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November 14, 2014

BY HAND

The Honorable Robert M. Stolz
Justice of the Supreme Court, New York County
100 Centre Street — Part 72
New York, New York 10013

Re: *People v. Steven Davis* et al.
Indictment Nos. 773/2014 and 5393/2013

Dear Justice Stolz:

On behalf of our client Joel Sanders and co-defendants Steven Davis and Stephen DiCarmine, we enclose the Defendants' Motion to Set the Order of Trials, together with supporting documents.

On November 10th, the Court held a telephone conference to clarify certain issues for the record — namely, scheduling a trial date and the parties' briefing regarding the order of trials. As we set forth in the enclosed motion papers, we believe the important rights of our clients require that the trial of co-defendant Zachary Warren proceed first.

One additional matter that we believe should be clarified for the record concerns the Defendants' Motion for a Bill of Particulars. We recall that on September 30th, the Court made certain rulings regarding the prosecution's disclosure obligations as a matter of "discovery," but not in connection with a Bill of Particulars. Accordingly, we respectfully request that the Court issue a ruling on the Defendants' Motion for a Bill of Particulars.

Respectfully submitted,

David B. Shanies

Enclosures

cc (by e-mail): Elkan Abramowitz, Esq. (counsel for Steven Davis)
Austin V. Campriello, Esq. (counsel for Stephen DiCarmine)
Paul Shechtman, Esq. (counsel for Zachary Warren)
Pierce R. Moser, Esq. (Assistant District Attorney)

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

PEOPLE OF THE STATE OF NEW YORK,

- against -

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

Defendants.

Ind. No. 773/2014

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 21, 2014 at 9:30 a.m., or as soon thereafter as counsel may be heard, upon the accompanying Memorandum of Law dated November 14, 2014, the exhibits attached thereto, and upon all the prior pleadings, submissions and proceedings in this action, defendant Joel Sanders, on behalf of himself and co-defendants Steven Davis and Stephen DiCarmine, will move this Court before the Honorable Robert M. Stolz, Justice of the Supreme Court, in Part 72 of the Supreme Court, 100 Centre Street, New York, New York, for an order granting the defendants' motion to set the order of trials by directing that defendant Zachary Warren be tried first, together with such further relief as the Court deems just and proper.

HUGHES HUBBARD & REED LLP

New York, New York
Dated: November 14, 2014

By: 

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

PEOPLE OF THE STATE OF NEW YORK,

- against -

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

Defendants.

Ind. No. 773/2014

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO SET THE ORDER OF TRIALS

Defendant Joel Sanders respectfully submits this memorandum, on behalf of himself and co-defendants Steven Davis and Stephen DiCarmine (collectively, "Defendants"), in support of their motion to set the order of trials to safeguard the Defendants' rights under the Fifth and Sixth Amendments to the United States Constitution and the Constitution and law of New York.

PRELIMINARY STATEMENT

The severed trial of co-defendant Zachary Warren, a crucial exculpatory witness for the Defendants, should proceed first so Mr. Warren can be available to testify at the Defendants' trial. Contrary to the prosecution's claim that the order of trials is "purely a matter of discretion" for the District Attorney's Office, it does not have the right to prevent the Defendants from eliciting Mr. Warren's exculpatory testimony by unilaterally proclaiming that it will try him later. Where a co-defendant being tried separately is a potential exculpatory witness, courts have repeatedly held — under both New York law and the United States Constitution — that the trial court has the power to set a trial order that preserves the potential to offer that exculpatory evidence.

As Mr. Warren confirms through a proffer by his attorney (attached as Exhibit A), if he is tried first and acquitted, he would testify if called as a witness at the Defendants' subsequent

trial. The substance of that testimony is well documented: Mr. Warren will contradict the prosecution's allegations that the Defendants directed Mr. Warren and other Dewey & LeBoeuf employees to make fraudulent accounting entries in the firm's financial records. Under these circumstances, the Defendants' rights outweigh the prosecution's strategic prerogatives and the Court should order that Mr. Warren be tried first.

DISCUSSION

A. This Court Has the Power to Set the Proper Order of Trials

It is well settled that the need to introduce a co-defendant's exculpatory testimony overrides the prosecution's scheduling preferences and empowers a trial court to set the proper order of trials. In *People v. Owens*, the Court of Appeals recognized the "right of a defendant to call as a witness an alleged accomplice" — a right the court called "unqualified" where, as here, the defendants will be tried separately. 22 N.Y.2d 93, 97-98 (1968). As the court recognized: "It is undoubtedly true that a party's right to defend may be severely impaired if he cannot call his co-defendant as a witness…." *Id.*

The Court of Appeals in *Owens* upheld the Appellate Division's ruling that the trial court had erred by permitting a defendant to call a co-defendant to the stand in their joint trial, prejudicing the co-defendant by forcing him to take the Fifth before the jury. 22 N.Y.2d at at 95. Thereafter, numerous courts have relied upon the reasoning in *Owens* to recognize a trial judge's authority to direct the order of trials so that a co-defendant possessing exculpatory testimony may be tried first, before the trial of the defendant wishing to call him as a witness. In *People v. Garnes*, 510 N.Y.S.2d 409, 134 Misc.2d 39 (Sup. Ct. Queens Cty. 1986), the trial court ordered that the defendant be tried *after* the severed trial of his co-defendant so that he could call that co-defendant as an exculpatory witness at his later trial. 510 N.Y.S.2d 409, 134 Misc.2d 39, 43-45 (Sup. Ct. Queens Cty. 1986); *writ of prohibition denied*, *Matter of Santucci v. Di Tucci*, 124 A.D.2d 850 (2d

Dep't 1986).[1] *See also People v. Wang*, 140 A.D.2d 567, 569-70 (2d Dep't 1988) (reversing trial court's denial of severance motion and ordering a new trial because the defendant "demonstrated that he intended to call his co-defendants as witnesses, that they were willing to testify in his behalf if he were tried separately, and that their testimony would tend to exculpate him").

Numerous federal courts have reached similar conclusions. In *Taylor v. Singletary*, the United States Court of Appeals for the Eleventh Circuit reversed the district court's denial of a writ of habeas corpus, agreeing with the district court that the state court's refusal to schedule the co-defendant's trial first violated the defendant's right to call witnesses in his defense under the Sixth Amendment, but reversing the district court's conclusion that the error was harmless. 122 F.3d 1390, 1391 (11th Cir. 1997). The Eleventh Circuit concluded that the state "trial court violated [the defendant's] constitutional rights by effectively depriving him of a material witness's testimony" when it denied his motion to be tried after his co-defendant. *Id.*; *see also Byrd v. Wainwright*, 428 F.2d 1017, 1022 (5th Cir. 1970) (holding that a defendant's Fifth Amendment due process right to a fair trial was violated by the denial of his severance motion based on the defendant's need for exculpatory testimony from his co-defendants).

B. Mr. Warren Can Provide Exculpatory Testimony for the Defendants If His Trial Proceeds First

The heart of the prosecution's case is its allegation that the Defendants conspired to defraud the firm's lenders by causing numerous employees — including Mr. Warren and others — to make fraudulent accounting adjustments in the firm's financial records. Mr. Warren's

1. The Louisiana Court of Appeal followed *Garnes* in the case of *State v. Walland*, holding that "the District Attorney's statutory authority to control the prosecution cannot supersede the defendant's constitutional right to a fair trial, to present a defense, and to call his witness." 555 So.2d 478, 482 (La. Ct. App. 1988) (reversing the trial court's denial of a defendant's post-severance motion to be tried after his co-defendant who could provide exculpatory testimony). The court concluded that, "[o]nce the trial court granted a severance only one order of trials is equitably possible" — the defendant seeking to use his co-defendant's exculpatory testimony must be tried *second*. *Id.*

testimony[2] will undermine that claim because he will testify, contrary to the prosecution's theory and the testimony of its key cooperator Frank Canellas, that none of the defendants ever caused him to make an improper accounting adjustment. Mr. Warren will testify that the Defendants never asked him "to do anything that crossed the line or that needed to be kept from partners of the firm." Mr. Warren will further testify that he never "heard of anyone else being asked to do anything like that either." (Exhibit B (relevant portions of the prosecution's interview notes from its meeting with Mr. Warren on November 15, 2013), at DANY-710.30-008.) That is significant because Mr. Warren worked in the firm's accounting department, surrounded by others whom the Defendants allegedly "caused" to make improper accounting entries — activity in which the prosecution claims Mr. Warren was intimately involved.

Regarding Mr. Sanders, in particular, Mr. Warren will testify that when Mr. Sanders gave him a direction, Mr. Warren "never thought it was unreasonable." (*Id.* at DANY-710.30-006.) Similarly, Mr. Warren will testify that Mr. Sanders never "did anything that gave Warren pause. Warren was never asked to do anything untoward." (*Id.* at DANY-710.30-008.)

Mr. Warren's testimony will contradict the prosecution's allegations that the Defendants directed the firm's employees to use fraudulent accounting adjustments to "back into" the numbers required to meet the firm's bank covenants. Contrary to the prosecution's insinuations, Mr. Warren will testify that when he and Mr. Sanders discussed the "numbers they were trying to get to," they were strategizing about ways to reach the firm's financial targets by making collections for work the firm had performed. (Exhibit C (relevant portions of the prosecution's interview notes from its meeting with Mr. Warren on April 1, 2013) at DANY-710.30-002.)

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2. Mr. Warren's attorney's proffer (s*ee* Ex. A) makes clear that in the event Mr. Warren is tried first and acquitted, Mr. Warren "would testify" to the statements memorialized in the prosecution's interview notes. *See People v. Wang*, 140 A.D.2d 567, 568 (2d Dep't 1988) (trial court erred in denying defendant's request to be tried after his co-defendants where the "co-defendants' attorneys confirmed the defendant's assertions that their clients were willing to testify in the defendant's behalf provided that the defendant was separately tried following their trial.").

Mr. Warren's testimony will also help refute the prosecution's claims that the Defendants were involved in creating the so-called "Master Plan." Although the prosecution implicates both Mr. Warren and Mr. Sanders in creation of that document,[3] Mr. Warren has flat-out denied that any "Master Plan" was created or that any fraudulent adjustments were discussed in his presence.[4] Mr. Warren will likewise contradict the prosecution's claim that in late 2008, he, Mr. Canellas, and Mr. Sanders met "over a steak dinner" to "come up with a plan" to meet the covenants.[5] Mr. Warren will testify that he attended the meeting and understood that its purpose was not to "plot fraud" but to discuss collections, and that no one at the dinner discussed fraudulent accounting adjustments in his presence.[6]

Mr. Warren's testimony would be valuable exculpatory evidence in other areas as well, including the specific falsifying business records charges. For example, three of the counts relate to the accounting treatment of disbursement payments.[7] As Client Relations Manager, Mr. Warren's job was to collect outstanding legal fees and disbursements from the firm's clients.[8] Mr. Warren can testify that, in any discussions he had with Mr. Sanders or the other Defendants about disbursements, the topics were collections, the proper treatment of disbursements, and "finding ways to incentivize partners to ensure that legitimate client disbursements [were] timely billed and paid" — not fraudulent accounting entries.[9]

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3. *See* Indictment, Count 106 (Alleged Overt Act 7) (alleging that Mr. Canellas "documented the fraudulent adjustments he and defendant SANDERS decided to employ *in the presence of defendant WARREN* on or about December 30, 2008 in a document [Canellas] named the 'Master Plan.'") (emphasis added).

4. Exhibit C at DANY-710.30-002, 004; Ex. B at DANY-710.30-012.

5. Prosecution's Opposition to Defendant Warren's Motion for a Severance at ¶ 25.

6. Reply Memorandum of Law in Support of Defendant Zachary Warren's Omnibus Motion at 11.

7. *See* Indictment, Count 17, "Reversing disbursement write-offs," Count 18, "Reclassifying disbursement payments," and Count 19 "Reclassifying disbursement retainer."

8. Memorandum in Support of Motion by Defendant Zachary Warren for a Severance ("Warren Severance Motion") at 5.

9. Warren Severance Reply at 8.

Similarly, in his reply memorandum requesting severance, Mr. Warren points to an April 16, 2009 email exchange with Mr. Sanders and the Billing and Collections Committee.[10] At a separate trial following his own, Mr. Warren would testify that — as demonstrated in the email — Mr. Sanders instructed him on proper practices for applying client disbursement payments, including Mr. Sanders' instruction to comply with any client's stated designation of payment.[11] That testimony would go hand-in-hand with Mr. Warren's statements that Mr. Sanders never asked him to do anything "unreasonable" or "untoward" and that he was never "asked to do anything that crossed the line or that needed to be kept from partners of the firm." (Ex. B at DANY-710.30-006, DANY-710.30-008.)

C. This Motion is Timely

The Defendants make this motion well in advance of the tentative late-January trial date and within days of the Court's order granting Mr. Warren's severance motion. In their brief in support of the severance motion, Mr. Warren's attorneys indicated their readiness to begin trial immediately.[12] Moreover, counsel for all parties, including the prosecution, have repeatedly identified the need to determine the order of trials in the event of severance. As the Court noted during the recent (November 10th) phone conference, both the parties and the Court contemplated that this issue would be addressed in two steps.[13] In the prosecution's words: "Were the Court to grant severance, the People would request an opportunity to be heard separately on the issue of trial order." Prosecution's Opposition to Defendant Warren's Motion for a Severance at ¶ 55 n.12. Now that the issue of the order of trials is ripe, the prosecution cannot claim that this motion is untimely.

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10. *Id.*

11. *Id.*

12. Warren Severance Motion at 1 n.1 (stating that Mr. Warren's defense team is prepared to begin trial in October 2014).

13. Exhibits D (relevant portions from the Sept. 15, 2014 Hearing Transcript) at 152:6-17, 152:22-24); E (relevant portions from the July 11, 2014 Hearing Transcript) at 3:22 - 4:3.

CONCLUSION

For the reasons set forth above, the Defendants' rights to a fair trial and to call witnesses on their own behalf trump any strategic concerns of the prosecution and compel that Mr. Warren's trial proceed first.

Respectfully submitted,

HUGHES HUBBARD & REED LLP

New York, New York
Dated: November 14, 2014

By: 

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EXHIBIT A

ZUCKERMAN SPAEDER LLP

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PAUL SHECHTMAN
Partner
646-746-8657
PShechtman@zuckerman.com

VIA EMAIL

November 11, 2014

Edward J. M. Little
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004-1482

Dear Ed:

This is to confirm that if Zachary Warren were tried first and acquitted, he would testify in a manner that was generally consistent with the statements that he gave to representatives of the District Attorney's Office, the Securities and Exchange Commission, and the Federal Bureau of Investigation in an April 1, 2013 telephone interview and a November 15, 2013 in-person interview.

Sincerely,

Paul Shechtman

PS/wr

EXHIBIT B

REDACTED

When SANDERS told WARREN to do something, WARREN never thought it was unreasonable

Neither Employee C nor SANDERS ever did anything that gave WARREN pause. WARREN was never asked to do anything untoward.

WARREN never felt he did anything or was asked to do anything that crossed the line or that needed to be kept from partners of the firm. WARREN never heard of anyone else being asked to do anything like that either.

Regarding the "master plan", WARREN remembered Employee C sending something to himself from WARREN's computer. WARREN remembered seeing something, but not having a clue what it was. WARREN did not recall anything called the "master plan", but it sounds like an accounting report.

EXHIBIT C

- Knew that information also reported to banks? Yes, but had no involvement in preparing numbers—my compensation was not tied to this

- Compliance with cash flow covenant? "Master Plan?"
  - Do recall covenants—financial targets of firm had always been A/R—collections tied to partner compensation until end of 2008

  - Can't recall "master plan"—don't know anything about accounting

Various Topics

- Del Frisco's dinner?
  - Was "cash flow dinner"—working late, was just invited to Joel and Employee C's dinner
  - They had numbers they were trying to get to and my job was to tell them how to get there—prepared files and spreadsheets with outstanding collections

REDACTED

- Can't recall discussions of adjustments being made to meet covenants—just remember cash flow issues and income targets

- ZW: Why is Del Frisco's dinner so important? It didn't seem very different than most other meetings
    - Remember dinner pretty well, carried over a bunch of A/R reports
    - Can't recall "Master Plan" spreadsheet—would not have added those entries

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TRIAL TERM PT 72

- -x

THE PEOPLE OF THE STATE OF NEW YORK

INDICT #'s:
5393/13
00773/14

-against-

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

-Defendants.

- -x

100 Centre Street
New York, New York
September 15, 2014

B E F O R E:

THE HONORABLE ROBERT STOLTZ
JUSTICE OF THE SUPREME COURT

A P P E A R A N C E S:

FOR THE PEOPLE:

CYRUS R. VANCE, JR., ESQ.
DISTRICT ATTORNEY, NEW YORK COUNTY
One Hogan Place
New York, New York 10013

BY: PEIRCE MOSER, ESQ.
STEVEN PILNYAK, ESQ
MICHAEL KITSIS, ESQ.
GREGORY WEISS, ESQ.
Assistants District Attorney

FOR THE DEFENDANTS:

ELKAN ABRAMOWITZ, ESQ
AUSTIN CAMPRIELLO, ESQ
EDWARD LITTLE, ESQ.
PAUL SHECHTMAN, ESQ.
MARC WEINSTEIN, ESQ.
WILLIAM MURPHY, ESQ.

BENITA WHITAKER
Senior Court Reporter

request and you don't want to turn it over, you'll let me know and we'll talk it through.

September 30, 10 o'clock in the morning.

MR. LITTLE:: Defendant's excused?

THE COURT: The defendant's excused on that date,

MR. LITTLE: One very last point, super-short. I the Court decides to sever Mr. Warren, we, the three primary, ask that his trial go first for the very simple reason that if it doesn't, he will not be available to us to testify as a witness for obvious reasons.

During his proffers he repeatedly said, "Joel Sanders did not ask me to do anything wrong." I want to be able to put that in evidence at our trial.

If he goes second, we're not going to be able to do that. So we actually do have a very strong interest in that, your Honor.

Thank you.

MR. SCHECTMAN: If we're severed, during jury selection we'll take the first 12 in the box. We won't have a protracted jury selection. We're ready to go.

THE COURT: You still want to go first?

MR. SCHECTMAN: We'd obviously like to go first.

But I think the best thing is if you're severing, then we'll come back and argue.

THE COURT: You want to be heard on that

EXHIBIT E

SUPREME COURT: NEW YORK COUNTY
TRIAL TERM: PART 72

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THE PEOPLE OF THE STATE OF NEW YORK

IND.#:
5393-13
0773-14

-against-

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

CHARGE:
SCHDEFR 1, FBR 1

PROCEEDINGS:
CALENDAR CALL

Defendants.

----------X

100 Centre Street
New York, New York 10013

July 11, 2014

B E F O R E: HONORABLE ROBERT M. STOLZ
Justice of the Supreme Court

A P P E A R A N C E S:

FOR THE PEOPLE:

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BY: PAUL SHECHTMAN, ESQ.
WILLIAM J. MURPHY, ESQ.
For Defendant Zachary Warren

MORVILLO ABRAMOWITZ GRAND IASON & ANELLO, P.C.
565 Fifth Avenue
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BY: ELKAN ABRAMOWITZ, ESQ.
For Defendant Steven Davis

I received motions this morning from everyone. There is a pending severance motion as to Mr. Warren, which I'm going to reserve on.

I do in connection with that, have one question for the People.

First of all, it seems to me that the prudent thing to do is to reserve at this point on that motion pending review of everything else, pending my review of the grand jury minutes in this case, which is something people are asking me to do in the motions that were filed today. So in the fullness of time, I will decide that.

I do note, however, in Mr. Shechtman's papers on behalf of Mr. Warren, there is statement not only that he wants to be severed, but if severed, he wants to go first. The People have said, well, if the Court severs, we'd like to be heard on that issue.

I'm not deciding whether we are severing this case right now, but I think it is appropriate for the People to say at this juncture, and certainly I will in deciding the motion and thinking about it, if it were severed, you want to go first with him or first with somebody else?

MR. MOSER: Yes, your Honor, the People would want the other defendants to go first, and when the People said that we would want to be heard on it, it was on the issue of whether or not it would be appropriate to order the

People to have Mr. Warren's file go first. That's if the Court is inclined to order the People to try Mr. Warren first, we would like to be heard on that issue.

THE COURT: Well, I don't want to order at this point. But I just want to know what your position on that issue was. So that record is now complete.

I received an application, I think from Hughes Hubbard, which purports to transmit a further application from a firm in South Barrington, Illinois, which says they represent someone called Iron-Starr, which is, I think, an excess liability carrier, organized under the laws of some other jurisdiction, which declines to appear here, and they are asking me to do something.

Is anybody going to take a position on that or is this just being forwarded to me for my general information?

The first communique came from Hughes Hubbard.

MR. WEINSTEIN: Marc Weinstein from Hughes Hubbard.

THE COURT: Who are these people exactly, and what they do they want, and why should they get it here?

MR. WEINSTEIN: Okay. So they are excess insurers as your Honor has noted.

The defendants have submitted requests for coverage by the various insurance companies of which Iron-Starr is one as an excess.