memorandum, at 19. Their arguments must be rejected, as there was competent evidence before the Grand Jury that the records at issue were business records of the entities identified in the Indictment.

The first misstep in the defendants' argument is their attempt to amend the Penal Law. They acknowledge that a business record must evidence the "condition or activity" of the referenced entity, Joint Memorandum, at 17, but then assert that "[a] business record can only evidence or reflect an enterprise's condition or activity when it is made in the enterprise's own *financial books and records*." *Id.* (original emphasis omitted and emphasis added). They then argue that the counts at issue can only stand if the "records evidence or reflect the *financial* condition or activity of the recipient enterprises." *Id.* (original emphasis omitted and emphasis added). But the word "financial" appears nowhere in the statute, and indeed, there are many cases in which defendants have been convicted of falsifying records that do not reflect the *financial* condition or activity of the subject entity. *See, e.g., People v. Fuschino*, 278 A.D.2d 657, 658 (3d Dept. 2000), *lv denied*, 96 N.Y.2d 800 (upholding falsifying business records conviction where false information provided by defendant in numerous calls to the power company, "such as the identity of the caller, caused [the power company] to create a business record containing false entries").

People v. Smith, 300 A.D.2d 1145 (4th Dept. 2002), is particularly instructive, as the defendants here argue that "because [the records at issue] relate to

the financial condition of D&L, not the business entities who received them . . . they must be dismissed." Joint Memorandum, at 15. As discussed in greater detail below, this is not the law. A record that on its face relates to the financial condition of one individual or entity may nonetheless be a business record of another entity. In *Smith*, for example, the defendant was charged with falsifying the business records of the public defender when he allegedly filed a false affidavit with the public defender understating his income in order to qualify for assigned counsel. 300 A.D.2d at 1145. The trial court dismissed the charge after concluding that "the grand jury could not rationally infer from the evidence before it that defendant had the requisite intent to defraud." *Id.* Although the issue before the Appellate Division was one of intent, in reversing the trial court, the Fourth Department stated that the affidavit "constitute[d] a business record," *id.*, even though the affidavit in question related – falsely – to the financial condition of the defendant and not the public defender, whose business record it was.

The Court of Appeals has made clear that where an entity receives a record from a third party, the record becomes a business record of the recipient entity when the record "relate[s] to any *rights* or *obligations* on the part of the recipient [entity]." *People v. Kisina*,14 N.Y.3d 153, 159 (2010) (emphasis added). In such a case, as long as there is "sufficient evidence establishing that [the recipient entity] 'kept or maintained' the [records], and that they evidence or reflect 'its condition' – specifically its legal obligation," then the business records element is satisfied. *Id.* at 160.

Similarly, in *People v. Weinfeld*, 65 A.D.2d 911 (4th Dept. 1978), the Fourth Department reversed the trial court and reinstated an indictment, including falsifying business records counts, where the evidence before the Grand Jury was sufficient to establish that the defendant falsified the business records of the Department of Social Services and Blue Shield of Western New York, Inc. "The claims [which were executed by the defendant and] submitted to Social Services and Blue Shield were made on forms provided by them and certified as required by them and evidenced and were intended to evidence in the records of the party charged with the claim certain *legal rights, duties and obligations* of the parties." *Id.* at 911-12 (emphasis added). *See also People v. Linardos*, 104 Misc.2d 56, 59 (Sup. Ct. Queens Co. 1980) (upholding false business records charges because the statute "applies also to those who supply erroneous information which results in false records" where the recipient "relie[s] upon the accuracy of the statements contained therein").

Cases cited by the defense are not to the contrary. In those cases, there was simply insufficient evidence that the records at issue were relied on by the recipient entity or affected its or the submitting entities rights or obligations. *See People v. Papatonis*, 243 A.D.2d 898, 900 (3d Dept. 1997) (stating that "presumably" the enterprise kept the employment application submitted to it by the defendant on file); *People v. Bel Air Equip. Corp.*, 46 A.D.2d 773 (2d Dept. 1974) (finding that the proof at trial did not establish that duplicate false vouchers maintained in the defendant's own records were "'kept or maintained' by defendants '*for the purpose* of evidencing or reflecting its condition or activity'" (emphasis in original)); *People v. Headley*, 37 Misc.3d

815, 831 (S. Ct. Kings Co. 2012) (holding that the records at issue did not "reflect[] a legal obligation" of the recipient entity, nor was the recipient entity "obligated to keep, maintain, and pay out money in reliance" on the records); *People v. Banks*, 150 Misc.2d 14, (S. Ct. Kings Co. 1991) (dismissing false business records counts where the records at issue "created no 'legal duties' or 'obligations to pay' of the [entities] to which they were submitted, and they created no 'legal rights' of the [submitting entity]").

1. There was competent evidence before the Grand Jury that the management representations letters were the business records of EY.

There was competent evidence before the Grand Jury demonstrating that the management representations letters at issue in Counts 72 through 74 – which were riddled with intentional misrepresentations – were the business records of EY, because they evidenced or reflected EY's condition or activity and were maintained in EY's records. GJ Tr. 20:16 – 23:23; 541:1-18; 669:3 – 670:7; 1485:22 – 1486:21. There was evidence before the Grand Jury that the management representations letters were actually drafted by EY and then edited by Dewey, and that they were required to be executed before the audit could be completed. GJ Tr. 702:20 – 703:16. The Grand Jury also heard evidence that in performing its audits, EY was required to comply with generally accepted auditing standards promulgated by the American Institute of Certified Public Accountants, including obtaining a management representations letter. GJ Tr. 2827:22 – 2828:8. For each of the years at issue, EY issued an unqualified audit opinion, providing that the audit had been performed in conformity with generally accepted auditing standards, which would include receiving a management

representations letter. GJ Exhs. C-022; C-023; C-024. Moreover, there was competent evidence before the Grand Jury that EY actually relied on the representations made in the letters. Each of the letters at issue, which EY helped prepare, provided that obtaining the representations contained in the letter was a significant factor that enabled EY to form its opinion regarding Dewey's financial statements. GJ Exhs. C-010; C-013; C-019.

This evidence was sufficient to establish that EY "kept or maintained [the management representations letters] for the purpose of evidencing or reflecting its condition or activity." P.L. § 175.00(2). Such a conclusion is rational, first, because EY participated in drafting the letters; second, because EY "relied upon the accuracy of the statements contained" in the letters, *Linardos*, 104 Misc.2d at 59; and third, because the letters "related to [the] obligations on the part of [EY]," *Kisina*,14 N.Y.3d at 159, under generally accepted auditing standards, and maintaining the letters evidenced that EY had complied with those obligations.

2. There was competent evidence before the Grand Jury that the compliance certificates were the business records of the various financial institution lenders, investment management companies, and insurance companies.

There was competent evidence before the Grand Jury demonstrating that the compliance certificates at issue in Counts 78 through 104 – which falsely claimed that there had been no event of default under Dewey's respective credit or note agreement and which contained additional intentional misrepresentations – were the business records of the entity named in the Indictment because they evidenced or

reflected that entity's condition or activity. These documents were maintained in the respective entity's records, GJ Tr. 15:14 – 18:8; 1720:8 – 1722:13; 1979:21 – 1982:6; 2040:18 – 2043:3; 2404:15 – 2406:20; 2477:16 – 2480:1; 2519:18 – 2522:6; 2573:18 – 2575:19; 2639:21 – 2641:25; 2666:6 – 2667:25; 2862:18 – 2864:14; 2950:9 – 2952:5; 3077:5 – 3079:2, and were required under the terms of Dewey's various credit agreements and the note purchase agreement. GJ Tr. 574:2-6; GJ Exhs. B-001; E-040; F-009; F-032; G-008; I-001; I-006. In the certificates, among other things, Dewey was required to certify there had been no event of default. GJ Tr. 226:9-13. The Grand Jury heard evidence that an event of default would terminate a lender's obligation to continue to lend under a credit agreement, GJ Tr. 1743:10-12, thereby allowing the lender to prohibit Dewey from drawing on its lines, foreclose on the loan, and seek satisfaction from collateral. GJ Tr. 201:3-7; 581:13-25. An event of default would also allow lenders to change pricing on the facility or demand a change in the terms of the agreement. GJ Tr. 227:5-12. An event of default likewise affected the legal rights of Dewey and the investors under the note purchase agreement. GJ Tr. 265:21 – 266:19; 285:20 – 286:13. The fact that an event of default altered the legal rights of Dewey, the lenders, and the investors was borne out by the terms of the various credit agreements and note purchase agreement before the Grand Jury. GJ Exhs. B-001; E-040; F-009; F-032; G-008; I-001; I-006. Moreover, there was evidence before the Grand Jury that entities relied on the accuracy of the compliance certificates in deciding to continue to allow Dewey to draw on its lines of credit. GJ Tr. 218:3-7; 1750:17-21; 2005:9-13; 2056:8-12; 2685:22 – 2686:2; 2878:1-5.

It was rational for the Grand Jury to infer that each entity named in Counts 78 through 104 "kept or maintained [the compliance certificates] for the purpose of evidencing or reflecting its condition or activity." P.L. § 175.00(2). Such a conclusion was rational, first, because the compliance certifications affected the "legal obligations" of Dewey, the lenders, and the investors, *Kisina*,14 N.Y.3d at 160; and second, because the lenders were obligated to "pay out money in reliance on the false information submitted by [Dewey]." *Headley*, 37 Misc.3d at 831.

iii. There was competent evidence before the Grand Jury that the defendants are criminally liable for the business records charges.

Defendant Davis argues that "no evidence supports the notion that he himself made the entries, directed someone else to do so, or undertook activities which caused the firm to book false entries."[13] Davis Memorandum, at 13. "Without evidence that Mr. Davis made or caused false entries to be made at Dewey, Counts 17 through 50 and 62 through 71 must fail." *Id.* Similarly, defendant Warren argues that the Grand

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[13] In support of his argument, defendant Davis quotes a January 3, 2009, email in which he states to a client: "[Partner F] and I have been discussing the payment situation and wanted to solicit your continued help. I understand tomorrow will see people back to work and your assistance in connections [sic] with this matter is greatly appreciated.'" Davis Memorandum, at 13. Defendant Davis argues that his "email cannot, under any interpretation, be construed as a request for a backdated check." *Id.* To the contrary, when viewed in context, this email cannot be construed as anything *but* a request for a backdated check. Defendant Davis sent the email *knowing* that he was asking for a backdated check, because the day before, January 2, Partner F asked defendant Davis to do so. Partner F wrote:

> I assume that, unfortunately, the money did not arrive by year-end. If that is the case I will now continue to push the check route, as per my last e-mails . . . .
>
> My thought is that you re-emphasize how important it is the these funds are credited to '08 and reiterate this can still be achieved if they give us a check dated December 31 at some point next week. It would also be worthwhile to mention that we have agreed the same approach with a few other major clients.

GJ Exh. Q-115; *see also* GJ Tr. 1348:21 – 1350:17.

Jury could not have heard evidence that he made or caused the five business records entries with which he is charged. Warren Memorandum, at 3-6.

Defendants Davis and Warren each fails to acknowledge that he can be held criminally liable for the conduct of others if, "acting with the mental culpability required for the commission [of the offense], he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." P.L. § 20.00. *People v. Morris*, 28 Misc.3d 1215(A); 2010 N.Y. Misc. LEXIS 3484 (S. Ct. N.Y. Co. 2010), which is discussed by defendant Warren, *see* Warren Memorandum, at 5, actually supports this unassailable proposition, that the accessorial liability rule applies to charges under Article 175 of the Penal Law.[14] See 2010 N.Y. Misc. LEXIS 3484 at 100-01. There was legally sufficient evidence before the Grand Jury that, pursuant to section 20.00 of the Penal Law, defendant Davis is criminally liable for Counts 17 through 50 and 62 through 71, GJ Tr. 3175:5 – 3176:4; 3256:19 – 3258:7; GJ Exh. Q-279, and defendant Warren is criminally liable for the false business records counts with which he is charged. GJ Tr. 3180:21 – 3184:20; GJ Exhs. Q-153; Q-154; Q-187.

3. Competent evidence before the Grand Jury made out a *prima facie* case of conspiracy.

Defendants Davis, DiCarmine, and Sanders ask the Court to review the minutes "to determine whether, with respect to each count of the indictment and with respect to each defendant separately, a *prima facie* case of conspiracy existed without

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[14] Nor is it of any moment that the People did not specifically charge these defendants as accomplices in the Indictment. "The People are not required to specify in an indictment whether a defendant is being charged as a principal or as an accomplice. For charging purposes, the distinction between principal and accomplice is academic." *People v. Guidice*, 83 N.Y.2d 630, 637 (1994).

recourse to statements made by any co-conspirator, and dismiss any count against any defendant where that standard was not met." Joint Memorandum, at 28. The defendants make similar arguments in their respective supplemental memoranda. *See* Davis Memorandum, at 6-9; DiCarmine Memorandum, at 5; Sanders Memorandum, at 3-5.

"A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule." *People v. Tran*, 80 N.Y.2d 170, 179 (1992) The rule regarding the use of coconspirator statements was succinctly laid out by the Court of Appeals in *People v. Salko*:

> As a general rule, an admission made by one defendant is not binding upon a codefendant. The rule is otherwise, however, where codefendants are partners in crime such that each defendant can be viewed as acting as an agent for each defendant engaged in the criminal partnership. United by this privity of obligation, defendants engaged in a conspiracy are bound by one another's declarations to the same extent that a principal is bound by the declarations of his agent. Thus, any declaration by a conspirator made during the course of and in furtherance of the conspiracy is admissible against a coconspirator as an exception to the hearsay rule.
>
> This exception is not limited to permitting introduction of a conspirator's declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be invoked to support introduction of such declaration to prove a coconspirator's commission of a substantive crime for which the conspiracy was formed. However, whether utilized to sustain introduction of a hearsay declaration of a conspirator to prove a coconspirator's complicity in the conspiracy or a substantive crime, this evidence may be admitted only upon a showing that a *prima facie* case of conspiracy has been established. Of course, the determination whether a *prima facie* case of conspiracy has been established must be made without recourse to the declarations sought to be introduced.

47 N.Y.2d 230, 237-38 (1979) (internal citations and quotation marks omitted).

Of course, a defendant's own statements can be used to make out a *prima facie* case of conspiracy. "[W]here the defendant ma[kes] admissible statements . . . linking defendant with the witness coconspirator[, and t]hose statements by themselves are *prima facie* proof of the predicate conspiracy, [they] render[] admissible a coconspirator's hearsay statements." *Tran*, 80 N.Y.2d at 179-80. Also, statements of a coconspirator can be used if they fall under another exception to the hearsay rule or are not hearsay. *See Salko*, 47 N.Y.2d 239-40. Finally, "[n]ot to be slighted in the resolution of this question is the People's burden of proof: to introduce these declarations they need not prove defendant's participation in the conspiracy beyond a reasonable doubt, as they must to sustain a conviction, but need only establish a *prima facie* case of conspiracy." *Salko*, 47 N.Y.2d at 240. Here, there was *prima facie* evidence that each of the three defendants, as well as defendant Warren, was involved in a conspiracy to commit scheme to defraud, as well as the other charges contained in the indictments.

There was overwhelming, competent, non-hearsay testimony before the Grand Jury establishing the existence of a conspiracy at Dewey as described above. The only question is whether competent, non-hearsay evidence before the Grand Jury established each defendant's participation in the conspiracy.

There was competent, non-hearsay evidence before the Grand Jury that Dewey did not meet its cash flow covenant beginning in 2008. GJ Tr. 566:15 – 570:14; 580:12 – 581:1; 582:16-23; 694:11 – 697:25; 740:1-20; 1537:7 – 1538:13; 3165:5 –

3168:13; 3180:21 – 3181:6; 3184:7 – 3183:19; 3229:4 – 3231:16; 3258:8 – 3260:1. There was competent, non-hearsay evidence before the Grand Jury from which it rationally could infer that each of the defendants was informed that Dewey would not meet its covenants for 2008.[15] GJ Tr. 299:2 – 302:3; 3391:10 – 3393:16; 3399:25 – 3407:4; GJ Exhs. Q-009 – Q-010; Q-155 – Q-156; Q-165; Q-188; Q-270; Q-277 – Q-278; Q-286 – Q-287; Q-298 – Q-299. This is true for future years as well. GJ Tr. 1339:25 – 1346:7; 1895:24 – 1898:10; 1902:11 – 1903:20; 3207:15 – 3208:25; 3248:5 – 3256:15; 3381:3 – 3389:11; 3398:10 – 3399:24; 3408:5 – 3412:21; 3413:6 – 3417:3; GJ Exhs. Q-080; Q-112; Q-161; Q-180; Q-216; Q-279; Q-282; Q-291; Q-293 – Q-294. There was also competent, non-hearsay evidence before the Grand Jury that each defendant engaged in conduct fraudulently to help Dewey appear to have met its covenant requirements:

- Defendant Davis: GJ Tr. 1346:9 – 1352:22; 3254:19 – 3258:7; 3282:5 – 3283:1; GJ Exhs. Q-115 – Q-117; Q-297.
- Defendant DiCarmine: GJ Tr. 238:23 – 244:5; 1895:24 – 1898:10; 2218:11 – 2234:5; 2618:12 – 2619:7; 3165:5 – 3167:8; 3223:3 – 3223:17; 3226:11 – 3227:17; 3262:14 – 3268:1; 3274:7 – 3278:14; 3282:5 – 3283:1; 3290:5 – 3294:20; 3399:25 – 3400:19; GJ Exhs. Q-117; Q-165; Q-204 – Q-205; Q-272; Q-295; Q-304.

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15 Although some of the exhibits listed throughout this section contain or refer to statements made by defendant Sanders and other individuals; those statements are not being used here for their truth, but rather for the fact that they were said and their effect on the readers – the other defendants. Consequently, they are not hearsay.

- Defendant Sanders: GJ Tr. 238:23 – 250:11; 698:12 – 700:21; 1346:9 – 1348:20; 1354:10 – 1365:21; 1895:24 – 1898:10; 2196:12 – 2210:3; 2218:11 – 2234:5; 2247:6 – 2248:4; 2618:12 – 2619:7; 3165:5 – 3170:17; 3172:1 – 3176:11; 3205:6 – 3209:10; 3209:16 – 3212:15; 3214:22 – 3216:25; 3221:22 – 3222:9; 3223:3 – 3223:17; 3226:11 – 3227:17; 3240:10 – 3244:21; 3254:19 – 3258:7; 3262:14 – 3268:1; 3274:7 – 3278:14; 3282:5 – 3283:1; 3287:18 – 3290:1; 3290:5 – 3294:20; 3324:19 – 3338:15; 3344:1 – 3349:7; 3399:25 – 3400:19; GJ Exhs. Q-013; Q-038; Q-113 – Q-115; Q-117; Q-153 – Q-156; Q-164 – Q-166; Q-186; Q-188; Q-190 – Q-191; Q-193 – Q-195; Q-202 – Q-207; Q-213; Q-221; Q-237; Q-272; Q-277; Q-279; Q-293 – Q-295; Q-304.
- Defendant Warren: GJ Tr. 1871:10 – 1875:8; 3167:9 – 3170:17; 3186:12 – 3187:4; 3211:14 – 3212:15; GJ Exhs. Q-160; Q-166; Q-187; Q-188.

This evidence provides *prima facie* proof that each of the defendants was engaged in the conspiracy.[16]

One example of this conduct warrants mention. Defendant Davis argues that two of his emails requesting backdated checks are not evidence of a conspiracy, because they are not in fact emails requesting backdated checks. Davis Memorandum, at 7-8. The first of these emails is addressed above in footnote 13 and was clearly a request for a backdated check. Defendant Davis makes the additional argument that

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16 This same evidence – along with the evidence establishing legal sufficiency of the scheme to defraud count – established the legal sufficiency of the conspiracy count of the Indictment. *See* Davis Memorandum, at 5-10; Warren Memorandum, at 8-9.

"even if this email could be construed as a request for a check bearing an earlier date, that is not itself evidence that Mr. Davis entered into an illicit agreement to commit scheme to defraud. Indeed, . . . no such backdated check was ever received from this client as a result of Mr. Davis's email . . . ." Davis Memorandum, at 7-8. But actual receipt of a backdated check is not necessary to make out a *prima facie* case of conspiracy. *See People v. Ribowsky*, 77 N.Y.2d 284, 293 (1991) ("The function of the overt act in a conspiracy prosecution is simply to manifest that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. The overt act must be an independent act that tends to carry out the conspiracy, but need not necessarily be the object of the crime." (internal citations, alterations, and quotation marks omitted)).

With respect to the second email, defendant Davis argues that he:

> correct[ed] an email that might be read as eliciting backdated checks in favor of one simply stating the firm's financial accounting policies. The fact that the Chairman of the firm amended an ambiguous email that was going to be broadcast to a number of the firm's partners, in order to accurately state the firm's account policies, is hardly evidence of a crime.

Davis Memorandum, at 8. An examination of the full course of events shows that defendant Davis grossly mischaracterizes that email chain. An employee sent defendant Sanders and Frank Canellas a draft form email to be sent to certain partners that concluded, "It is imperative that you contact every one of these clients first thing Monday morning [January 4] and ask them to send us a check dated 12/31 for the amount listed above." GJ Exh. Q-002. On January 1, 2010, defendant Sanders then forwarded the email to defendants Davis and DiCarmine, writing, "Any comments? I'd

like to send this to each partner that has a balance that we think we might be able to get. I'd like to get these out tomorrow [January 2]." *Id.* Defendant DiCarmine responded that same day, "No reason not to send it. It doesn't disclose the final #, just what was left on the table. I'd go with it." *Id.* On January 2, defendant Davis responded, "I would change the wording of the last sentence slightly to say 'It is imperative that you contact each of these clients on Monday morning [January 4]. All payments through checks dated December 31 will be included in revenues for 2009.'"[17] *Id.*

Defendant Davis did not simply "amend an ambiguous email." The Grand Jury could rationally conclude that he intentionally altered the email both to clarify and to blur. As originally written, the email directly requested backdated checks, but it did not state how backdated checks would be applied. As altered by defendant Davis, the email clarified that backdated checks would count towards the prior year, but it blurred the request for backdated checks. It nonetheless still requested backdated checks: Otherwise, there would be no reason to inform partners who were contacting clients for checks in January that December dated checks would count towards the prior year.

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17 Again, in determining whether non-hearsay evidence before the Grand Jury made out a *prima facie* case of conspiracy involving defendant Davis, the original email can be considered for the fact that it was said and its effect on defendant Davis and is therefore non-hearsay. Defendant Sanders's email asks a question, which is not hearsay because it is not offered for its truth, and makes two statements that can again be considered for the fact that they were said and their effect on defendant Davis. The email from defendant DiCarmine can be considered for determining a *prima facie* case of his participation in the conspiracy but would not be used in determining defendant Davis's participation.

4. The unsworn conclusory "facts" alleged by the defense, which are speculative, collateral, and not exculpatory, do not warrant dismissal of any of the counts.

Throughout their filings, the defendants posit certain "evidence" and argue that "if the prosecutors' presentation to the grand jury was fair and thorough," the "evidence" was presented to the Grand Jury.[18] *See, e.g.*, Joint Memorandum, at 10-11; 21. Defendants Davis, DiCarmine, and Sanders also argue that certain of this "evidence" is exculpatory, and the Court should dismiss the Indictment if the "evidence" was not put before the Grand Jury. *Id.* at 11. This "evidence" should be discounted, and the legal argument must fail.

The "evidence," which in many cases is simply conclusory argument, is unsworn and must be discounted. *See Byrd v Roneker*, 90 AD3d 1648, 1649 (4th Dept. 2011) ("[I]t is well settled that unsworn allegations of fact in a memorandum of law are without probative value." (internal quotations and alterations omitted)).

With respect to dismissal for the People's failure to present exculpatory evidence to the Grand Jury, even if such evidence existed, the People are not required to present all exculpatory evidence to the Grand Jury. While the prosecution owes "a duty of fair dealing to the accused and candor to the courts," *People v. Pelchat*, 62 N.Y.2d 97, 105:

> The People generally enjoy wide discretion in presenting their case to the Grand Jury and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused even though such information undeniably would allow the Grand Jury to make a more informed determination. In the ordinary case, it is the defendant who, through the

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18 The People do not concede the accuracy of any of the factual assertions made by the four defendants.

> exercise of his own right to testify and have others called to testify on his behalf before the Grand Jury, brings exculpatory evidence to the attention of the Grand Jury.

People v. Lancaster, 69 N.Y.2d 20, 25-26 (1986). The legal standards cited by the defense do not address when evidence must be presented to the Grand Jury, but rather when the Grand Jury must be charged on a legal defense. *See People v. Valles*, 62 N.Y.2d 36, 38 (1984) ("Viewed from this perspective, the question of whether a particular defense need be charged depends upon its potential for eliminating a needless or unfounded prosecution.").

Here, there is simply no exculpatory evidence that should have been put before the Grand Jury but wasn't. Indeed, if there were, the defendants should have made efforts to get that evidence before the Grand Jury themselves. Each of the four defendants knew that District Attorney's Office was conducting an investigation in conjunction with the Grand Jury. *See* Moser Aff., at ¶ 15. "Defendant[s] failed to exercise [their] right to bring exculpatory evidence to the Grand Jury's attention by [their] own testimony or that of others testifying on [their] behalf." *People v. Mitchell*, 82 N.Y.2d 509, 515 (1993). Their quest now to have the Indictment dismissed for the People's failure to put alleged – but unsworn – exculpatory "evidence" before the Grand Jury must fail.

5. The language in Count One of the Indictment was properly approved by the Grand Jury and should not be stricken, because evidence supporting the allegations are relevant and admissible to the charge.

Defendants Davis, DiCarmine, and Sanders move to strike some of the factual allegations contained in pages two through eight of Count One of the

indictment, which charges all four defendants with scheme to defraud in the first degree. Joint Memorandum, at 28. These factual allegations are divided into the subsections "Background," "The Scheme," "The Fraudulent Methods," "Covenant Misstatements," "The Private Placement and the Revolving Line of Credit," and "The Bankruptcy," and immediately follow the paragraphs that track the statutory language of P.L. §190.65(1)(b).

New York law does not expressly grant a judge power to strike any language from an indictment. *See People v. Pustilnik*, 14 Misc.3d 1237(A), at *44 (Sup. Ct. N.Y. Co. 2007). In *Pustilnik*, Justice Hayes looked to federal law,[19] where the standard for striking language from an indictment is an exacting one and thus, the power is rarely exercised. *Id.* (*citing United States v. DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)). While not controlling, given the absence of New York law, Justice Hayes found the federal standards instructive. *See id.* at *45. In the federal system, a motion to strike surplusage "'where it is clear that the allegations are not relevant to the crime charged and are inflammatory and prejudicial' in nature." *Id.* at *44 (*quoting DePalma*, 461 F. Supp. at 797). "Therefore, 'if the evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken.'" *Id.* at *45 (*quoting DePalma*, 461 F. Supp. at 797). The defendants cannot satisfy that standard here.

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[19] Unlike New York State courts, federal courts are specifically granted the power to strike surplusage in an indictment. *See* Fed. R. Crim. Proc. 7(d) ("Upon the defendant's motion, the court may strike surplusage from the indictment or information.").

The defendants claim that this "'speaking' portion" of the indictment "has no place in an indictment under any circumstances." Joint Memorandum, at 28. But this is not true. Section 200.50(7)(a) of the Criminal Procedure Law specifically provides that the facts asserted in an indictment must be stated with "sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation." The Scheme at issue in Count One took place over the course of approximately three and a half years and involved many fraudulent methods and a multitude of misrepresentations. Thus, it is not merely within the power of the Grand Jury, it is particularly appropriate to return an indictment that provides a factual statement sufficient for both the defendants and the Court to be properly noticed of the nature of the conduct at issue.

The defendants appear to take particular umbrage with the following sentence from the Indictment: "As part of the efforts to ensure the success of the Scheme, the Schemers lied to and otherwise misled the Firm's partners and auditors, as well as others." See Joint Motion, at 31. The defendants compare this sentence to impermissible prosecutorial comment on the credibility of the defendant's testimony or that of other witnesses. But that is not what this sentence is. The sentence merely makes a factual assertion about how the Scheme worked. Moreover, it does not name any individual defendant. It is particularly striking that the defendants claim that this sentence "has nothing to do with the crimes charged in the indictment, making this reference not only inflammatory but improper," Joint Memorandum, at 31, n.15, while at the same time arguing, for example, that they cannot be held accountable for the

private placement because it was authorized by the Firm's Executive Committee and Firm lawyers "participated in drafting and reviewing the documents that effectuated" the placement. DiCarmine Memorandum, at 6. That lawyers at the Firm authorized and worked on the private placement is not particularly enlightening if these lawyers were "lied to and otherwise misled." In short, because this factual allegation is both related to the crime and supported by competent evidence submitted to the Grand Jury, it must not be stricken.

The only other language from Count One that the defendants specifically quote in their claim is: "'the Firm declared bankruptcy; thousands lost their jobs; and the Firm's creditors were left owed hundreds of millions of dollars'" Joint Memorandum, at 30. The defendants then suggest there "is a very good argument" that the People caused this sequence of events. *Id.* at 30, n. 14. What the defendants fail to do is challenge the accuracy of this factual assertion or explain how it is unrelated to the crime. This is because, of course, they cannot; the defendants effectively concede the accuracy of this statement in their attempt to blame the People for it. The language is merely a statement of undisputed facts; facts that mark the collapse of the defendants' scheme, contributed to its uncovering, and are unquestionably relevant to the charge. Therefore, again, this language should not be stricken.

Defendants Davis, DiCarmine, and Sanders further argue, without any support, that the Court should strike the above-described portion of Count One from the Indictment if the "'facts' [were] not expressly found by the grand jury and [the] language [was] not approved by the grand jury." Joint Memorandum, at 29-30.

Whatever the validity of this unsupported argument may be, it must fail. As evidenced in the introduction to this memorandum, competent evidence supporting these factual allegations was duly presented to the Grand Jury, and the Grand Jury specifically deliberated and voted to include these factual allegations as part of the Indictment. GJ Tr. 3497:12 – 3498:5; 3506:6 – 3521:4; 3524:3 – 3526:12.

Even assuming that this Court has the power to strike surplusage from the Indictment, the facts alleged in Count One are both admissible and relevant to various charges, providing additional particulars and details about how the crimes were committed and the defendants' knowledge and intent. None of the allegations is merely inflammatory and prejudicial. Thus, the defendants' motion to strike should be denied.

6. Counts One and 105 are not multiplicitous, because each requires proof of an additional fact that the other does not.

Defendants Davis, DiCarmine, and Sanders next argue that the Court should dismiss Count One of the indictment, because it is multiplicitous with Count 105. As specified in the indictment, the conduct under the Penal Law scheme to defraud charged in Count One includes many different fraudulent acts, among which was misrepresenting the Firm's financial condition in connection with the April 2010 offering of securities. Count 105 charges a specific Martin Act scheme to defraud under the General Business Law only for the defendants' conduct in promoting and selling the securities in the April 2010 offering. Because some of the defendants' criminal conduct that constitutes part of the proof of Count One is also encompassed by the defendants' criminal conduct that proves Count 105, the defendants reason that the

two counts are multiplicitous. The defendants' argument misconstrues the definition of multiplicity.

The Court of Appeals has held that an indictment is multiplicitous "when a single offense is charged in more than one count." *People v. Alonzo*, 16 N.Y.3d 267, 269 (2011). On the other hand, counts are not multiplicitous if "each count requires proof of an additional fact that the other does not." *People v. Kindlon*, 217 A.D.2d 793, 795 (3d Dept. 1995); *see also People v. Nailor*, 268 A.D.2d 695, 696 (3d Dept. 2000); *People v. Henson*, 263 A.D.2d 550 (3d Dept. 1999). Here, in part because their legal elements are different and in part because their factual bases are different, Count One requires proof beyond that which is necessary to prove Count 105, and Count 105 similarly requires proof beyond that which is necessary to prove Count One. Therefore, the two counts cannot be multiplicitous.

In *People v. Alonzo*, a case the defendants cite prominently, in a single incident, the defendant sexually abused two women by groping the breasts and buttocks of both of them. 16 N.Y.3d at 269. The indictment charged him with two counts of sexual abuse against each woman, one for touching the breasts and one for touching the buttocks. *Id.* The Court held, "As a general rule . . . where a defendant, in an uninterrupted course of conduct directed at a single victim, violates a single provision of the Penal Law, he commits but a single crime." *Id.* at 270. The Court reasoned that a single physical attack by one person against another is normally a single assault, and that it would be an abuse to charge a defendant with ten separate assaults for striking his victim ten times during a single attack. *Id.*

The conduct the defendants challenge here is quite different. As outlined in the Indictment language of Count One, the defendants schemed to conceal the Firm's true financial condition from their lenders and others over a period of years. That concealment was carried out by changing from true to false certain entries in the Firm's financial records in ever-increasing categories and amounts and by mischaracterizing incoming funds to satisfy the covenants of their bank loans. As such, the defendants' conduct was not confined to a single incident like the defendant's conduct in *Alonzo*. Thus, each incident of concealment and misstatement constituted its own separate crime. The scheme in Count One encompasses the defendants' overall fraudulent scheme from start to finish. In order to prove their guilt of this scheme the evidence will need to show, among other things, that the defendants obtained property with a value in excess of $1,000 from one or more person. The Martin Act charge in Count 105 does not require this same proof. It requires only proof that the defendants obtained property. One of the means the defendants used to accomplish the fraudulent scheme in Count One was through the April 2010 private placement. But it was not the only means they used, and many of the other means are also set forth in the language of Count One. Indeed, a jury could determine that the private placement was not fraudulent and nevertheless find the defendants guilty of Count One, because other facts show that the defendants' activities were confined to falsifying the Firm's books unrelated to the private placement.

The scheme in Count 105 is quite different. In order to prove the guilt of the three defendants charged in that scheme the evidence will need to show, among

other things, that during a much briefer period the defendants intended to defraud at least ten persons or obtain property from at least ten persons by false and fraudulent pretenses, representations, and promises. Count One only requires proof of such an intent with respect to more than one person. Count 105 also requires proof that property was obtained while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation, or purchase of a security. Count One does not require such proof. Thus, the proof for Count 105 must show at least eight additional victims, and it must show that the fraud occurred during a transaction in securities, the private placement. A jury could fine the three defendants guilty of Count 105, and not guilty of Count One, for example if it determines that the defendants intended to defraud the investors in the private placement, but not the banks. It could arrive at the opposite verdict if it finds that the defendants defrauded fewer than ten people, or if it finds that the banks were defrauded, but not the insurance companies who bought the securities in the private placement.

Thus, Count One requires proof of facts that Count 105 does not require, and Count 105 requires proof of facts that Count one does not require. *See Kindlon,* 217 A.D.2d 793 at 795 ("An indictment is not multiplicitous if each count requires proof of an additional fact that the other does not."). Moreover, each of the two counts, while having some elements in common with the other, also has elements different from the other and also has a timeframe charged that differs from the other. Those different elements and timeframes dictate that different facts must be proved to sustain both counts. Therefore, Counts One and 105 cannot be multiplicitous. In any

event, "[w]here the evidence reasonably permits a grand jury to find that either one or two crimes occurred, an indictment charging two should not be dismissed: When the case is tried, the court can reevaluate the evidence and decide how many crimes the trial jury should consider." *Alonzo*, 16 N.Y.3d at 271.

7. The Grand Jury was properly formed; its proceedings were proper; and it was properly instructed on the law.

a. The Grand Jury was properly instructed on who could deliberate and vote.

Defendants Davis, DiCarmine, and Sanders also request that the Court inspect "the grand jury records to determine whether at least twelve members of the grand jury who voted to indict each defendant with respect to each count were present for all of the essential and critical evidence" and that the People "properly instructed the grand jury that only those jurors who have heard all of the essential and critical evidence could vote." Joint Memorandum, at 33. The defendants further request that the Court dismiss the indictment if the People did not instruct the Grand Jury that only those jurors who "heard all of the essential and critical evidence could participate in deliberations." Joint Memorandum, at 34.

The Court of Appeals has made abundantly clear that "a valid indictment require[s] the concurring vote of at least 12 jurors who . . . heard the essential evidence." *People v. Collier*, 72 N.Y.2d 298, 301 (1988). The Court of Appeals has specifically reserved on "the issue whether – in addition to the necessary 12 – jurors who have not heard all the essential and critical evidence can also participate in deliberations or vote." *Id.* at 303, n.2. The defendants' suggestion that the law is otherwise is simply incorrect.

As the defendants acknowledge, at least the Third Department has held that "the possibility that there were jurors who had not heard all of the essential and critical evidence present and participating in the deliberation process does not warrant dismissal of the indictment[]." *People v. Perry*, 199 A.D.2d 889, 892 (3d Dept. 1993). Absent a contrary holding from the Court of Appeals or the First Department, *Perry* is binding on this Court, *see People v. Turner*, 5 N.Y.3d 476, 482 (2005); *Nachbaur v. Am. Transit Ins. Co.*, 300 A.D.2d 74, 76 (1st Dept. 2002), and it is surprising that defense counsel would block quote the non-binding statement of a concurring Judge, while relegating controlling precedent to a "but see" citation.

In any event, out of an abundance of caution, the People instructed the Grand Jury that only those Grand Jurors who had heard all the essential and critical evidence with respect to a count could deliberate and vote with respect to that count. GJ Tr. 3447:12-17. Before the People provided the legal charge to the Grand Jury and asked the Grand Jury to vote on the counts submitted, the People analyzed the Grand Jurors' attendance records for all dates that evidence was presented to the Grand Jury. The People then cross-referenced these attendance records with the specific evidence presented on each date. Based on that analysis, the People determined which Grand Jurors were permitted to deliberate and vote on each of the charges being submitted to them. The People then noted on the charge sheet that was provided to the Grand Jurors which Jurors were not permitted to deliberate or vote on which charges. GJ Tr. 3501:21-3502:1; 3503:9 – 3504:15. Copies of the charge sheet and attendance records for the Grand Jury are being provided to the Court for *in camera* review.

b. The Grand Jury was properly formed and properly in existence at the time the Indictment was returned.

By Order of the Supreme Court of the State and County of New York, a Grand Jury was convened for the purpose of hearing the presentation of evidence in this case and others. Thereafter, by subsequent Order of the Supreme Court of the State and County of New York, in accordance with C.P.L. §190.15(1), and upon the declaration of both the People and the foreperson of the Grand Jury, the existence of said Grand Jury was extended until at least the date that the Grand Jury returned the Indictment in this case. The motion by defendants Davis, DiCarmine, and Sanders to dismiss the Indictment under the premise that the Grand Jury that returned the Indictment was not legally in existence, *see* Joint Memorandum, at 35, should be denied. Copies of the relevant Affirmations, Affidavits and Orders pertaining to the formation of the Grand Jury and the extension of its term are being provided to the Court for *in camera* review.

c. The Grand Jury was properly charged on the law.

Defendant Warren asks the Court to "review the minutes to determine whether the grand jury was properly instructed on the elements of the crimes with which he is charged." Warren Memorandum, at 3, n.1. Defendants Davis, DiCarmine, and Sanders ask the Court to ensure the Grand Jury was instructed with respect to certain accounting issues and the use of coconspirator statements. *See* Joint Memorandum, at 21-28.

Given the functional difference between a grand jury and a petit jury, the grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law. . . [i]t [is] sufficient if the District Attorney provides 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*, 49 N.Y.2d 389, 394-95 (1980). "This does not mean, however, that the Grand Jury must be charged with every potential defense suggested by the evidence." *People v. Valles*, 62 N.Y.2d 36, 38 (1984). The prosecution "ordinarily need instruct only as to those 'complete' defenses which the evidence will support." *People v. Lancaster*, 69 N.Y.2d 20, 26 (1986). Here, the Grand Jury was properly instructed on the law. GJ Tr. 2133:1, *et seq.*; 3444:23, *et seq.*

Defendants Davis, DiCarmine, and Sanders additionally argue that the Grand Jury should have been instructed that under the doctrine of constructive receipt "that December dated checks could under some circumstances appropriately be counted in December income even when they had been received in January." Joint Memorandum, at 24. They fail to state what those circumstances might be. "A check in the hands of a taxpayer ordinarily means that funds are immediately available. Therefore, the general rule is that a check constitutes taxable income to a cash-basis taxpayer *when received*." *Walter v. United States*, 148 F.3d 1027, 1029 (8th Cir. 1998) (emphasis in original).

However difficult the defense tries to make the concept of constructive receipt, this much is certain: In January, one cannot request that a check be cut with a December date in order to post it to the prior year. Even the Treasury Regulation cited by the defendants makes this clear. When an individual in 2009 asks for a check backdated to 2008, the money was not "credited to his account, set apart for him, or otherwise made available [in 2008] so that he may draw upon it at any time, or so that he could have drawn upon it during [2008] if notice of intention to withdraw had been given." Treas. Reg. § 1.451-2(a). There was competent evidence before the Grand Jury that this practice was not legitimately available to an entity reporting its financial statements on the income tax basis of accounting. GJ Tr. 1570:23 – 1571:15; 2812:16-20; 2844:3-18; 2894:13-22; 2987:1-11.

Nor does it help defendants' cause to resort to the New York Uniform Commercial Code. *See* Joint Memorandum, at 23-24. Whatever the U.C.C. may mean in a commercial context, it does not rewrite time to make a backdated check exist at a time it did not, and it does not override federal tax rules. *Walter*, 148 F.3d at 1029; *Millard v. Commissioner*, 2005 T.C. Memo 192; 2005 Tax Ct. Memo LEXIS 192, *8 (2005) ("Petitioner's reliance on Georgia commercial statutes and related caselaw [sic] is misplaced. While State law creates legal interests and rights, it does not override the Federal doctrine of constructive receipt as set forth in the Code and the regulations, since it is Federal law that designates which of those interests and rights is taxed."). In any event, defendants' argument is that the People failed to instruct on the U.C.C., but

an instruction on the U.C.C. is not required in a criminal case where the date of a check is at issue. *People v. Tinsley*, 58 N.Y.2d 990, 993 (1983).

Defendants Davis, DiCarmine, and Sanders next argue that the Grand Jury should have been instructed that disbursements need only be written off in the year in which the firm makes a final determination not to bill the client. *See* Joint Motion, at 25. But such an instruction was unnecessary, as there was competent evidence before the Grand Jury from which they rationally could infer that the Firm *never* intended to charge through to clients the disbursement write-offs that were reversed as part of the Scheme. *See* GJ Tr. 595:7 – 596:3; 1852:17 – 1859:19; 1860:16 – 1861:16; 2213:15 – 2215:3; 2216:5 – 2218:10; 3212:16 – 3216:25.

Next, defendants Davis, DiCarmine, and Sanders argue that the Indictment must be dismissed "if the prosecutors neglected to instruct the [grand] jurors that these non-accountant defendants had a right to rely on the accounting advice given them by the firm's professional accounting staff." Joint Memorandum, at 26. Such an instruction was not required here. The instruction the defendants seek is a defense, and even assuming it is an exculpatory defense, "the evidence [before the Grand Jury] must establish that defense, requiring more from a defendant than a mere allegation." *People v. Mitchell*, 82 N.Y.2d 509, 514-15 (1993). Here, there was simply no evidence that the defendants were told that the false and fraudulent practices at issue in this case were appropriate or acceptable.

8. The People have provided all required particulars and discovery.

The defendants also complain that, although they have received in excess of a million documents in voluntary discovery, the People have failed in their obligation to provide required discovery, a bill of particulars, and *Brady* material. Without any factual basis, they speculate that, regardless of the People's disclosure of far more than they are entitled to under the law, the People misunderstand their disclosure obligations. After citing authority for the general notion that the People must provide *Brady* material and discovery, the defendants offer no statutory or case law supporting any of their specific requests, because there is none. Rather, they complain that they are entitled to long lists of materials that either do not exist or are not discoverable, and then claim that they are entitled to know whether the items on their wish lists exist or are not subject to discovery. Because the People have disclosed all the materials and information to which the defendants are entitled, as well as significantly more, the Court should deny the defendants' motion.

The defendants recognize that all discovery is governed by C.P.L. § 240.20(1), yet almost none of the items they request falls into any of the categories of property in the statute. In their papers, the defendants seek to justify their discovery requests by claiming that they have made a number of "reasonable and necessary" requests. Joint Memorandum, at 36. The defendants' statement highlights that while they themselves may deem their requests reasonable and necessary, those requests are not recognized by the law to be discoverable. For example, the first request in the letter of Edward J.M. Little, Esq., dated April 29, 2014, asks for, "Any and all property

provided by the trustee in bankruptcy for Dewey & LeBoeuf LLP ("Dewey"), his counsel or his agents." Understanding, as all parties surely do, that some of the property the trustee has provided may fit within the categories of discoverable property in the statute, and some may not, the People responded, "After a diligent search, we have produced all responsive property in our possession, with the exception of certain lists of employees and documents that were clawed back by Dewey & LeBoeuf LLP or the Dewey & LeBoeuf Liquidation Trust ("Dewey") under a claim of privilege (as more fully described in our letter to Counsel dated April 21, 2014)." Letter of A.D.A. Christopher Conroy, dated June 13, 2014, at 2 (hereinafter, "Conroy Letter").[20] A.D.A. Conroy's response specifies that the People searched the materials we possess; recognized that we had produced a significant volume of materials well before June 13, 2014; compared what we had already produced with what the statute requires us to disclose; determined that we had disclosed what the statute dictates (and significantly more); and identified that Dewey had improperly provided some privileged materials that it clawed back. It is simply disingenuous for the defendants to now claim that the People have taken a cavalier attitude to providing to the defendants the items the statute obliges us to give them.

Similarly, in paragraph 9 of Mr. Little's letter, he requests, "Any and all property provided by The American Lawyer." It is difficult to understand how anything the People may have received from a magazine could include:

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[20] A copy of this letter is attached as Exhibit H to the July 11, 2014, Affirmation of Austin C. Campriello in Support of Omnibus Motion.

> (a) a statement of one of the defendants made to law enforcement; (b) a transcript of a defendant's testimony before the grand jury; (c) a report of a physical or mental examination, or a scientific test made by a public servant or by a witness the People intend to call at trial; (d) a photograph or drawing made by a public servant or by a witness the People intend to call at trial; (e) a photograph, photocopy, or reproduction of property that the People had released pursuant to C.P.L. §450.10; (f) property obtained from any of the defendants (especially since the request was for property obtained from the magazine); (g) a recording the People intend to introduce at trial; (h) anything required to be disclosed pursuant to the New York or United States constitutions; or (i) the date, time, and place of the offense or any defendant's arrest.

C.P.L § 240.20(1). The People's response to this "reasonable and necessary" request was, "To the extent property exists, the defendants are not entitled to it at this time." Conroy Letter, at 2. A.D.A. Conroy's response clearly communicates that to the extent The American Lawyer gave us any materials, none of them falls into any of the nine categories C.P.L. § 240.20(1) requires the People to disclose. Despite the response's clarity, the defendants claim that they are entitled to more.

The defendants seem to desire lists of all property the People have and what we claim we need not disclose. They cite no legal authority that permits any court to entertain and satisfy their desire, because there is no such authority. The People have produced far more than required, have disclosed what we have done on the record and in writing. These documents were requested by the defense and were produced, to the extent possible, in the same manner received by the People. The People have provided them so that the defendants will have a fair opportunity to prepare their defenses in the manner they see fit. That the People may have not yet disclosed everything we have in our possession is of no moment. We have not yet given the defendants certain materials, like *Rosario* material, which according to the law is appropriately turned over

much closer to trial, and which we expect to disclose well in advance of what the statute requires. But we have disclosed everything the law requires that we disclose up to this point, and much, much more.

Similarly, the defendants complain that we have made "a blanket refusal to supply a bill of particulars," because our response to many of the defendants' requests is that the information they seek is evidentiary detail beyond the scope of a bill of particulars. Joint Memorandum, at 41-42. A bill of particulars is:

> a written statement by the prosecutor specifying . . . items of factual information which are not recited in the indictment and which pertain to the offense charged and including the substance of each defendant's conduct encompassed by the charge which the people intend to prove at trial on their direct case, and whether the people intend to prove that the defendant acted as principal or accomplice or both . . . . However, the prosecutor shall not be required to include in the bill of particulars matters of evidence relating to how the People intend to prove any item of factual information included in the bill of particulars.

C.P.L. § 200.95(1)

In essence, the statute instructs that the People must, for example, specify which document was falsified in a falsifying business records charge. What is not required is an exposition on what aspect of each false entry is false or what condition of an enterprise is evidenced by each entry. So, when the defendants seek such information in their requests it is entirely appropriate to answer as the People did.

The indictment charges each defendant with counts of falsifying business records in the first degree. For each such count, the Indictment reads, "The defendants . . . with intent to defraud and to commit another crime and to aid and conceal the commission thereof, made and caused a false entry in the business records

of an enterprise . . . ." In A.D.A. Conroy's letter, he explained, "The defendants acted as both principals and accomplices with respect to the counts in which they are charged." Letter of A.D.A. Conroy Letter, at 4. In their request for a bill of particulars, the defendants demand such information as, "whether each of the defendants caused each alleged false entry in the business records of each specified enterprise to be made (and if so who made the entry)," and "whether each of the defendants made or caused each alleged false entry in the business records of each specified enterprise with the intent to commit another crime (and, if so, what crime(s))," and "whether each of the defendants made or caused each alleged false entry in the business records of each specified enterprise with the intent to conceal the commission of another crime (and, if so, what crime(s))." In essence, their questions ask whether each of the defendants really committed the crimes with which he is charged. It is not in any way "a blanket refusal to supply a bill of particulars" for the People to respond to such questions as the People did.

As noted above, the statute requires the People to specify whether a defendant acted as a principal, an accomplice, or both. So when the defendants ask, "If charged as a principal, state how, and by whom each defendant was aided and abetted," and "for each act or omission alleged, also identify any other individuals whom the People allege participated in the act or omission," they are making demands that on their face seek information well beyond the scope of a bill of particulars. The fact that the defendants have made many such requests does not make any of them more appropriately addressed in a proper bill of particulars. As A.D.A. Conroy stated in his

letter, citing *People v. Davis*, 41 N.Y.2d 678, 680 (1977), "[a] bill of particulars serves to clarify the pleading; it is not a discovery device."

The People have provided all the law requires in a bill of particulars. The Court should reject the defendants' complaints that we have not provided more than they are entitled to.

All four defendants also protest that despite their requests for *Brady* material, the People have not provided to them as much exculpatory material as they speculate we should have.[21] In their papers, defendants Davis, DiCarmine, and Sanders attribute the lack of production to a difference of opinion as to what constitutes *Brady* material and to gamesmanship on the People's part; they scold the People for not taking our obligation seriously; and they suggest to the Court that it should order the People to provide lists of virtually everything we have so that the defendants can challenge whether the People have met our disclosure obligation. In reality the defendants' purpose is transparently to obtain as much information as possible and as early as possible about the seven cooperating witnesses, so that they can attack those witnesses at trial.

The People recognize that our duty to disclose exculpatory material is an ongoing one. It is possible that as we prepare for trial we may obtain additional information that could be exculpatory. Should that happen, we will disclose it promptly. We believe that we have already disclosed all such information that we now possess.

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21 On August 7, 2014, the People responded to defendant Warren's *Brady* request. See Warren Memorandum, at 20-21.

The mere fact that we might disclose additional information later does not mean that we have it now.

Moreover, the defendants' request that the Court require the People to make lists of materials we possess and explain item by item why each one should be disclosed or not disclosed under *Brady* is patently absurd and has no support in the law. The obligation to identify and disclose *Brady* material lies solely with the People, and the defendants' attempts to insert themselves into the process is merely a not-so-veiled way to try to get as much of an advantage as they can, in contravention of the law. Also, it can only distract the Court and the parties from preparing for the January 2015 trial toward which all parties are working.

Since the defendants have received far more than that to which they are entitled; since the People are actively aware of and will continue to disclose what the law requires; and since the defendants' request has no basis in either fact or the law, the Court should deny the defendants' requests.

9. The interest of justice neither requires nor supports dismissal of the charges against defendant Warren.

Defendant Warren also requests that the Court dismiss the case against him "in the interest of justice," pursuant to C.P.L. §210.40, by filing what is commonly referred to as a *Clayton* motion. The defendant recognizes that "[i]t is a rare case that presents circumstances so compelling that . . . the Court should dismiss [the charges] 'in furtherance of justice.'" Warren Memorandum, at 15. Faced with the challenge of demonstrating that this is that rare case, he argues that his education and work

accomplishments merit the dismissal of charges of having calculatedly defrauded lending institutions of millions of dollars. The defendant's presentation of his personal circumstances and his conduct in this case fails to demonstrate that conviction or prosecution of the defendant would constitute or result in injustice. C.P.L. §210.40(1).

The trial court's discretion to dismiss in the interest of justice should be 'exercised sparingly' and only in that 'rare' and 'unusual' case where it 'cries out for fundamental justice beyond the confines of conventional considerations.'" *People v. Insignares*, 109 A.D.2d 221, 234 (1st Dept. 1985) (internal citations and punctuation omitted); *see also People v. Stewart*, 230 A.D.2d 116, 122 (1st Dept. 1997), *app. dismissed*, 91 N.Y.2d 900 (1998); *People v. Perez*, 156 A.D.2d 7, 10 (1st Dept. 1990), *app. den'd*, 76 N.Y.2d 794 (explaining that a *Clayton* motion seeks "extraordinary relief"); *People v. Serrano*, 163 A.D.2d 497, 498 (2d Dept. 1990) ("A court's discretionary power to dismiss an indictment in the interest of justice is to be exercised sparingly."). This simply "is not one of those rare instances that warrants the exercise of the dismissal power provided a trial justice under CPL 210.40." *Insignares*, 109 A.D.2d at 234. The Legislature has declared that a trial court should exercise that power based only on "the existence of some *compelling* factor, consideration or circumstance *clearly* demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." C.P.L.§ 210.40(1) (emphasis added). As the Court of Appeals has admonished, a *Clayton* motion does not call for a trial court "to act on purely subjective considerations," but rather to perform "a sensitive balancing of the interests of the individual and of the People." *People v. Rickert*, 58 N.Y.2d 122, 126-27

(1983). To that end, a court "must, to the extent applicable, examine[] and consider, individually and collectively," the factors listed in the Criminal Procedure Law. C.P.L.§ 210.40(1).

"It is the District Attorney's prerogative to prosecute those who commit crimes, to bring charges or discontinue criminal proceedings, and to determine the nature of the charges preferred against a defendant. That prerogative should not be lightly abrogated by a court's exercise of its interest of justice power . . . ." *People v. Keith R.*, 95 A.D.3d 65, 67 (1st Dept. 2012). "Although the power to dismiss in furtherance of justice is, in theory, committed to the discretion of trial courts, trial courts granting such motions are routinely reversed and reminded by appellate tribunals that their discretion is not absolute and is to be exercised sparingly." Lawrence K. Marks, *et al.*, NEW YORK PRETRIAL CRIMINAL PROCEDURE § 5:27, at 459 (2007) (internal citations and punctuation omitted). The People may directly appeal an order granting a *Clayton* motion, C.P.L.§ 450.10(1), and like other appellate courts in the state, the Appellate Division, First Department reverses such orders frequently. *See, e.g.*, *Keith R.*, 95 A.D.3d at 70; *Stewart*, 230 A.D.2d at 125; *People v. Pittman*, 228 A.D.2d 225, (1st Dept. 1996); *Perez*, 156 A.D.2d at 10 (reversing trial court's grant of C.P.L.§ 210.40 motion as an abuse of discretion); *People v. Howard*, 151 A.D.2d 253, 256 (1st Dept. 1989), *lv. denied*, 74 N.Y.2d 811; *People v. Diggs*, 125 A.D.2d 189, 191-92 (1st Dept. 1986); *People v. Cruz*, 114 A.D.2d 769, 771-72 (1st Dept. 1985); *Insignares*, 109 A.D.2d at 234; *People v. Varela*, 106 A.D.2d 339, 340 (1st Dept. 1984); *People v. Reyes*, 148 Misc.2d 227, 228 (N.Y. App.

Term 1st Dept. 1990). In sum, a motion to dismiss an indictment in furtherance of justice faces a steep uphill climb.

The defendant sets forth the ten statutory factors the Court must consider in order to grant the defendant's application, and then he provides facts supporting some of them. The People now address all ten factors.

The first factor is the seriousness and circumstances of the offense. In his motion, the defendant merges this factor into an eight-line paragraph with two other factors, then does not address this one at all. But the scant attention that defendant Warren pays to this factor does not diminish its importance. Indeed, the crimes with which the defendant is charged are quite serious. The indictment accuses him of engaging in a conspiracy and a scheme to defraud financial institutions and others of millions of dollars, and with making and causing false entries in the Firm's records in order to effect the fraud. His active participation in the conspiracy and Scheme came at their genesis, and he committed his crimes while supposedly representing the interests of a law firm that at the time was a respected member of the legal community, and by reputation above reproach. Moreover, these were not impulsively committed crimes. Rather, they were carefully thought out and perpetrated in order to deceive relatively sophisticated victims. A dismissal of these charges based on this factor would hardly be in the interest of justice.

The second factor is the extent of the harm caused by the crimes. The defendant again nominally addresses this factor in the same paragraph in which he purports to address the seriousness and circumstances of the offense, but again he says

not a word about the harm he caused. In stark terms, great harm is caused when lending institutions give a business millions of dollars, when the lenders take great pains to build oversight mechanisms into the loans in case the borrower runs into financial difficulty, and then the borrower bypasses the oversight and deceives the lenders into believing that all is well when in reality disaster has occurred and is only getting worse. The lenders here had no chance to minimize their losses, because the defendant and his codefendants defrauded them into believing that their loans were secure.[22] Thus, the harm caused to the victims can be measured in the huge sums of money they lost due to the defendant's and his codefendants' fraud. Moreover, the defendant's crimes caused an even greater harm, the burden that fraud places on future dealings between lenders and law firms and others who borrow money. Smart lenders may now impose greater requirements to minimize the chances they will be defrauded, adding transaction costs to business loans for everybody. It is also important to keep in mind that the defendant committed his crimes not for any pure motive, but rather because he was paid handsomely to commit them. In the last twelve months he worked at the Firm, he earned around $100,000 in base salary, *see* Moser Aff., at Exh. 1, and he received $115,000 more for his role in committing his crimes. *See* Moser Aff., at Exhs. 2; 3; 37. A dismissal of these charges based on this factor would most certainly not be in the interest of justice.

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22 Defendant Warren states, quite remarkably, that "[i]t bears note that the four major banks that had loaned the firm money in 2008 and 2009 were repaid in full in April 2010." Warren Memorandum, at 19, n.12. In fact, much like a Ponzi scheme, these banks were paid back with money that was obtained through the 2010 refinancing, including from two of the banks at issue, that relied on the very financial statements that defendant Warren helped falsify. GJ Exhs. F-032; K-007.

The third factor is the evidence of the defendant's guilt, whether or not admissible at trial. Because so much of the evidence of defendant Warren's involvement in the Scheme at Dewey and the falsification of Dewey's business records comes from his own mouth, in the form of emails he authored, the evidence of guilt is strong.

During the period at issue, defendant Warren was the Firm's client relations manager. *See* Moser Aff., at Exh. 37. Defendant Warren was aware that Dewey had substantial debt, including lines of credit. *See* Moser Aff., at Exh. 37. Defendant Warren's knowledge of the Firm's debt profile is borne out by Firm emails. For example, in late August 2008, Dewey drew $20 million on a new line of credit. Canellas received an email that the $20 million had been received, which he forwarded to defendant Warren. *See* Moser Aff., at Exh. 4. As another example, in March 2009, Canellas forwarded an email to defendant Warren about loan repayments. *See* Moser Aff., at Exh. 5.

Defendant Warren was also aware that the Firm's debt contained covenants with which the Firm was required to comply. In an email he wrote to defendant Sanders in February 2009, defendant Warren wrote that he was to receive his full bonus if the Firm satisfied its covenants. *See* Moser Aff., at Exh. 6. Defendant Warren told another employee that he was entitled to a $75,000 bonus if the Firm's bank covenants were met. *See* Moser Aff., at Exh. 1.

In his position, he dealt with bill collection and write-offs and had access to view Dewey's accounting system. *See* Moser Aff., at Exh. 37. He knew that the Firm

was booking revenue it had not actually received. *See* Moser Aff., at Exh. 7. He knew that the Firm was creating fake bills to improve its accounts receivable numbers. *See* Moser Aff., at Exh. 8. Warren understood how write-offs worked and how they affected Dewey's books. For example, when the Firm's Billing and Collections Committee authorized write-offs, defendant Warren would at times instruct those responsible for inputting the write-offs to refrain from doing so until the Firm's accounts-receivable inventory levels improved – despite the fact that partners at the Firm who dealt with the client requested the write-off, and other partners at the Firm approved the write-off. *See* Moser Aff., at Exh. 9. Additionally, on one occasion, he suggested to defendant Sanders and others that the Firm reapply partial payments from clients to cover disbursements rather than fees, so that partners would receive less credit for fee collection. He acknowledged that doing so would decrease Firm revenue, but also noted that there would be a corresponding decrease in Firm expenses, because the unpaid disbursements would not have to be written off. *See* Moser Aff., at Exh. 10.

The Firm was unable to satisfy its cash flow covenant for 2008. *See* Moser Aff., at Exhs. 11; 12. On December 30, 2008, defendant Warren, defendant Sanders, and Canellas met to come up with a plan to deal with the shortfall. *See* Moser Aff., at Exhs. 13; 14. In anticipation of the meeting, Canellas forwarded defendant Warren a Firm income statement that contained false and fraudulent adjustments that Canellas and Sanders had previously come up with. *See* Moser Aff., at Exhs. 15; 16. The three had dinner at Del Frisco's, *see* Moser Aff., at Exh. 17, where defendant Sanders told defendant Warren that defendant Warren would receive his full bonus – despite

the Firm's dismal financial performance – if Canellas and defendant Warren could get the Firm to meet its bank covenants. *See* Moser Aff., at Exhs. 6; 37. After dinner, the three returned to the Office to come up with additional false and fraudulent adjustments to plug the Firm's cash flow hole. *See* Moser Aff., at Exh. 18.

After the three met in defendant Warren's office and came up with additional entries, *see* Moser Aff., at Exh. 38, Canellas forwarded defendant Warren a copy of the Firm's current income statement, so the adjustments could be added to it. *See* Moser Aff., at Exh. 19. But it appears the three left before that was done.

The next day, December 31, 2008, Canellas forwarded defendant Warren an new Firm income statement near the end of the day. *See* Moser Aff., at Exh. 20. Canellas then updated the document in defendant Warren's office with the false and fraudulent adjustments. *See* Moser Aff., at Exh. 38. After the work was done, the two congratulated each other. *See* Moser Aff., at Exhs. 21; 22. Friday morning, January 2, 2009, defendant Warren forwarded the document containing the list of false and fraudulent adjustments, aptly named the "Master Plan," so that the adjustments could be approved by defendant Sanders and implemented, and knowing that he would receive a sizeable bonus as a result. *See* Moser Aff., at Exhs. 23; 38. Any argument that defendant Warren was just a bystander – which frankly was never colorable – certainly crumbles at this point.

Three of the adjustments contained in the Master Plan and charged in the Indictment related directly to defendant Warren's work, so he is hard-pressed to argue he didn't understand their wrongfulness. One, called "Reclass $1.5M Saudi

Disbursement retainer as fees," *see* Moser Aff., at Exh. 23, involved taking money owed to a partner and temporarily applying as a fee payment. Defendant Warren must have known this was wrongful, as he was involved in setting the money aside for the partner in the first instance. *See* Moser Aff., at Exh. 24. Another, called "Re-apply Disbursements as Fees" on the Master Plan and referred to as the Disbursement Reclass Adjustments in the Indictment, involved applying payments clients had made for disbursements to fees. Defendant Warren knew the effect this would have on the Firm's books and must have known it was wrongful, as it was against Firm policy, and he was in charge of Firm collections. *See* Moser Aff., at Exh. 10. A third, called "Back-Out of Disbursement W/O" on the Master Plan and referred to as the Disbursement Write-off Adjustments in the Indictment, involved reversing write-offs and planning to re-write them off in the future. Defendant Warren must have known this was wrongful, as he was intimately involved in the write-off process and must have known that $4 million worth of disbursements did not need to be reversed because, for example, they were not written off in error.

Once defendant Warren forwarded the Master Plan to Canellas, so that Canellas could implement the various fraudulent adjustments by directing that necessary accounting entries be made, several hurdles had to be cleared to ensure the Scheme's ongoing success. These hurdles included concealing the entries and covering them up if detected, primarily by deceiving the Firm's partners and auditors. At least as it related to the Disbursement Reclass Adjustments and the Disbursement Write-off Adjustments, defendant Warren played an important role in this process.

When Dianne Cascino was questioned about a Disbursement Write-off Adjustment, she turned to defendant Warren for guidance on how to respond. It was defendant Warren who instructed Cascino on the lie to tell to keep partners at bay. And it was this lie that was used in the Scheme going forward. *See* Moser Aff., at Exhs. 25-27.

The Disbursement Reclass Adjustments had a side effect. Because old disbursement payments were backed out and generally reapplied to fee amounts due, these adjustments caused long-ago paid disbursement amounts from old invoices to reappear in Dewey's accounts receivable. In other words, invoices that were removed from Dewey's accounts receivable many months ago, when they were paid, suddenly reappeared showing that old disbursement amounts were suddenly due again.

This is where defendant Warren came in again. With at least one client, he sought to conceal and further the Scheme by instructing others to apply new payments to the old disbursement amounts as quickly as possible. First, he knew how payments on that client were supposed to be – and had been – applied, so he knew that reclassifying old payments to outstanding fee amounts was wrongful. *See* Moser Aff., at Exh. 28. Nonetheless, once these old payments were reclassified, it was defendant Warren who took the lead on making sure the Firm's books were cleaned up in 2009, as part of the Scheme. *See* Moser Aff., at Exhs. 29-36.

Defendant Warren was well-compensated for his conduct in the ongoing scheme. His salary as the Firm's Client Relations Manager was $100,000 per year, but he was only in that position for six months in 2008. *See* Moser Aff., at Exh. 37. At the

Del Frisco's dinner on December 30, 2008, defendant Sanders told defendant Warren that defendant Warren would receive his full bonus if the Firm met its banks covenants. *See* Moser Aff., at Exhs. 6; 37. Defendant Warren did his part in making sure that happened: meeting to come up with additional fraudulent adjustments; forwarding the list to Canellas for implementation; disseminating the lie used internally to cover up the Disbursement Write-off Adjustments; and taking steps necessary to conceal the Disbursement Reclass Adjustments, among other things. Defendant Warren did his part to ensure the ongoing scheme's success, and he wanted to make sure he'd be paid.

By February 23, defendant Warren's bonus had been approved at 100%, which defendant Sanders took to mean $25,000. Employee X, the Firm's Director of Administrative Human Resources, contacted defendant Warren to give him the news. A $25,000 bonus would be 50% of the base salary he made as the Client Relations Manager in 2008. But defendant Warren wasn't happy. He wanted, and expected, more, and he told the Firm's Director of Administrative Human Resources so. This employee told defendant Sanders that defendant Warren expected a higher bonus for helping the Firm meet its bank covenants. *See* Moser Aff., at Exh. 1. In less than three hours after this email was sent to defendant Sanders, defendant Warren's bonus was bumped to $75,000. *See* Moser Aff., at Exh. 2. Defendant Warren received the $75,000 bonus, plus an additional $40,000 bonus for his work during the first half of 2009, the period when he was concealing the fraudulent entries and covering them up by deceiving the Firm's partners. *See* Moser Aff., at Exh. 37.

When defendant Warren was confronted with just a few of these emails, he asked whether he was being offered immunity. With such strong evidence of guilt, this factor weighs resoundingly against granting a dismissal in the interest of justice.

The fourth factor is the history, character, and condition of the defendant. In his papers, the defendant spends the largest part of his presentation on this factor. Principally, he sets forth for the Court that he received a first-rate education at Stanford University and Georgetown University Law Center, that in law school he excelled academically and participated in prestigious extracurricular activities, that he served internships at the United States Department of Justice and as an associate at a prominent law firm, and that after his law school graduation he has served as a law clerk to two federal judges. While the facts the defendant sets forth speak to his achievements, they say nothing of his character. Indeed, this defendant has had advantages beyond those available to most people in this country, and certainly he has had advantages well beyond most who come into the criminal justice system as defendants in New York. He comes from a family of some means. His parents are both members of the legal profession, his father a respected, retired judge, and his mother a distinguished professor at an excellent law school. *See* Moser Aff., at ¶ 11; Exh. 40. The family's financial circumstances are such that when the defendant moved to Washington in 2009, they could afford to purchase a residence for him, rather than rent. *See* Moser Aff., at ¶ 16; Exh. 46.

Having had access to these advantages, it is difficult to understand how this defendant is a person who should receive the rare and unusual remedy of dismissal

of the charges against him. He knew better than to make false accounting entries in the Firm's records; he knew better than to scheme to defraud lenders; and he knew better than to conspire to deceive others so that he could receive bonus payments that doubled his pay. The simple fact that he is a recent law school graduate at the start of his legal career is of no moment. In the same way that being "a hardworking family man, talented artist, and model probationer . . . alone are insufficient for interest of justice dismissal," *Pittman*, 228 A.D.2d at 26, so too is being a lawyer. Indeed, as the First Department has cautioned: "Laypersons who commit felonies suffer the consequences. Lawyers who commit felonies should not be allowed to avoid the consequences, even though they include disbarment." *Stewart*, 230 A.D.2d at 121.

The defendant offers no facts pointing to his good character in his motion papers. Rather he points to his achievements, and claims that he "was well on his way to an outstanding legal career when these indictments were returned." Warren Memorandum, at 17. Unfortunately, an unemotional look at what the defendant did shows just the opposite.

On November 15, 2013, defendant Warren was interviewed at the Securities and Exchange Commission in Washington, D.C. *See* Moser Aff., at Exh. 37. Representatives from the Securities and Exchange Commission and a Special Agent from the Federal Bureau of Investigation were present, and defendant Warren was advised that he had a right to a lawyer and that, in substance, pursuant to 18 U.S.C. § 1001, it was a crime for him to make material misstatements. Nonetheless, during

that interview, defendant Warren made numerous material statements that are directly contradicted by emails from the Dewey email system. Among them are the following:

- Defendant Warren stated, in substance, that when the Billing and Collections Committee said to write off a bill, defendant Warren would get an email he would forward to others who would input the write-off into Elite. *See* Moser Aff., at Exh. 37. In fact, he instructed others at the firm not to make write-offs that had been approved by the Billing and Collections Committee, in order to inflate the Firm's accounts receivable numbers. *See* Moser Aff., at Exh. 9.
- Defendant Warren stated, in substance, that he did not know how write-offs affected the Firm's books; that was not his area. *See* Moser Aff., at Exh. 37. In fact, a review of Firm emails reveals that defendant Warren knew that writing off disbursements increased expenses at the Firm. *See* Moser Aff., at Exh. 10.
- Defendant Warren stated, in substance, that he never did anything at the Firm that needed to be kept from the partners of the Firm, nor was he aware of anyone else being asked to do anything like that. *See* Moser Aff., at Exh. 37. In fact, when Dianne Cascino forwarded defendant Warren a voicemail seeking an explanation for a fraudulent write-off reversal to give to two partners, defendant Warren manufactured a lie to tell the partners and wrote, "It's [Partner B] and [Partner C], I think they will be satisfied if you just ask them not to worry about it." *See* Moser Aff., at Exh. 25.
- Defendant Warren stated, in substance, that he did not remember any changes being made in the Firm's accounting system to demonstrate compliance with a

covenant. *See* Moser Aff., at Exh. 37. But in addition to the inappropriate write-off reversal discussed above, defendant Warren was involved with correcting the effects of the fraudulent reclassification of disbursement payments, even instructing another employee on more than one occasion what entries to make in the Firm's accounting system. *See* Moser Aff., at Exhs. 31-34; 36. Also, after participating in a meeting where fraudulent accounting adjustments were discussed, defendant Warren wrote to Frank Canellas, "Hey man, I don't know where you come up with some of this stuff, but you saved the day. It's been a rough year but it's been damn good. Nice work dude. Let's get paid!" *See* Moser Aff., at Exh. 22.

- Defendant Warren stated, in substance, that his bonus was not tied to net income, just collections. He was never told that his bonus was tied to anything else, and he did not recall his bonus ever being tied to a covenant. *See* Moser Aff., at Exh. 37. In fact, defendant Warren received a $75,000 bonus in early 2009 because the Firm met its covenants at year-end 2008. Defendant Warren discussed this fact with at least defendant Sanders and another employee at the Firm. *See* Moser Aff., at Exhs. 1; 6.

As noted in our Memorandum in Opposition to Motion by Zachary Warren for a Severance, the defendant spoke with prosecutors from our Office by telephone on April 1, 2013, in addition to the in-person interview on November 15, 2013. In the latter meeting, he asked if he would be given immunity, and he was told no. However, he was told that the People had serious concerns about his conduct at

the Firm and did not believe he was being honest and forthcoming. Further, he was told that if his memory improved or if he retained counsel, he could contact the District Attorney's office and start over with a clean slate. *Id.* at ¶¶ 3, 6.

At that point, the defendant seemingly hid his head in the sand. As an admitted lawyer, he exercised extremely poor judgment in not, at the very least, having an attorney of his choosing contact the People to try to learn what trouble he might be in and for which he asked for immunity. But he never took that step. And, of course, he exercised far worse judgment when he engaged in acts of conspiracy, making false entries, and scheming to defraud. Rather than exercising the kind of judgment an attorney well on his way to an outstanding legal career should use, he did the opposite. He committed crimes for which he received significant sums of money, and when confronted with the knowledge that prosecutors were scrutinizing what he had done, he chose to be dishonest – again. When the legal profession examines the character of practitioners and when members of the public assess who should represent them, all of us expect a better display of character than what the defendant has shown here. Clearly, a dismissal of these charges based on this factor would be contrary to the interest of justice.

The fifth factor, any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest, and prosecution of the defendant, weighs against granting the defendant's motion, because there has been no such misconduct. *See Stewart*, 230 A.D.2d at 120. In not addressing this factor in his papers, clearly the defendant agrees with the People on this point.

The sixth factor is the purpose and effect of imposing upon the defendant a sentence authorized for the offense. The defendant addresses this factor in his papers by assuming that he will not go to prison or be placed on probation. He bases his assumption on the notion that some but not all others who have pleaded guilty in this case have been promised sentence recommendations including conditional discharges and community service. Of course, these others are individuals who have taken responsibility for what they did, who have pleaded guilty to crimes, and who have agreed to provide information and to testify against others.

The defendant's assumptions disregard that he is in a far different situation than any of those to whom he refers. As noted above, he was given the opportunity on two separate occasions to be honest about what he had done. Both times he declined to do so, even after he was warned in the second meeting that being dishonest to federal agents could constitute a separate crime. And he declined to contact the People after he was invited to do so. All of those to whom he compares himself have done just the opposite. They have shouldered responsibility for their crimes. Defendant Warren's head remains in the sand if he truly believes that the People will not seek a significant custodial term if he is convicted at trial, simply because the People promised not to seek custodial dispositions for some others who acknowledged their conduct and promised to assist law enforcement. Conviction and the imposition of an appropriate term of incarceration will promote justice. A dismissal of these charges based on this factor would not be in the interest of justice.

The seventh factor is the impact of a dismissal upon the confidence of the public in the criminal justice system. The defendant claims in his papers that this factor favors dismissal, because it will show the public that prosecutors do not have unbridled discretion in New York State. Whatever else this case has meant to the litigants and the public, prosecution run amok is certainly not one of them. Rather, as noted above, this defendant presents himself to the Court as someone who is unlike others who appear as defendants in this county. He is educated and comes from a life of some privilege. His parents are legal professionals, and he has chosen the same route. Most defendants who come before the courts in New York County are from far humbler backgrounds, and have not had all of the same advantages of education and a family that provides for them as this defendant's family has. To dismiss the charges against this defendant would be to send the message that the defendant gets one additional privilege, immunity from facing trial and its consequences for what he has done. The criminal justice system cannot maintain its vitality and credibility if it is seen as a club where lawyers and judges turn blind eyes to protect their own. But the Court need not rely on the People for this view; it can rely on the First Department's finding in *Stewart*: "the impact of dismissal of the charge against a lawyer on the ground that disbarment is too harsh a penalty, a ground not available to a layperson, could only injure public confidence in the criminal justice system." 230 A.D.2d at 121.

The defendant notes that he was a mere 24 year old "[d]uring the events at issue." That simply ignores that thousands of defendants under the age of 25 are

prosecuted annually in New York County for all kinds of crimes.[23] This defendant is no different from them, and to dismiss his case "in the interest of justice" would be to signal that he is somehow better and more deserving of having his case dismissed without regard to the merits than those thousands. The reality is that he is no different from other defendants, and his case should proceed just as those thousands of others proceed. A dismissal of these charges based on this factor would not be in the interest of justice.

The eighth factor is the impact of a dismissal on the safety or welfare of the community. The defendant claims that he has demonstrated himself to be a valuable member of his community, and he quotes a purported statement of his former employer, Judge Motz, from the popular press to underline his argument. An examination of the quoted statement, though, shows that it does not address the safety or welfare of the community at all. Rather the judge's statement, which the Court should note the defense chose not to – or could not – have reduced to a sworn affidavit, expresses a personal affection for the defendant, and an articulation of sympathy for him. As noted above, the defendant used extremely poor judgment in committing his crimes in the first place, and he showed poor judgment in how he handled his own circumstances once he understood that prosecutors were scrutinizing his criminal conduct. That should not give the Court confidence that the allowing the defendant to practice law in the near future would have a favorable impact on the safety or welfare

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[23] A check of the District Attorney's statistics for calendar year 2013 shows that the Office screened cases of 30,632 defendants under the age of 25, and prosecuted 29,589 of those defendants for all kinds of crimes. *See* Moser Aff., at Exh. 47.

of the community. Attorneys who have made the kinds of poor judgment calls that this defendant has made can hardly be expected to make good judgments for clients and can hardly be expected to be trusted officers of the court. A dismissal of these charges based on this factor would not be in the interest of justice.

The ninth factor is the attitude of the victim with respect to the motion. The defendant does not address this in his papers, and that may well be because he has no basis on which to address it. The victims in this case are many. Of course the lenders are victims. The investors in the private placement are also victims. But in another sense, the former lawyers and other employees of the firm are also victims. They all are or were out of jobs at least in part because of what the defendant did. Many of them became embroiled in lawsuits in the Firm's bankruptcy that resulted because of what he did. The People have not asked any of them what their attitude toward the defendant's motion is, but we request the Court to be mindful of the far reaching effects of the crimes of the defendant and his codefendants. A dismissal of these charges based on this factor would not be in the interest of justice.

The final factor is any other relevant fact indicating that a judgment of conviction would serve no useful purpose. In support of this factor, the defendant has quoted Justice Schweitzer in *People v. Davis*, 55 Misc. 2d 656 (Sup. Ct. N.Y. County 1967). In *Davis*, the defendant had been caught with slightly more than an ounce of marijuana as he debarked a ship arriving from England. *Id.* The defendant pleaded guilty, and was placed on interim supervision. *Id.* at 657. He committed no further crimes, was about to graduate college, and he sought a dismissal in the interest of

justice. *Id.* It must be noted that the crime in *Davis*, although a felony, was relatively minor, and that it did not involve a planned scheme to defraud and a conspiracy. What is most important to note, however, and what completely distinguishes this case from *Davis*, is that the defendant there "readily and forthrightly admitted his guilt." *Id.* Defendant Warren is a lawyer who only recently was required to take and pass the Multistate Professional Responsibility Exam; who has clerked for two different federal judges; and who sat in a conference room at the Securities and Exchange Commission in Washington, D.C., and lied not only to a representative of the Manhattan District Attorney's Office, but also to representatives of two federal agencies, even after he was warned that doing so was a crime. Yet once again, he asks this Court to dispense mercy by comparing himself to an individual who stood up and acknowledged his conduct and took responsibility for his crime. His comparison is a sham, and the Court should have none of it.[24]

None of the ten statutory factors demonstrates "the existence of some *compelling* factor, consideration or circumstance *clearly* demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." C.P.L.§ 210.40(1) (emphasis added). Therefore, the Court should deny defendant Warren's motion.

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[24] It is also important to understand that Davis arose before the current statutory provision under C.P.L. § 210.40 was passed, so there was no requirement for the Davis court to evaluate the ten statutory factors as this Court is required to do here. Equally important, the People did not appeal the decision, as we surely would here. A glance through decisions courts have made on motions to dismiss pursuant to C.P.L. § 210.40 shows that the legislature and the Court of Appeals now require an adherence to standards that did not exist at the time of Davis. So while the defendant's citation of the Davis case makes good reading, its applicability to the case here is nonexistent. A dismissal of these charges based on this factor would not be in the interest of justice.

Conclusion

The People consent to *in camera* review of the Grand Jury minutes. For the forgoing reasons, the defendants' motions should otherwise be denied in their entirety.

Respectfully submitted,

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Dated: August 15, 2014
New York, New York