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

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS ON BEHALF OF STEVEN DAVIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

It is true that it is unusual and rare for an indictment to be dismissed at this stage of the proceedings. But this indictment, at least as it applies to Mr. Davis, is so fundamentally flawed and ill-conceived that we urge this Court to take that unusual and rare step. Simply put, justice mandates that this indictment be dismissed as to Steven Davis.

The People's attempt to respond to our separate motion to dismiss by scattering their points throughout the joint opposition brief dismally fails to meet the crux of our central argument: that the scant evidence before the grand jury against Steven Davis was utterly insufficient to sustain an indictment against him. Nothing in the People's opposition even remotely rises to the level of an adequate response to our motion. Mr. Davis should not be forced to stand trial on such flimsy and insupportable charges.

The People's case against Mr. Davis is essentially divided into two distinct phases: one, with direct evidence in the form of emails, is that he was aware of and encouraged partners to request "backdated" checks—December-dated checks from clients in January—and by doing so committed the crimes charged against him in the indictment; the other, with no direct evidence to support the charges is that he had passive knowledge of other accounting irregularities. Neither phase is supportable.

In essence, the People righteously argue that all requests for backdated checks are *per se* wrongful. As indicated below, this assertion totally misstates the law—"antedated" checks are indeed legally permissible under certain circumstances—and altogether ignores the fact that, like Mr. Davis, dozens of partners at Dewey & LeBoeuf ("D&L")—some with substantial expertise in tax, accounting and criminal law—saw nothing wrong in asking a client for a December-dated check in January of the following year. In fact, dozens of partners did so, even where their

clients were sophisticated financial institutions. The People's opposition essentially argues that the alleged requests for antedated checks constitute their *prima facie* proof that Mr. Davis was engaged in a criminal conspiracy. Yet, as discussed more fully below in Point II, these requests standing by themselves neither establish that Mr. Davis entered into an illicit agreement nor that he acted with criminal intent. Moreover, as more fully discussed below in Point III, the mere allegation, without more, that Mr. Davis "knew" that a specified list of accounting adjustments, such as reversing disbursement write-offs, reclassifying disbursement payments, reclassifying payments as a return of capital, reclassifying foreign payroll, and reversing credit card write-offs were all wrongful, when there is no doubt that all of these adjustments could be perfectly lawful under certain circumstances, cannot stand. The opposition offers no competent evidence to support any notion that Mr. Davis knew that any of these adjustments were improper or unlawful. Without evidentiary support, the indictment must be dismissed.

I. THE COURT SHOULD RELEASE THE GRAND JURY MINUTES TO THE DEFENSE

The People's opposition consists of selective citation to pages of grand jury testimony followed by conclusory assertions that the cited testimony provides sufficient evidence for every charge. While it is obvious that the opaqueness of their response renders impossible a directed and thorough reply by Mr. Davis, the People nonetheless superficially argue that the grand jury minutes need not be released, and aver that Mr. Davis's critical need for counter-appraisal of the evidence in this complex accounting fraud case does not overcome "the predominant confidentiality of Grand Jury proceedings." Opp. Br. at 15.

The relevant case law says otherwise. *See People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970) ("[S]ecrecy of grand jury minutes is not absolute . . . Firmly settled is the rule that determination of the question whether disclosure should be permitted is addressed to, and rests

in, the trial judge's discretion."); *see also Attorney Gen. of State of N.Y. v. Firetog*, 94 N.Y.2d 477, 483 (2000) (release of the grand jury minutes to defendants in a complex Medicare fraud case is firmly within the discretion of the trial judge, and "does not lessen the critical importance of the protective shield for the secrecy of Grand Jury proceedings and records").[1]

The Court has the authority to release the grand jury minutes pursuant to CPL § 210.30(3).[2] Indeed, should the Court determine that "it *could benefit* from defendants' counter-appraisal and analysis of the People's evidence in order to decide their forthcoming motions to dismiss or reduce the indictment," the Court has the authority to do so. *Attorney Gen. of State of N.Y. v. Firetog*, 94 N.Y.2d at 483 (emphasis added). As outlined in the Joint Omnibus Motion at 21–28, this case involves highly complex accounting issues necessitating precise jury instructions. *See id.* at 483 (the release of grand jury minutes to the defendants was appropriate in a complex Medicaid fraud case); *see also People v. Cespedes*, 9 Misc. 3d 705, 707 (N.Y. Sup. Ct. 2005) ("To enable the parties to fully brief the issue, this court found that release of certain portions of the Grand Jury minutes to the parties was necessary to assist the court in making the determination on the motion.").

As the People's own brief tellingly demonstrates, the evidence that they rely on as the foundation of their case against Mr. Davis is riddled with hearsay. Opp. Br. at 53–54. The People rely on an email exchange in which a member of the accounting department proposes

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[1] The People's reliance on *People v. Fetcho* is misplaced as it does not concern the release of grand jury minutes in order to assist the court in making a determination on a motion to dismiss or reduce counts of an indictment pursuant to CPL § 210.30(3). *People v. Fetcho*, 91 N.Y.2d 765, 770 (1998) (dismissing defendant's request for complete grand jury minutes to counter any potential arguments made by the People on appeal *after* the court had already turned over the relevant portion of the minutes to defendant and dismissed the indictment due to a prejudicial instruction). *People v. Robinson* is also inapposite. In *Robinson*, the Court determined an assault charge, involving no complex accounting issues, business transactions or other issues establishing a particularized need for the release of grand jury minutes that we have here. *People v. Robinson*, 98 N.Y.2d 755 (2002).

[2] CPL § 210.30(3) states, in pertinent part, "If the court, after examining the 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."

sending an email on December 31, 2009, asking partners to contact their clients on "Monday [January 4, 2010] and ask them to send us a check dated 12/31 . . . " Exhibit A. Mr. Davis did not receive the email from the accounting department. Rather, that email was forwarded to him by Mr. Sanders, the firm's CFO, who solicited comments and indicated that he would like to send the email out on January 1, 2010. On January 2, 2010, Mr. Davis proposed changing the wording of the email to state: "'[I]t is imperative that you contact each of these clients on Monday morning. All payments through checks dated December 31 will be included in revenues for 2009.'" Exhibit A. This email exchange constitutes the People's alleged *prima facie* proof that Mr. Davis engaged in a conspiracy. Putting aside the fact that Mr. Davis, who is not an accountant, was simply stating the firm's accounting policies, the email exchange contains inadmissible hearsay.

The People disingenuously argue that the original email and Mr. Sanders' response are non-hearsay statements:

> [I]n 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.

Opp. Br. at 54. The People's position is flat wrong. It is evident from the People's own opposition brief that the People offered these emails for their truth—and not for the alleged "effect" they had on Mr. Davis—because they argue that Mr. Davis amended an email that clearly requested a backdated check to one that "blurred" an allegedly improper request. *See* Opp. Br. at 54. ("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 blur."). The

emails undoubtedly were not offered for their "effect" on Mr. Davis, but rather for their truth. *Liberto v. Worcester Mut. Ins. Co.*, 87 A.D.2d 477, 478 (2d Dep't 1982) (finding "no merit" to the contention that letters were admissible to show their effect on plaintiff as "no effort was made to demonstrate the effect of the letters on plaintiff's state of mind" and it was "apparent that the real purpose of the offer of the letters was [an] impermissible one").

The People's erroneous hearsay arguments concerning an email at the heart of their evidence against Mr. Davis raises serious concerns about the competency of the evidence that the grand jury relied upon to return a sixty-five count indictment against Mr. Davis and should inform the Court's decision about whether to release the grand jury minutes so that the defendants can make additional arguments concerning the competency of the evidence.

II. THERE IS NO EVIDENCE THAT THE ALLEGED REQUEST FOR "BACKDATED" CHECKS WAS INAPPROPRIATE

The People's opposition to Mr. Davis's motion relies virtually exclusively on requests for antedated checks to demonstrate that Mr. Davis intentionally engaged in wrongdoing. Even assuming that such checks were requested and written, there is no evidence that Mr. Davis believed that such checks for services provided and billed in a prior year were in any way inappropriate.

The People cite two emails to support their faulty argument. The first, a January 3, 2009 email from Mr. Davis to a client, the Abu Dhabi Water and Electric Authority ("ADWEA"), states: "[Partner A] and I have been discussing the payment situation and wanted to solicit your continued help." Exhibit B. However much the People desire it to be a request for an improperly backdated check, it is not.[3]

[3] The People argue that it is a request for an improperly backdated check because Mr. Davis separately emailed with Partner A the prior day and Partner A asked Mr. Davis in an email to request a check dated December 31. Exhibit C. The People completely ignore the fact that Partner A had advised Mr. Davis on December 31, 2008, that "(1)

In the second, Exhibit A, discussed in Point I *supra*, Mr. Davis corrects a draft email in order to clearly state the firm's financial policies. Even adopting the People's construction that both emails request checks bearing an earlier date, neither support the notion that Mr. Davis engaged in any wrongdoing. This is because the People's argument is predicated on the incorrect assumption that an antedated check cannot be included in revenues for the year the check is dated.

The bald assertion that "backdating" is always improper is a gross mischaracterization of the law and if the grand jury were so instructed, the indictment must be dismissed. The People's theory ignores the legitimate doctrine of constructive receipt—whereby money received in a later period can be deemed to have been received in an earlier one—and it entirely disregards the fact that the firm's partnership was aware of these requests and, to Mr. Davis's knowledge, nobody—not even sophisticated tax partners and the firm's accounting staff—ever voiced any concern to him regarding its propriety.

1. FEDERAL TAX LAW REQUIRES THAT ANTEDATED CHECKS BE COUNTED AS INCOME FOR THE YEAR THEY WERE CONSTRUCTIVELY RECEIVED[4]

Without legal authority that actually supports the position, the People boldly—and falsely—assert that "*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.*" Opp. Br. at 68 (emphasis added). Dewey & LeBoeuf was *required* to include any items constituting gross income in the taxable year in which they were actually or constructively received. Treas. Reg. § 1.446-1(c)(i).

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they had committed to pay [in 2008] and (2) all approvals had been obtained." Exhibit C. As discussed below, even if ADWEA had made a payment by check dated December 31 in January 2009, it would have been proper—indeed required by the IRS—for the firm to credit those revenues to 2008.

[4] We respectfully refer the Court to the Joint Omnibus Reply at Point II for a discussion of the necessity for instructions to the grand jury based on the federal tax doctrine of constructive receipt.

Constructive receipt refers to "the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given." C.F.R. § 1.451-2(a); *see also Kunze v. C.I.R.*, 19 T.C. 29 (1952).

Federal tax law supports the proposition that an antedated payment is constructively received as of the date on the instrument. Where a taxpayer has a matured right to income based on services rendered in the previous year, and controls the time of collection, the income is constructively received at the time he *could have* obtained such income, or at the time the funds could have been made available to him. *Romine v. Commissioner*, 25 T.C. 859, 873–75 (1956) (farmer liable for 1946 taxes on December 31, 1946 sale when he could have obtained a check on December 31 but actually obtained a check on January 2, 1947; he controlled "the time of collection of the matured right to income which he could have obtained upon request"); *see also Hineman v. Brodrick*, 99 F. Supp. 582, 583 (D. Kan. 1951) (holding that plaintiff constructively received payment in 1947 though plaintiff actually received payment in 1949, because the goods in question were sold and delivered in 1947); *Hamilton Nat. Bank of Chattanooga, Administrator v. Commissioner*, 29 B.T.A. 63, 67 (1933); I.R.S. TAM 9336001 (Sept. 10, 1993) (compensation for taxpayer's legal services was constructively received by taxpayer even though payment had not yet been made because taxpayer performed substantially all the services owed to his client and client was ready, willing, and able to pay taxpayer).

By requesting antedated checks, D&L's attorneys were asking their clients to confirm that the income was available to the firm, and thus constructively received by the firm, as of the date of the check. Even assuming that the People's interpretation of Exhibit A is accurate, under federal tax law, Mr. Davis's revision appropriately requested that the partners contact each of

their clients in order to collect upon their matured right to income for services already rendered in the prior year.

Moreover, the NYUCC expressly provides that "[w]here an instrument is antedated or postdated[,] the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date." NYUCC § 3-114(2); *see also* Uniform Commercial Code § 3-114(a) ("An instrument may be antedated or postdated."). The People argue that the NYUCC is inapplicable here because it cannot "override federal tax rules." Opp. Br. at 68. In the cases the People cite for this proposition, however, the courts rejected references to negotiable instruments law because the relevant provision dictated that the time the funds were made available did *not* constitute the constructive receipt of taxable income by petitioner, whereas the federal tax doctrine of constructive receipt provided the opposite—that the time the funds were made available *did in fact* constitute the constructive receipt of taxable income by petitioner. *Walter v. United States*, 148 F.3d 1027 (8th Cir. 1998); *Millard v. C.I.R.*, T.C. Memo (RIA) 2005-192 (2005). In both cases, the court held that taxpayers wrongfully declared checks as income in the year in which they were cashed, rather than the earlier year in which they had been constructively received. In contrast, here, both the NYUCC and the federal doctrine of constructive receipt require recording an antedated check as constructively received as of the date on the check. *Walter*, 148 F.3d at 1029. The NYUCC section cited above in no way "override[s] federal tax rules"; rather, it requires the exact same treatment as required under the federal doctrine of constructive receipt. Thus, both *Walter* and *Millard* actually demonstrate that D&L acted *appropriately* if it applied funds that were constructively received in a prior year to that year's revenues. And yet this perfectly lawful accounting treatment is mischaracterized as criminal wrongdoing that forms the heart of the People's criminal indictment against Mr. Davis.

2. THERE IS NO EVIDENCE THAT MR. DAVIS INTENTIONALLY ENGAGED IN WRONGDOING

The People's use of Exhibit A as their primary piece of evidence to show that Mr. Davis intentionally engaged in wrongdoing is particularly inappropriate given Mr. Davis's decision to candidly share the purportedly fraudulent policy with every single partner who failed to meet collection commitments—a large proportion of the partnership. Nor does it help the People's cause that not one of the recipients, many of whom had far more experience with tax and accounting than Mr. Davis, responded that the accounting treatment outlined in the email was in any way improper.

To the contrary, the partners were unanimous in responding favorably. For example, Partner B, a highly experienced tax attorney at D&L, responded, "Working on all of these today .... The [Financial Institution A] money I am confident we can get still. [Financial Institution B] is the hardest but we are chasing them again today for a check 12/31." Exhibit D. Partner C, a former federal prosecutor, replied, "Just did, they said they will pay." Exhibit E. Partner D, a veteran white collar partner, sent an email to a client on January 5, 2010, asking if the check the client was sending out by FedEx that day "c[ould] be dated 12/31/09?" Exhibit F. Partner E responded, "I will indeed be calling clients Monday morning first thing, asking for checks." Exhibit G. In response to a request for collection in the previous year, Partner F's response stated, "I have been in touch with [Client Y]. They are all in Spain for the holidays but have promised to send a check next week dated as of December." Exhibit H.[5] Surely had these partners believed that the policy was inappropriate, they would have challenged Mr. Davis's instructions and would *not* have passed on what they believed to be an unlawful request to their institutional clients—who included some of the most prestigious investment banks in the world.

[5] Unredacted copies of the Exhibits will be provided to the Court for *in camera* inspection.

Exhibits D–H. Given (1) the strong basis in tax law that this accounting policy was in fact lawful and to some extent preferred by the IRS, (2) Mr. Davis's decision to disseminate broadly the policy within the firm's partnership, and (3) the undisputed acceptance of this policy by attorneys well-versed in federal tax law, it should come as no surprise that Mr. Davis correctly believed that he was not engaging in any wrongdoing.

It is worth noting that Exhibits A and B are the only pieces of evidence specifically cited by the People in their opposition to show that Mr. Davis intentionally engaged in wrongdoing. These ambiguous emails, combined with the clearly insufficient suggestion that Mr. Davis may have been "nervous" or "sarcastic" around the audit, and the fact that he responded with a simple "[u]gh" to being informed that the firm may fall short of its covenants, have been patched together by the People in an attempt to serve as proof of criminal intent for all charges against Mr. Davis. As made clear in Mr. Davis's opening brief, the People's paltry collection of evidence falls fatally short of showing that Mr. Davis had the wrongful intent required to sustain any of the counts of this indictment. *See People v. Evangelista*, 88 A.D.2d 804, 806 (1st Dep't 1982).

Simply put, it would be unfair in the extreme to force Mr. Davis to stand trial—let alone a predicted six-month trial—on such plainly insufficient and wrongly conceived evidence.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT ANY OF THE CRIMES CHARGED

The People expose their clear lack of evidence against Mr. Davis by solely citing to only a few pages of testimony in order to prove that sufficient evidence supported each of the crimes charged. In their opposition, the People cite to a mere *three pages* of grand jury testimony and *one* exhibit to show that Mr. Davis is criminally liable for forty-two separate counts of falsification of business records. Opp. Br. at 48. The People cite to only twelve pages of grand

jury testimony and four exhibits to support their conspiracy charge against Mr. Davis. Opp. Br. at 50–52. Likewise, the People's only response to the arguments made in Mr. Davis's opening brief with respect to the Martin Act count is a citation to certain pages of grand jury testimony and a conclusory allegation in a footnote that these pages establish legal sufficiency for this count. Opp. Br. at 37 n.10. The unbelievable assertion that the substantial evidence required to establish criminal liability on the part of Mr. Davis is contained in this limited sampling of pages—out of at least three thousand five hundred pages—underscores the importance of releasing the grand jury minutes to the defendants. Mr. Davis could then provide crucial assistance to the Court through informed counter-appraisal and analysis of the sufficiency of the evidence presented.

Moreover, in response to Mr. Davis's arguments for why the falsifying business records counts against Mr. Davis must be dismissed, the People allege, without any support, that Mr. Davis knew that a specified list of accounting adjustments was wrongful, including *and* limited to: "adjustments involving a backdated check, reversing disbursement write-offs, reclassifying disbursement payments, reclassifying payments as a return of capital, reclassifying foreign payroll, and reversing credit card write-offs." Opp. Br. at 40 n.12. We have already discussed the backdated check issue, see Point II *supra*. There is nothing in the mere recounting of these other adjustments to indicate one way or the other that they were inappropriate or wrongful in any way. The fact that Mr. Davis passively received or was copied on an email that referenced these adjustments is by no means sufficient to prove knowledge of wrongdoing.

The People further argue that Mr. Davis should be held criminally liable for Counts 17 through 50 and 62 through 71, notwithstanding their concession that they have *no* evidence of Mr. Davis's knowledge of wrongdoing for any adjustments outside of their circumscribed list.

For example, some of the counts in which Mr. Davis has been charged relate wholly to *other* types of accounting adjustments charged in the indictment—such as adjustments relating to leases, an alleged fictitious client payment, and applying loan payments as revenue. Yet the grand jury has indicted Mr. Davis on false business record counts relating to these adjustments about which the People effectively admit that they have no evidence of Mr. Davis's knowledge or involvement. For example, Count 22 charges Mr. Davis with an alleged fraudulent entry relating to the firm's lease in London; Count 27 charges Mr. Davis with an alleged fictitious client payment; Counts 28 and 50 charge Mr. Davis with alleged entries involving applying partner capital as fee revenue; Count 29 charges Mr. Davis with a false entry allegedly applying partner capital loans to increase net income; and Count 71 charges Mr. Davis with an entry relating to applying loan repayments as revenue. Exhibit I. Each of these counts relates to accounting adjustments where—even based upon the People's own assessment of their evidence—Mr. Davis was *unaware of the alleged wrongfulness* of the adjustments.[6]

Finally, the People state in their opposition that while Mr. Davis did not make or cause false entries to be made, he can be held criminally liable for the conduct of others as an accomplice.[7] It bears noting that on June 13, 2014, in response to the defendants' May 28, 2014 Request for a Bill of Particulars, the People stated that "[t]he defendants acted as *both principals and accomplices* with respect to the counts in which they are charged." Exhibit J. Not only does this change in position reflect upon the People's cavalier attitude towards their discovery

[6] This list is not exhaustive and is based solely on the summary description of the false business record counts provided in the People's bill of particulars. Exhibit I. We have not been able to analyze all of the false business record counts because the defense only recently received access to D&L's accounting system.

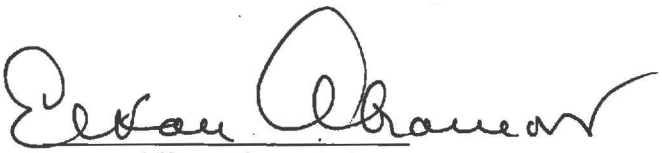
[7] The mental culpability required of an accomplice is the same as that required of a principal. N.Y. Penal Law § 20.00 (McKinney) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."). As discussed in Mr. Davis's opening brief at 12–14, the People lack any proof of Mr. Davis's criminal intent.

obligations, but it underscores the importance of releasing the grand jury minutes so that Mr. Davis is able discern the nature of the charges that have been leveled against him, and make informed arguments to assist the Court in its determination of the sufficiency of evidence for these charges. Moreover, for Mr. Davis to be held criminally liable as an accomplice, he would have had to solicit, request, command, importune, or intentionally aid a person to "[m]ake[] or cause[] a false entry in the business records of an enterprise . . . . " Penal Law § 175.05. The People's meager allegations against Mr. Davis, summarized in less than three pages of grand jury testimony, cannot possibly prove that Mr. Davis solicited, requested, commanded, importuned, or intentionally aided anyone to make or cause a false entry in D&L's books—let alone forty-two allegedly false entries. *People v. Williams*, 172 A.D.2d 448, 450–51, *aff'd,* 79 N.Y.2d 803 (1991) (holding that "in the absence of evidence of some overt act in furtherance of the underlying transaction," there was simply not enough evidence "to warrant a criminal conviction under a theory of accomplice liability").

CONCLUSION

For the foregoing reasons, Mr. Davis respectfully requests that this Court dismiss the indictment after inspection of the grand jury minutes pursuant to CPL § 210.20(1)(b) and § 210.30, and release to defense counsel, pursuant to CPL § 210.30(3), such portions of the grand jury minutes which the Court determines are necessary to assist defense counsel in addressing the issues presented.

Dated: August 29, 2014
New York, New York

By: 

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