SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK

- against - Indictment 773/2014

JOEL SANDERS,

Defendant.

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MEMORANDUM OF LAW ON BEHALF OF JOEL SANDERS
IN SUPPORT OF MOTIONS *IN LIMINE*

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Introduction

This Memorandum of Law is submitted on behalf of Joel Sanders in support of his motions *in limine* to preclude evidence in advance of the scheduled retrial in this case. It is not practical in this motion to identify all evidence which we may seek to preclude at or before the retrial, nor to identify all issues for which judicial resolution may be necessary based on the interplay of the prosecution's presentation at the first trial, the Court's rulings to date and/or the jury's acquittals. The purpose of this motion is to raise some issues now to assist the Court.[1]

A. The Prosecution Should Be Precluded from Introducing Evidence of Acquitted Conduct

After the first trial, the jury acquitted Mr. Davis of twenty-three counts, Mr. DiCarmine of twenty-one counts, and Mr. Sanders of fourteen counts. Based on the results of deliberations and/or arguments of defense counsel related to the counts of acquittal, the jury plainly acquitted as it did because it unanimously found that the prosecution had not proven that the particular defendant had anything to do with the conduct described in the count of acquittal, and/or had not proven that the particular accounting adjustment was any evidence of intent to defraud.

The Double Jeopardy Clause bars the prosecution from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (internal citations omitted); *id.* at n. 8 ("the more descriptive term 'issue preclusion' is often used in lieu of "collateral estoppel"). Issue preclusion, like the bar on double jeopardy itself, ensures that jury verdicts and their intended finality are respected and maintained.

[1] Mr. Sanders joins in motions *in limine* filed on behalf of co-defendant Stephen DiCarmine on May 27, 2016.

"A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it . . . its finality is unassailable." *Id.* at 122-23. The prosecution, with all of its resources and power, should not be permitted to make repeated attempts to convict for a particular alleged offense, thereby enhancing "the possibility that even though innocent he may be found guilty." *Id*. at 117-18 (internal citations omitted).

Thus, while there may be circumstances where the prosecution may introduce acquitted conduct against a defendant, the court must first "examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," [*id.* at 120], and determine whether the issue was necessarily resolved against the prosecution after a full and fair opportunity to litigate. That examination of that record must be conducted, not with a "hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality . . . set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (any other more "technically restrictive" test "would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings").

New York has rightfully followed the Supreme Court's command. *See, e.g., People v. Aguilera*, 82 N.Y.2d 23, 30-31 (1993) ("courts have tended to favor defendants in the application of collateral estoppel because of concerns for due process, double jeopardy, the right to a jury trial, fundamental fairness and preventing undue harassment") *citing Ashe*, 397 U.S. at 436; *see also People v. Acevedo*, 69 N.Y. 2d 478, 485 (1987) ("where the People have had a full and fair opportunity to contest issues, but have failed, it would be inequitable and harassive to again permit the prosecution to establish these same matters, as if the first trial had never taken

place"). An issue should be precluded where the "State attempts to prove [a defendant's] guilt by relitigating a settled fact issue, once necessarily decided in his favor, whether it is a question of ultimate fact or evidentiary fact." *Acevedo*, 69 N.Y. 2d at 486-87 ([i]n both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial").

For example, in *Dowling v. United States*, 493 U.S. 342 (1990), the government introduced evidence of an earlier burglary of which the defendant had been acquitted, but which tended to prove the defendant's identity as the charged bank robber. *Id.* at 344-45. The acquitted burglary was not part of the same conduct as the charged robbery, and so admission of evidence of the burglary did not seek to relitigate the defendant's liability for it. *Id.* at 348. Further, even though the acquitted conduct in *Dowling* was independent of the conduct at issue in the subsequent trial, the Supreme Court spoke to the need to protect defendants from the possibility that they might be convicted based on inferences of conduct for which they were previously acquitted:

> [D]owling contends that the use of this type of evidence creates a constitutionally unacceptable risk that the jury will convict the defendant on the basis of inferences drawn from the acquitted conduct; *we believe that the trial court's authority to exclude potentially prejudicial evidence adequately addresses this possibility*.

493 U.S. at 353 (emphasis added). Indeed, the Court noted that the acquitted conduct was admitted at Dowling's second trial with instructions that the defendant had been acquitted of the prior crime, and that the evidence was admitted solely as proof of identity of the subsequent crime. *Dowling*, 493 U.S. at 345-46.

Here, Mr. Sanders was acquitted of the following conduct:

- accounting treatment of the Dewey & LeBoeuf corporate American Express card (Counts 21, 34, 49 and 69);

- deliberate failure to correct a software error in the exchange rate for Great Britain pounds (Count 20);

- falsifying records at the end of the first quarter of 2011 to meet an "asset coverage ratio" covenant (Counts 51, 52, 53 and 57), and reversal of disbursement write-offs in January 2010 and 2011 (Counts 24 and 36);

- accounting treatment related to payroll in Italy (Counts 47 and 70); and

- accounting treatment of Dewey's Riyadh office (Count 35).

For all of these charges, it is plain that the jury acquitted because the prosecution failed to prove that Mr. Sanders was in the loop in the underlying conduct in any significant way, if at all, and/or because the prosecution did not prove that the conduct was inappropriate or engaged in with intent to defraud.

1. The corporate American Express card

It is plain that the jury acquitted Mr. Sanders for accounting adjustments based on the firm's American Express card (issued in Mr. Sanders' name) because the prosecution failed to prove that he was in the loop on those adjustments.

On direct examination, cooperating witness Thomas Mullikin testified about a reversal of a write-off for a balance on the card of $2.4 million:

Q. And did you do that on your own or were you directed to do that?

A. I was directed to do that by Frank Canellas.

Q. Do you have any personal knowledge whether or not Frank Canellas received any instruction from anyone else to reverse this write-off?

A. No, I don't have any knowledge of that.

Q. Now, who else participated in reversing this write-off, if you can remember?

A. Dianne Cascino was involved, Victoria Harrington, Ann Stoya, I believe, was involved as well.

T 1756-57.

Q. What were some of the reasons for putting this $2.4 million amount or posting it to a pending billable matter?

…

THE COURT: Why did you do this?

THE WITNESS: I did it because Frank instructed me to.

T 1762-63. Asked about the reversal of the write-off for the years 2009 and 2010, Mullikin again testified that it was done at Canellas's direction. T 1834, 1909.

On cross-examination, to underscore Mullikin's exculpatory testimony, he was shown multiple email chains, some introduced by the prosecution and some by Mr. Sanders (PX 21-083, 21-089, 21-270, DX 2021 - 2025) (Exhibit 1), in which accounting treatment of the expense was discussed, but on which Mr. Sanders was never copied. T 1978-82; *see also* Canellas at T 4777-79, Harrington at T 5807-08. More, Mullikin testified that he had no firsthand knowledge even as to whom in the firm received the statements from American Express. T 1993 ("Q: You have no firsthand information as to who[m] in the firm reviewed the statements when they were received by the firm, correct? A: Correct").

In summation, Mr. Sanders further underscored the fact that the prosecution had not proven that Mr. Sanders participated in the accounting treatment of the $2.4 million by displaying the email chains on which the adjustment discussed and saying: "Joel is not on the emails, not a one." T 8842.

2. The Great Britain Exchange Rate

The prosecution was likewise unable to connect Mr. Sanders to application of an incorrect exchange rate for Great Britain pounds in early 2009. Mr. Mullikin testified on direct examination that, after the error was initially discovered and corrected, Mr. Canellas reversed the correction because it had served to reduce net income:

> Q. And can you explain what happened?
>
> A. What happened was Frank noticed that the net income had gone down a lot and asked why. And I -- I think there might have been some others involved, as well. We explained to Frank what happened with the exchange rate and how this caused an increase in expense, a decrease in net income.
>
> Q. And what effect, if any, did the change -- Well, what was done after Frank Canellas -- you had that conversation with Frank Canellas?
>
> A. He told us to go back and put in the wrong exchange rate again.

T 1779-81.

On cross-examination (T 2017-21), Mr. Mullin was shown emails demonstrating that Mr. Sanders was not in the loop on the issue (DX 2030 - 31) (Exhibit 2). Later, cooperating witness Victoria Harrington was shown other email exchanges on the issue, which excluded Mr. Sanders. T 5806-07; PX 21-093, 21-094 (Exhibit 3). Mr. Sanders in summation underscored the exculpatory evidence on this issue: "Canellas did not testify to you to any specific conversation in which he discussed that issue with Mr. Sanders, not one, nor did anyone else. And the email traffic confirms it." T 8842.

3. Falsifying records to meet an "asset coverage ratio" for Q1 2011, and reversal of disbursement write-offs in January 2010 and 2011

The prosecution at trial introduced emails showing that Mr. Sanders was

specifically excluded from emails in which Mr. Canellas, Diane Cascino and Lourdes Rodriguez purportedly falsified records to meet an "asset coverage ratio" at the end of the first quarter of 2011. Thus, Mr. Canellas in PX 21-304 (Exhibit 4) indicated to Ms. Cascino and Ms. Rodriguez that he had spoken to Mr. Sanders (who was then traveling), but Mr. Sanders did not participate in emails among Mr. Canellas, Ms. Casino and Ms. Rodriguez in which purported falsification was discussed:

> Looks like we may come in eight to 10 million short of projections. I need a really good billing BVA month to compensate for this. Could need to exceed the previous discussed billing target by 10 million. I 'm going to be caught up in a meeting most of the morning, but will need to make some decisions about cash by 12:30, one o'clock. Can you guys take a look to see if this is at all possible and maybe we can get together and discuss at noon. Thanks, and sorry.

T 4724. Subsequent emails in the chain among Mr. Canellas, Ms. Cascino and Ms. Rodriguez document their efforts to arrange a time to meet. Several days later, Mr. Canellas sent two emails to Sanders, copying Ms. Cascino and Ms. Rodriguez, providing no information about the underlying steps taken to meet the ratio, but instead reporting without explanation that, "[t]hanks to a lot of help from Dianne and Lourdes, we closed this morning in compliance with all covenants. Safe travels, Frank." PX 21-308; PX 21-306 (Exhibit 4). Mr. Sanders replied, "That's great guys. Good work." PX 21-309 (Exhibit 4); T 4726.

Defense counsel in summation noted the curious exclusion of Mr. Sanders from the purportedly incriminating part of the email exchanges:

> If your boss told you to do something requiring an intent to defraud, told you to do something wrong, the least you would do is copy your boss on the email to cover yourself.

T 8842-43. Defense counsel argued that the exclusion of Mr. Sanders from the incriminating part of the exchanges showed that Mr. Sanders had not been involved. *See* T 8843-44.

Perhaps the clearest illustration of the jury's acquittals are counts relating to reversals of disbursement write-offs. When Ms. Cascino met with the prosecutors before trial, she said, as she acknowledged at trial, that it was Mr. Canellas who directed her on accounting adjustments:

> Q. And from time to time you have given testimony when asked by Mr. Moser, who directed you to do one thing or another, you said Joel Sanders or Frank Canellas, do you recall?
>
> A. Yes.
>
> Q. At your third meeting with the prosecutors on September 18 of 2013, do you recall telling Mr. Moser and his colleagues that your instructions always came from Mr. Canellas?
>
> A. Yes, I could have said that at that meeting.
>
> Q. At a meeting on November 25 of 2013, do you recall telling Mr. Moser and his colleagues that Mr. Sanders rarely gave you instructions?
>
> A. I'm sure I said that. When confronted with all the e-mails that I have, that wasn't always the case.
>
> Q. We will come to the e-mails in a little bit.
>
> A. Okay.
>
> Q. Right now my question is, when you met with the prosecutors on November 25 of 2013, do you recall telling Mr. Moser and his colleagues that Mr. Sanders rarely gave you instructions?
>
> A. Yes.
>
> Q. At a meeting on October 11th of 2013, again, before you signed the cooperation agreement, do you recall telling Mr. Moser and his colleagues that you reported to Mr.

Sanders but you felt like you reported to Mr. Canellas?

A. Yes, I did feel that way at times.

Q. At your meeting with the prosecutor on October 11th of 2013, do you recall telling Mr. Moser and his colleagues that you reported to Mr. Sanders but your interaction with him went in spurts. You often felt like you were not involved or included?

A. That is true.

Q. At the meeting on October 11th of 2013, do you recall telling Mr. Moser and his colleagues that you could go months without interaction with Mr. Sanders?

A. Yes, that is true.

T 7155-57.

Consistent with that testimony, Ms. Cascino testified on direct examination at trial that it was Mr. Canellas who had directed her to reverse disbursement write-offs. When asked if Mr. Canellas was the only person who had so directed her, Ms. Cascino said, "I think so." Immediately upon Ms. Cascino giving that answer, the prosecutor paused and began looking for an exhibit. As the prosecutor looked for the exhibit, Ms. Cascino, without a pending question, volunteered that Ilya Alter had also so directed her. Then, *though Ms. Cascino had expressed no lack of recollection on the issue*, the prosecutor showed her PX 21-340 (Exhibit 5) and asked if it refreshed her recollection whether *anyone else* has ever directed her to reverse disbursement write-offs. In PX 21-340, Ms. Cascino had asked Mr. Sanders if he wanted her to reverse disbursements relating to four clients (Brantley Partners, Wextrust, Barwa Real Estate and Reserve Management), to which Mr. Sanders responded, "We can't take the expense hit this year." Only after the prosecutor handed PX 21-340 to Ms. Cascino to "refresh her recollection" did she "remember" that Mr. Sanders had so directed her:

A. I believe it was Frank Canellas.

Q. And was Frank Canellas the only person who ever directed you to reverse disbursement write-offs?

A. I think so.

Q. One moment, please, Your Honor.

A. Oh, it was Ilya.

Q. May I approach the witness. I would like to show the witness what's in evidence as 21-340.

A. Yes.

Q. And if you can look at the top of the second page and tell me if that refreshes your recollection whether anyone else ever instructed you to reverse disbursement write-offs.

A. Yes

Q. And who else instructed you?

A. Joel Sanders.

T 6861-62.

In summation, defense counsel focused the jury not just on Ms. Cascino's curious change of heart about whether anyone other than Mr. Canellas had directed her, but also on the prosecutor's curious use of PX 21-340 to address a lack of recollection that Ms. Cascino had not claimed:

> As Ms. Cascino recalled it she got directions on this issue from Mr. Canellas and Mr. Alter. Ms. Cascino doesn't claim any lack of recollection, but Mr. Moser shows her this exhibit to refresh your recollection so she can testify that Mr. Sanders directed her to do something sinister in this email.

T 8861. Even in PX 21-304 (Exhibit 4), one of the email chains discussed above in which Mr. Sanders was excluded, Ms. Cascino wrote to *Mr. Canellas*, "Do you want me to reverse w/o's?"

See DX 2116 (Exhibit 6) (Ms. Rodriguez to Mr. Canellas: "At some point, *we* should discus write-offs") (emphasis added).

More, defense counsel challenged the notion that any inference of fraud was fair from treatment of the disbursements related to the four clients identified in PX 21-340. On cross examination, Ms. Cascino acknowledged specific issues with the write-offs of three of the four matters.

> *See* T 7221: Brantley – "Q. Does that refresh your recollection that in March of 2012 you were directed to write off the Brantley matter because Mr. Pinkas had past away? A. Yes;"
>
> T 7246: Barwa – "Q. In any event, this is November 29, 2011 and it is again cc'ing Mr. Sanders. It says Bashir and I did with Janis over the weekend. Will set up a call today. Should have both Barwa and MIS sorted completely in next day or two. This is dated November 29, 2011;"
>
> T 7256: Wextrust – "Q. My question is whether it refreshes your recollection that the fees were written off at about that time [later in 2011]? A. Yes, they look like they were."

As to the fourth matter discussed in the email, defense counsel argued in summation:

> So on a list of four matters, maybe [Mr. Sanders] got one of them wrong based on information he had received on an email almost a year before. It is not proof of intent to defraud beyond a reasonable doubt.

T 8862.

More, the prosecution did not prove that the write-offs or their reversals were improper or done with intent to defraud. Ms. Cascino, who testified at trial that she never acted with intent to defraud [T 7284], acknowledged that she told the prosecutors before that "the rule about write-offs was you write it off if uncollectible, but the rule was not set in stone," and that one partner did not write things off for ten years. T 7153. One or more cooperators

acknowledged that too many disbursements had been written off without sufficient effort to collect, the non-paying clients nonetheless had the wherewithal to make the payments [*see e.g.*, T 4774-75], reversed disbursements were identified on reports sent to the billing partners [T 6425], who would attempt to collect on old bills in negotiating fees for new matters [T 6412], and the global financial crisis underscored the importance of securing payment. More, reversed write-offs remained on the books long after Mr. Sanders had left the firm, establishing either that the Dewey Trustee had deemed them proper, or that Mr. Canellas, who by then had assumed Mr. Sanders's duties, had been acting on his own.

4. *Accounting treatment related to payroll in Italy*

The prosecution also failed to prove a connection between Mr. Sanders and accounting treatment related to Dewey payroll in Italy, an issue about which the prosecution's evidence was fleeting. As Mr. Mullikin testified,

> Initially [the payment] was recorded as an expense. When Frank saw it, that the expenses were higher than what he was anticipating, he and I had discussions and he wanted to come up with a way to reduce the expense and I believe I was the one who suggested let's put it into prepaid.

T 1921. Mr. Sanders in summation highlighted the prosecutions' failure to connect the issue with Mr. Sanders: "Here are emails about the issue about the exchange rate where Mr. Sanders is not on any of them. The same is true of other issues, like the expense associated with the payroll from Dewey & LeBoeuf's office in Italy." T 8482.

5. *Accounting treatment of Dewey's Riyadh office*

Likewise, the prosecution did not prove a connection between Mr. Sanders and accounting treatment of Dewey's Riyadh office. As with the corporate American Express card

and the Great Britain exchange rate, Mr. Sanders did not participate in the email, DX 221 (Exhibit 7), related to that issue.

More, Victoria Harrington testified about an expense related to the Riyadh office that was initially written off, but later reversed, but she did not testify that Mr. Sanders participated in the write-off [T 5798-800]:

> Q. Do you see that this is a Dewey organizational chart regarding international offices?
>
> A. Okay.
>
> Q. And do you see that it says that Dewey & LeBoeuf was a hundred percent owner of the Khalid Al-Thebity law firm in Saudi Arabia?
>
> A. Okay.
>
> Q. Did you ever see this chart before?
>
> A. No.
>
> Q. Though you haven't seen the chart, did you know when you worked at Dewey & LeBoeuf that Mr. Al Thebity's law office in Riyadh was a hundred percent owned subsidiary of Dewey & LeBoeuf?
>
> A. I did not know.
>
> Q. Now, let me show you in evidence, Defense Exhibit 221 in evidence, and if you can just briefly read this to yourself.
>
> . . . .
>
> Q. As a CPA, do you know what an imprest balance is?
>
> A. No.
>
> Q. And this is an email from Mr. Canellas to Denise Pelli of Ernst & Young, June 2011. Do you know who Denise Pelli was when you worked at Dewey & LeBoeuf?
>
> A. Yes.
>
> Q. Are you aware that Mr. Canellas gave Ms. Pelli an explanation about the Riyadh

expense that he attempted to justify to her as to why it should be considered an investment and not an expense?

A. No.

Q. Did you ever learn that Ernst & Young rejected his explanation but decided that it was not material for purposes of the financial statement, did you ever learn that?

A. No.

T 5813-15.

5. Conclusion

After an extraordinarily lengthy trial and deliberations believed to be the longest ever in Manhattan, an especially conscientious jury which could not reach agreement on most submitted charges, but credited the defense of the counts discussed above and voted unanimously to acquit Mr. Sanders. The federal and state constitutions, respect for juries and their verdicts and basic fairness compel the conclusion that these allegations are out of the case.

B. The Prosecution Should Be Precluded from Arguing that Mr. Sanders Caused Dewey & LeBoeuf to Fail

In opening statement at the first trial, the prosecution argued that the predecessor firms that combined to form Dewey & LeBoeuf had survived the Great Depression and World War II, but that it was forced to file for bankruptcy in 2012 because of the stewardship of Mr. Davis assisted by Mr. DiCarmine and Mr. Sanders:

> Years of promises of compensation that Dewey & LeBouef failed to meet, years of overpayment of compensation which the firm simply could not afford, years of pushing expenses based on the dream of future prosperity that never came, millions of fake assets of the firm's books, and years of accounting fraud directed by these three defendants finally proves too much.
>
> On May 28, 2012, Dewey & LeBoeuf declared bankruptcy . . . . [T]he firm's creditors were left owed hundreds of millions of dollars and many New Yorkers lost their

livelihood.

T 152-53.

The evidence at trial painted a different picture. After the global financial crisis in 2008, Dewey & LeBoeuf began to rebound, and by 2012 was negotiating to merge with major New York firms, including Greenberg Traurig. The departure of a lucrative practice headed by partners Schwolsky, Dye and Groll in 2012, however, led to an exodus of other Dewey partners with lucrative practices. Merger negotiations with other firms abruptly ended in 2012 when the fact of a criminal investigation of Mr. Davis was leaked to the press. Because the true reasons for Dewey & LeBoeuf's bankruptcy were different than the prosecution had argued in opening, it began its summation by framing the case around the defendant's conduct and intent during the three years *before* the bankruptcy, and expressly arguing that the case was not about why the firm failed:

> Over the course of more than 3 years these defendants lied and they directed others to lie and cook the books to get and keep loan and investment money rolling into Dewey & LeBoeuf.
>
> That is why we're all here and it is really that simple.
>
> This case is about the scheme that these 3 defendants created and perpetrated in order to get what they wanted or what they thought they or Dewey & LeBoeuf needed.
>
> And in New York, ladies and gentlemen that is a crime. In fact, when it involves a scheme to defraud over a dozen investors and lenders running more than 3 years, it is multiple crimes.
>
> *This case is not about why Dewey & LeBoeuf failed. It is just not.* You know why? Because not one of the 53 charges against these defendants [as submitted to the jury] charges them with causing Dewey & LeBoeuf to fail.

T 8877 (emphasis added). Thus, the prosecutor was not just making the technical point that none

of the charges *required* a finding about the cause of the firm's demise; the prosecutor made that point by saying that the submitted counts did not charge the defendants with the firm's failure. Instead, based on evidence of the exodus of partners from the firm in early 2012 and the abrupt end of merger negotiations when the fact of the investigation of Mr. Davis was leaked, the prosecutor took a step further and understandably made the broader statement about "[t]his case," and that "[t]he point is [the defendants'] actions and their intent" [T 8878], not whether they caused the firm's failure.

Underscoring the prosecution's posture, it has now moved *in limine* to strike most of the introduction to Count One of the indictment in this case, including the following paragraph:

> By in or about March 2012, the Scheme had collapsed in on itself. 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. The Firm could no longer pay partners enought 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.

People's Motions *In Limine*, May 6, 2016, at 16-18. The prosecution argues that the indictment should be amended to strike this paragraph and others "to prevent the possibility that defense counsel might read portions of Count One to the jury in the second trial [including the above-quoted paragraph] and argue (albeit incorrectly) that the People are required to prove every factual allegation contained therein." People's Motions *In Limine* at 17. While the prosecution's motion to dispense with any formal obligation to prove that Mr. Sanders caused the firm's demise may not be the precise equivalent of declaring that "[t]his case is not about why Dewey & LeBoeuf failed," nor should its motion be irrelevant to the Court's consideration of this

application. If the prosecution cannot be bothered to prove beyond a reasonable doubt that Mr. Sanders contributed to the firm's demise, it should not be permitted to infer any such thing with a prosecutorial wink and nod.

"Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding." *Maas v. Cornell University*, 253 A.D.2d 1, 5 (3d Dep't), *aff'd*, 94 N.Y.2d 87, 91-93 (1999) (having successfully opposed conversion of action into Article 78 proceeding below, plaintiff precluded from arguing on appeal that matter should be converted into Article 78 proceeding); *Cobenas v. Ginsburg Dev. Cos., LLC*, 133 A.D.3d 812 (2d Dep't 2015). The prosecution is barred from advocating one position at one stage of a case and then pressing a different position that directly contradicts its earlier one. *See Stewart v. Chautauqua Cty. Board of Elections*, 69 D.D.3d 1298, 1303 (4th Dep't 2010).

More, should the Court permit the prosecution to change course and now argue that this case *is* about Mr. Sanders helping to cause the firm's demise, Mr. Sanders should be permitted to introduce the prosecution's prior contrary statement. In *United States v. McKeon*, the Second Circuit concluded that a prior opening statement by a defense counsel in a second trial was properly admitted against the defendant as an admission against interest at the defendant's third trial. 738 F.2d 26 (1984). Before admitting arguments advanced by a party's representative, *McKeon* set forth the following principle:

> [T]he district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Speculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted.

Id. at 33. The test for admissibility under *McKeon* is whether: (1) as the above principle reflects, the prior argument involves an assertion of fact that is inconsistent with similar assertions offered at a subsequent trial (*id.* at 31); (2) counsel's statements were the equivalent of testimonial statements made by their client (*id.* at 33); and (3) the inference sought to be drawn by the proponent is "is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.*[2]

McKeon has been expressly considered and applied as a controlling legal principle within New York courts. *See Miller v. Lewis*, 39 Misc. 3d 1216(A) at *5, 975 N.Y.S.2d 367 (Sup. Ct. Kings County 2013) ("[i]t is further well settled that statements made by an authorized agent of an individual may be introduced as admissions against interest of that individual provided the agent was designated with authority to speak on behalf of the individual.") (discussing *McKeon* at pages *9-11). Counsel's judicial admissions "can concede the ultimate facts of a case rendering the lawsuit superfluous." *Id.* at *3-4.

Here, the prosecution's statement that "[t]his case is not about why Dewey & LeBoeuf failed. It is just not" is an assertion of fact within the meaning of *McKeon*. *See* Anne B. Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 Minn. L. Rev. 401, 465 ("The line between fact and law or fact and opinion is often blurry. In

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[2] There is no meaningful distinction between the statements of a defense counsel and those of a prosecutor. It is been held that the rule applies to statements of both. *See, e.g. United States v. Salerno*, 937 F.2d 797, 811-12 (2nd Cir. 1991) (finding that the district court abused its discretion by refusing to admit statements from the government's opening and closing arguments); *see also United States v. DeLoach*, 34 F.3d 1001 (11th Cir. 1994) (applying the *McKeon* standards to prior inconsistent statements of a prosecutor).

closing argument, the prosecution encourages the jury to adopt the prosecution's view of the evidence and convict the defendant. If in a later case the government pursues a different theory, the inconsistent position on the legal and logical implications of the evidence should be disclosed to the jury. The prosecution should not be permitted to preclude consideration of earlier positions simply because they were expressed during closing argument").

The prosecution's position that this case is not about why the firm failed reflects a reality from which the prosecution should not be permitted to back away. While it is not known who leaked the fact of the 2012 investigation of Mr. Davis and thereby sabotaged the firm, the birth of this case is troubling and should bar the prosecution from alleging that Mr. Sanders is to blame for the firm's demise. It has been suggested that the criminal investigation of Mr. Davis in 2012 was pressed by people with unique access to the prosecution, including (a) Seth Farber, a disgruntled Dewey partner who had previously worked with senior executives of the District Attorney's office to create the annual Dewey award for assistant district attorneys; and (b) John Moscow, a 32-year veteran of the District Attorney's office and inaugural member of the District Attorney's 2012 White Collar Crime Task Force, who represented disgruntled Dewey partner Cameron McRae. In creating the Task Force in 2012, the District Attorney promised to revitalize anti-fraud statutes, including New York's Martin Act, the securities fraud felony with which the defendants in this case were shortly thereafter charged. *See "Vance Sets Up White Collar Crime Task Force,"* Corporate Crime Reporter, Oct. 24, 2012.

Thus far, this case has proven to be an unworthy repository for the prosecution's efforts to prosecute fraud. Of 106 counts against Mr. Sanders, 103 have been the subject of acquittals or dismissals, and the prosecution wants its most specific allegations to be struck from

the indictment. People's Motion *In Limine*, May 6, 2016, at 15-19. Whether or not the retrial follows script and ends with more acquittals or deadlocks, the reason for the firm's demise is at least an open question, and the prosecution should not be permitted to reverse course and suggest otherwise.

C. Accounting Issues Should Be Precluded

The prosecution has moved *in limine* to amend the preamble to Count One of the indictment to, among other things, strike over five pages of allegations, including a list of eight specific accounting issues which were the subject of the first trial. People's Motion *In Limine*, May 6, 2016, at 15-19. This latest motion follows acquittals or dismissals on every charge of falsifying business records with which Mr. Sanders was initially charged. Because we were just served with the prosecution's motions this past Friday, we are not yet prepared to address whether the proposed amendments improperly change the theory of the case, or otherwise tend to prejudice the defendant on the merits [*see* C.P.L. §200.70(1)], or, alternatively, favor preclusion of certain evidence, require particularization as to precisely what specific accounting issues, if any, Mr. Sanders should prepare to defend, or warrant other relief.

Thus, while it is premature to raise all relevant issues in this filing, we seek preclusion here of two accounting issues which appear indispensable to the prosecution's presentation, and a third which seems plainly irrelevant and misleading. For the reasons explained, evidence of these issues have limited if any probative value, and serve to confuse the issues, mislead the jury and otherwise cause undue prejudice.

Judges have broad "latitude under the Constitution to establish rules excluding evidence from criminal trials" within the limits imposed by the Fourteenth Amendment's Due

Process Clause and the Sixth Amendment's Compulsory Process and Confrontation Clauses. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). To ensure due process, the rules of evidence at common law "permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Clark v. Arizona*, 548 U.S. 735, 770 (2006) (*quoting Holmes*, 547 U.S. at 326; *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Consistent with the constitutional mandate, trial judges in New York have discretion to admit or preclude evidence based on a determination of whether its probative value confuses the main issues and misleads the jury:

> [E]ven if the evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage (e.g. where cumulative evidence is proffered); or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties.

People v. Petty, 7 N.Y. 3d 277, 286 (2006) (citing *People v. Davis*, 43 N.Y. 2d 17, 27 (1977); *People v. Corby*, 6 N.Y. 3d 231, 234-235 (2005)). The prosecution in this case acknowledges that a court may exclude evidence if its probative value is outweighed by the prospect for confusing the issues, misleading the jury or undue prejudice. People's Motions *In Limine*, May 6, 2016, at 1 (*citing People v. Primo*, 96 N.Y.2d 351, 355 (2001)).

1. Treatment of salaried partners

The prosecution at trial alleged that the firm incorrectly and fraudulently treated salaried partners Khalid Al-Thebity and Ralph Ferrara as equity partners to boost net income, but New York law in fact requires that such partners be treated as equity partners.

Payments made to non-equity partners of law firms are properly subject to income

taxation to the extent allocated specifically to New York as the source of the income. *In the Matter of the Petition of Robert and Frances Tosti*, DTA No. 822915 (July 1, 2010), *aff'd* by New York Tax Appeals Tribunal (May 12, 2011). Therefore, the distributive share of partnership income, even to non-equity partners, is taxable income to that non-equity partner if it is derived from or connected to New York sources. The distributive share of partnership income to partners, and unlike, for example, payments to associates or other law firm staff, are not typically expense items, and would not be billed as such in the ordinary course, for purposes of deductions from all partnership income or otherwise. *See id; see also Matter of Heller v. New York State Tax Comm.*, 116 A.D.2d 901 (3d Dep't 1986); *Matter of Hefron v. Chu*, 144 A.D.2d 729 (3d Dep't 1988); New York State Department of Taxation and Finance, Advisory Opinion TSB-A-06(9)I (Nov. 30, 2006).

Instead, payments to non-equity partners are properly treated as distributions of partnership income. As *Tosti* explains, and has been the subject of much commentary (including an article produced by the prosecution in this case as part of its discovery of Dewey's files), a salaried partner is treated as an equity partner if (as with Al-Thebity and Ferrara) he holds himself out as a partner, received a K-1 form as opposed to a W-2, pays estimated quarterly taxes and unemployment taxes as opposed to having taxes withheld, and enjoys the firm's resources and support typically provided to equity partners.

As we pointed out at trial, and without contradiction by the prosecution, PriceWaterhouse Coopers auditing Dewey Ballantine so treated salaried partners. More, Mr. Canellas, who did not think the treatment of salaried partners was wrong at the time [T 4694], so advised the prosecution in an initial meeting:

Q. Does it refresh your recollection that you told the prosecutors that since the salaried partners were given a K-1 and treated as partners from a tax perspective, they should be classified as partners?

A. Yes.

Q. Did you say, once a partner, always a partner, in the eyes of the tax authority?

A. I did say that.

Q. Did you say that you got the advice to give these partners K-1s from Ernst & Young and were told that they should be treated as partners?

A. Yes.

T 4750-51.

The prosecution got this issue wrong and should not be permitted to introduce evidence of it based on equivocal inferences pieced together from incomplete evidence which paints a partial and misleading picture of reality and did not actually have an adverse impact on the investors, banks and others whom the prosecution claims were defrauded.

2. Amortization of lease termination fees

The prosecution similarly missed the boat on amortization of lease termination fees; it pieced together inferences from incomplete evidence which painted a misleading picture. Here, like with salaried partners, a cooperator told the prosecution in an initial meeting that the accounting treatment was proper, a view consistent with available law:

Q. Mr. Alter, isn't it true that the very first time you spoke to prosecutors on February 22, 2013, you said that you believed that the costs relating to elimination of the firm's redundant offices were related to the merger, and could be amortized over time? Isn't it true that you said that?

A. I might have said that, yes.

Q. Isn't it true that the second time that you spoke with the prosecutors on or about

> March 8, 2013, you said that you believed that the costs relating to the elimination of the firm's redundant offices were related to the merger and could be amortized over time? Isn't it true that you said that?
>
> A. I might have said that.

T 4025. While the prosecution elicited from Mr. Alter at trial that his above-quoted statements were untrue, they happen to be consistent with the law and are not a basis on which to claim either of the defendants' criminal intent. Even Ernst & Young's Jacob Weichholz acknowledged in substance that the controlling principles of law were consistent with amortization of the lease termination fees. T 5594, 5600-01.

Ordinary expenses are typically necessary, appropriate and helpful in carrying on the taxpayer's business and are commonly and frequently incurred in the taxpayer's line of business. Capital expenditures, on the other hand, may not be deducted in the year in which they are incurred in the same way, and instead must be amortized over time to better reflect the continued future income that they help generate, and which spreads the cost over a longer period of time rather than in the particular year in question. *Indopco, Inc. v. Commissioner of Internal Revenue*, 503 U.S. 79 (1992).

Expenditures that create or enhance a separate and distinct asset are frequently, though not exclusively, capital expenditures. However, whether the expense creates or enhances a separate or distinct asset is not always controlling. The realization of future benefits that the expense will generate beyond the tax year in question is an important factor in whether the cost is a capital expenditure. An expense may be capitalized if its purpose goes to the entity's continued operations and betterment for the duration of its existence or into the indefinite future beyond the taxable year. When a business is acquired by a parent company and becomes a wholly-owned

subsidiary, the costs it incurs in investment banking activities and legal fees to facilitate such a merger and the acquisition of its shares, would be a capital expenditure. Expenses incurred to change the corporate structure for the benefit of future operations are typically not ordinary and necessary business expenses. *See generally Indopco*, 503 U.S. at 83-89.

In connection with the Dewey merger and the resulting redundancy in office space in London and Texas, the firm paid substantial lease termination fees that are properly characterized as capital expenditures and therefore not deductible in the calendar year in which they are incurred. *See id.* Thus, for example, if a bank incurs costs in connection with the establishment of new branches in different cities relating to investigative or market research or attorney fees, those expenses have been capitalized because the benefits that they produce endure for the duration of the time that rgw new branch is doing business, rather than in the current tax year only. *See Central Texas Savings & Loan Assn. v. United States*, 731 F.2d 1181, 1184 (5th Cir. 1984); *see also Commissioner v. Lincoln Savings & Loan Assn.*, 403 U.S. 345, 354 (1971).

Similarly, where a business acquires a different physical location for its headquarters, the payments it incurs to terminate a lease at the site of its original headquarters are not ordinary deductible expenses. Instead, such lease termination payments are a capital expenditure because they are made only in connection with the acquisition of the site for the newer headquarters, and are part of an overall plan to change the entity's headquarters to a more preferred site. In those circumstances, the lease termination fees are the cost of acquiring the second site, and the interrelation meant that the taxpayer would be obtaining benefits in connection with the termination payments beyond the calendar year in which they were actually paid. *See IRS Letter Ruling 9607016* (Nov. 20, 1995).

The prosecution's proof of intent to defraud on this issue was based on two threads, which neither alone nor together justified use of the amortization to prove a criminal case: (i) Mr. Sanders' awareness that a separate possible basis for amortization - the firm's continuing guarantee of the lease even after acquired by another firm - did not exist because there was no such guarantee; and (ii) the absence from Ernst & Young paperwork of reference to the lease termination fees as merger-related. But the first prong of the prosecution's theory begs the question whether the *Indopco* theory of amortization was proper or at least arguably so, as Mr. Alter initially explained to the prosecution. And the second prong lacked *any link* between the rationale for amortization and Ernst & Young: Ernst & Young received letters regarding the leases which had been sent to the firm by DLA Piper and Fulbright & Jaworski [PX 52-077, 52-078 (Exhibit 8)], each of which contains handwriting of Ernst & Young auditors indicating conversations with someone from Dewey. But even Mr. Canellas, in charge of the firm's finance department, had ever before seen those letters from DLA Piper or Fulbright or ever spoken to those firms about the issue; and he did not know whom at Dewey had provided the letters to or spoken to Ernst & Young about the issue. T 5183-5186.

Thus, the prosecution's theory lacks a persuasive link connecting Mr. Sanders to any wrongdoing; instead, the prosecution has pieced together bits of testimony and portions of emails, creating a view that is incomplete, misleading, confusing and unduly prejudicial. Mr. Sanders should not be required to answer for accounting treatment which was proper or arguably proper, for which he had no contact with Ernst & Young, and which did not serve to defraud.

3. Delay in paying invoices

It was not disputed at trial that the firm operated on the modified cash basis of

accounting. Under that basis, revenues are recorded when received, but expenses are recorded when paid. It was also not disputed at trial that all of the purported victims in this case knew that the firm operated under the modified cash basis, and knew that expenses were not recorded until paid. Mr. Canellas at trial acknowledged telling the prosecution when meeting with them before trial that "delaying payments might be bad for business relationships but was not inappropriate for a firm on that accounting basis." T 4746-47. The prosecution introduced evidence of instances where Mr. Sanders delayed paying certain invoices. *See* PX 21-155 (Exhibit 9). But the firm's basis of accounting permitted him to do so and was not fraudulent. The prosecution should not be permitted to press this inference in support of criminal charges.

D. Emails Unconnected from Fraud or Based on Hearsay Should Be Precluded

The full record of the first trial, including the prosecution's summation, establishes that certain emails should be precluded at the retrial. Those emails fall into two categories: (1) emails from which inferences of fraud were pressed, but which the full record of the first trial, coupled with the prosecution's summation, establishes had limited if any probative value compared with great unjustifiable risk of confusion and undue prejudice; and (2) emails proffered as non-hearsay, but which were in fact admitted and used for the truth of the matter asserted.

1. *Emails from which inferences of fraud were pressed*

The lesson of the first trial may be to take care in writing emails because sarcasm, histrionics and careless wording can be misinterpreted after the fact to fit a theory of criminal fraud; prosecutors, as here, can use emails that may perhaps cast a participant in an unflattering light, but do not truly justify inferences of criminal fraud. When such evidence risks confusion

of the issues, serves to mislead and causes undue prejudice, it should be precluded.

a. *There was no misuse of term debt [PX 21-205]*

At trial, the prosecution admitted an email chain, dated January 29, 2010, PX 21-205 (Exhibit 10), in which Mr. Sanders wrote to Dennis D'Alessandro and Mr. DiCarmine, suggesting that he had misrepresented the firm's use of term debt to banks. Mr. Sanders wrote, in substance, that he had "piled it on," not told banks that the firm had used term debt to pay partners, and instead told them that the money had been used for capital improvements and technology upgrades.

But the prosecution neither proffered nor introduced any evidence of any actual misuse of term debt, and we are aware of no such evidence. In fact, as the defense established through cross-examination of Thomas Mullikin -- without contradiction from the prosecution -- the firm had made no use of term debt at the time, and was in fact paying it off:

> Q. On direct examination, you talked a little bit about term debt. Do you recall that testimony?
>
> A. Yes.
>
> Q. And you said in substance that term debt is like a mortgage, correct?
>
> A. Similar.
>
> Q. That's a way of explaining it to the jury, that's the way it works, right?
>
> A. Right.
>
> Q. Could you turn to page 13 of that Exhibit, People's 12-009 (Dewey 2009 financial statement).
>
> A. Okay.
>
> Q. Does that -- what is that page, first of all?

A. It's a listing of the firm's borrowers.

Q. And it lists term debt in the upper part of the page and below some revolving debt, correct?

A. Right.

Q. Can you tell from that page that the term debt of the firm Dewey & LeBoeuf in 2009 was decreasing?

A. Yes

Q. Can you tell that the term debt was not being used in 2009, essentially like a mortgage, that it was being paid off?

A. Yes.

Q. Now, if you can turn to page five of the same document, and you're free to look at any page you need to to answer my question, but I am focusing on page five. Are you able to tell from page five or any other page in that document, what the firm used its term debt for that is reflected on page 13 that you just looked at?

A. What they used the term debt for?

Q. Yes.

A. No, I can't tell it from here.

Q. Do you know that they used it to pay for fixed assets; and that's with regard to the document or independent of the document, if you know?

A. Well, there wasn't any term debt in this year, so there was no use of term debt in this year.

Q. In 2009?

A. Right.

T 2012-13.

The firm's financial statements further help establish that no term debt was actually being used at least as of the time of the email in January 2010. *See* PX 12-009 at 13; 12-

010 at 14 (Exhibit 11). More, no witness from any bank nor any cooperator testified at trial to any misrepresentation from anyone at the firm about misuse of term debt. Apparently realizing the lacuna in its proof, the prosecution in summation used the email to create an unjustified inference that it had never proven. Thus, the prosecution read the email into the record, arguing that "Defendant Sanders lied to the banks about how the firm was using loan money and he updated defendant DiCarmine and Dennis D'Alessandro on the lies so they could following the party lying." T 9142. But because the prosecution had no evidence that Mr. Sanders had actually misrepresented the firm's use of term debt, the prosecution immediately pivoted in summation from the email, which it quoted [T 9142], to testimony from witnesses that banks and investors had generally relied on the firm's representations:

> Now, Robert Mills from the Hartford told you the Hartford relied on the lies, deception, and false and fraudulent documents provided by the defendants and other co-conspirators.

T 9143. The prosecutor then discussed general reliance of other investors as well as representatives of banks who testified. T 9144. The prosecution thereby unfairly linked PX 21-205 with the testimony of witnesses, even though it never proved any actual link.

Whatever the basis for the prosecution's arguments of misrepresentations and reliance thereon, PX 21-205 was not a fair basis therefor. At the retrial, it would be precluded.

b. *The 2008 "Clueless Auditor" never worked on the 2008 audit [PX 21-129 and 21-237]*

Likewise, the prosecution made much of email exchanges in which Mr. Sanders (i) asked Mr. Canellas after the 2008 audit if he could find another "clueless auditor" like Ernst & Young's Joseph Capparelli for the following year's audit, to which Mr. Canellas responded, "That's the plan. Worked perfect this year" [PX 21-129 (Exhibit 12)]; and (ii) asked Mr.

Canellas in March 2010 if they could get Mr. Capparelli back as the firm's auditor. PX 21-237 (Exhibit 12). But Mr. Capparelli was not involved in the 2008 audit and left the firm in 2008.

The prosecution in summation argued that the emails were not made in jest because Mr. Sanders knew that Mr. Capparelli's cluelessness had worked to the firm' advantage, and that Mr. Sanders was demanding and would not have tolerated a clueless auditor. As the prosecution argued in summation, "Ernst & Young dropped the ball on the 2008 audit and defendant Sanders and Frank Canellas were thrilled about it." T 9075. But that argument has no basis in fact. The reality of this case is not that fraudulent adjustments escaped the attention of Ernst & Young in 2008; to the contrary, the jury *acquitted* Mr. Sanders of two adjustments made for 2008 (Count 21, the corporate American Express card; and Count 20, the Great Britain exchange rate); the prosecution is simply wrong about at least two others that are *sine qua nons* of this case or close to it (the proper treatment of salaried partners under *Tosti*, and amortization of lease termination fees under *Indopco*); and Mr. Sanders in fact was dissatisfied with Ernst & Young precisely because he came to believe they were incompetent, and said that he was inclined to replace them. *See* DX 2109, 2111, 2112 (Exhibit 13). Even Mr. Canellas, who participated in the email exchanges about a "clueless auditor," testified that he was not thinking at the time about whether the accounting was wrong or right. T 4694. Mr. Canellas could hardly have been "thrilled" about incompetent auditors if he was not even thinking at the time that what he was doing was wrong.

Whether or not the prosecution can prove that a criminal scheme, it should not be permitted to secure a conviction based on fanciful prosecutorial inferences drawn from sarcastic emails. If this case truly warrants the prosecutors' rhetoric about it and its concomitant

investment of extraordinary state resources, it should be able to prove its charges without attempting to squeeze probative value from an offhanded email exchange.

c. The Wextrust fees were in fact written off

Likewise, the prosecutors relied on Mr. Sanders' email to Ms. Cascino in April 2011 that she "hide . . . w/o actually writing" off fees totaling $6.9 million that Vincent P. Schmeltz, III had advised should be written off. PX 21-316 (Exhibit 14). But Ms. Cascino took no action on that email, the amount was in fact written off later in the same year, and the prosecutors introduced no evidence (and made no argument in summation) connecting the email to any actual deceit on the banks or investors:

> Q. [D]o you remember whether or not Mr. Sanders asked you to remove six point nine million dollars in fees from accounts receivable?
>
> A. I don't remember.
>
> Q. Okay, now upon receiving the e-mail to which you just made reference which is 21 316 also at 6:46 p.m, am I correct from your testimony you took no immediately action regarding the six point nine million dollars in fees related to Wextrust?
>
> A. I don't think I did because I did not know how to accomplish what Joel asked me to do.
>
> . . . .
>
> Q. As you sit here today, do you recall that in fact by the end of 2011 that six point nine million dollars in fees was in fact written off?
>
> A. Do I recall precisely if it was written off, no.
>
> Q. Do you recall that the fees related to the Wextrust matter were written off in 2011?
>
> A. I don't recall.
>
> Q. Let me show you something and see if it refreshes your recollection.
>
> A. Sure.

Q. I'm going to show you what I believe is in evidence as 22 dash 115, People's Exhibit 22 dash 115. I know it is a voluminous document, but if I can ask you to look at it and see if it refreshes your recollection?

. . . .

Q. I'm going to direct Ms. Cascino's attention for the record to the dates October and November 2011 which begin on the page, the bates number which ends in 10307.

A. Do I have to look through more pages or this is okay?

Q. Look at the pages for those months if you could. I understand there is a lot of component figures, and so I do not expect you to add them up and know six point nine million dollars. My question is whether it refreshes your recollection that the fees were written off at about that time?

A. Yes, they look like they were.

T 7252-56.

More, Mr. Sanders' email was sent 31 minutes after Mr. Sanders received an email from senior Dewey partner Alan Salpeter (DX 2305, Exhibit 15), advising Mr. Sanders and other Dewey executives that Mr. Schmeltz had been asked to leave the firm because of his professional failings and unreliability. The prosecutors will find it difficult at a retrial to deny the legitimacy of the firm's concerns about Mr. Schmeltz: after our trial, he was sanctioned by a federal judge for tweeting nine photographs of evidence as a spectator attending a high-profile trial despite large signs making clear what experienced lawyers like Mr. Schmeltz well know: photographs and recordings are prohibited in federal court. "Tweeting Barnes & Thornburg Lawyer Rapped by Federal Court, *Crain's Chicago Business*, December 10, 2015.

Mr. Sanders' email about hiding the $6.9 million did not adversely affect the books and was motivated by the concern about Mr. Schmeltz learned 31 minutes earlier. Any

probative value is thus outweighed by the risk of confusion, misleading the jury and undue prejudice.

2. Emails based on hearsay

At trial, the prosecution introduced multiple emails without calling their authors as witnesses purportedly to prove the fact that words were written or heard by the email recipient. But the emails were in fact used to prove the truth of the matters asserted.

By statute and at common law, there is no "e-mail" exception to the hearsay rule where a *declarant's* e-mail to a *defendant's* e-mail address for either the truth of the matter asserted or as evidence of the defendant's state of mind. *See* NY CLS CPL § 60.10; NYCP § 4543. The federal and state rights to confrontation and due process are the lodestars in New York in determining the admissibility of evidence. N.Y. Cons. § 6 ("[An] accused shall be . . . confronted with the witnesses against him or her. . . [n]o person shall be deprived of life, liberty or property without due process of law").

The rules governing the admissibility of e-mail evidence are essentially the same for "conventional correspondence:"

> An email offered for the truth of its contents is hearsay and must satisfy an applicable hearsay exception or exemption.

Modern Visual Evidence, § 15.03 at pg. 13. E-mail correspondence, similar to conventional written correspondence, must clear several evidentiary hurdles in order to be admissible. *See Lorraine v. Marken Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007) ("Whether [electronically stored information] is admissible into evidence is determined by a collection of evidence rules

that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible"). These well-known hurdles are the evidentiary rules relating to relevance, authentication, hearsay, the original writing rule, and the danger of unfair prejudice. *Id.* In order for an e-mail to clear the hearsay hurdle, five separate questions must be answered:

1. Does the evidence constitute a statement;
2. Was the statement made by a "declarant;"
3. Is the statement being offered to prove the truth of its contents;
4. Is the statement excluded from the definition of hearsay; and
5. If the statement is hearsay, is it covered by one of the common law exceptions.

Id. at 562-63. At common law, there may be a question as to whether the state of mind exception to hearsay applies to both the sender of the e-mail (*e.g.*, the declarant) and the recipient of the e-mail. Where the sender of an e-mail is the declarant, and the recipient of the e-mail is the defendant, this exception to hearsay generally applies only when the state of mind of the declarant (*e.g.*, the sender) is relevant.

Brooks v. State, a murder case involving e-mail correspondence regarding the victim's state of mind and travel plans on the night of her murder, is illustrative. 787 S.2d 767 (Fla. 2001). In *Brooks*, the Florida Supreme Court, in construing statutory hearsay rules similar to the Federal Rules of Evidence, found that the trial court committed reversible error by improperly applying the state of mind exception [Rule 803(3)] to the hearsay rule by admitting e-mail correspondence, among other statements, of the victim: "A statement admitted to show

state of mind is only allowed to prove the state of mind or subsequent act of the *declarant*, not of a *defendant*." 787 S. 2d 767, 770 (Fla. 2001) (emphasis added). *Id.* at 770. The *Brooks* court reasoned, consistent with due process, that the state of mind exception "is only admissible to infer the future act of the declarant, not the future act of another person." *Id.* at 771.

E-mail correspondence sent by non-party declarants to a recipient defendant are also classic hearsay. *See e.g.*, *Broadspring, Inc. v. Congoo*, 2014 U.S. Dist. LEXIS 177838 at *8-9 (S.D.N.Y. Dec. 29, 2014) (excluding nine-mails that were sent by third-parties to plaintiff because, "to the extent they are offered for the truth, the e-mails are plainly hearsay . . . [d]efendants do not rely on any of the hearsay rules or case law interpreting those rules . . . [which] do not overcome the hearsay problems with the evidence"); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 398 (D. Conn. 2008) (granting defendant's motion to strike non-party e-mails as inadmissible hearsay that cannot be offered either for the recipient's state of mind or for the truth of the matter asserted); *But see*, *United States v. Safavian*, 435 F. Supp. 2d 36, 46 (D.D.C. 2006) (subject to a limiting instruction that the e-mails were not being offered for the truth of the matter asserted, the court permitted the admissibility of certain e-mails received by defendant to show his state of mind at the time he received them as a motive to obstruct justice).

To afford Mr. Sanders his rights to confrontation and due process, the People must demonstrate how it can clear the evidentiary hurdles relating to the admissibility of e-mail correspondence to his e-mail address, to include the constraints on the admissibility of hearsay evidence. Any e-mail correspondence offered merely to demonstrate that certain things were said, or that Mr. Sanders heard things, fail these constitutionally-based evidentiary hurdles.

There is no e-mail exception to the Constitution or the rules of evidence, and the People must be held to its burden as the proponent of any e-mails where Mr. Sanders is merely a named recipient, and not the declarant.

Because we do not know whether the prosecution will introduce the same emails at the retrial nor whether the context will be different, it would not be constructive to do more than set forth the controlling principles so they can be applied when any emails are offered.

E. Evidence of Compensation Should be Precluded

The prosecution argued at the first trial that Mr. Sanders was motivated to defraud banks and investors by personal gain, but the prosecution's argument was unmoored from any real connection between compensation and conduct. To the contrary, the evidence demonstrated Mr. Sanders' genuine motivation to keep the firm afloat. *See, e.g.*, PX 21-150 (Exhibit 16). Nor is compensation automatically admissible; it is subject to the same weighing of probative value and prejudice as any other evidence.

The prosecution in summation expressly acknowledged that compensation was "really besides the point:"

> And whether you ultimately decide that these 3 defendants lied and schemed and conspired in order to keep the firm afloat because 3 thousand families were depending on a paycheck, or whether you decide they lied and schemed and conspired in order to maintain their powerful and lucrative positions or to feed their egos and keep the bottomless A T M they had turned Dewey & LeBoeuf into, that is really besides the point.
>
> The point is their actions and their intent.

T 8878. More, though not dispositive of the admissibility of compensation, the Court in dismissing the fifteen charges of grand larceny in this case found that no rational jury could

conclude that the defendants acted with larcenous intent in obtaining proceeds of the private placement or lines of credit for the firm. Transcript of February 26, 2016, at 6.

The prosecution's emphasis on compensation amounts to an unconstitutional appeal to wealth and class. Such prosecutorial appeals to wealth and class risk error by violating a defendant's right to due process under the federal and state constitutions. *United States v. Jackson-Randolph*, 282 F.3d 369, 376 (6th 2002); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) ("appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them"). As one court has observed, the mere existence of high compensation or wealth does not give rise to motive or an improper state of mind:

> [I]t is illogical and improper to equate financial success and affluence with greed and corruption. Much, probably, most wealth and affluence are gained through honest and socially desirable or socially neutral means such as hard work, innovation, successful investments, inheritance, good luck, etc. . . . The problem with a general rule of permitting evidence of an affluent lifestyle to show "motive" for committing a crime is that it ignores the real possibility that the extreme or extravagant wealth or spending was made possible by legitimate means and, if so, the introduction of such evidence would appeal solely to class prejudice.

Jackson-Randolph, 282 F.3d at 377-78. Our case, of course, is many steps removed from white collar defendants, such as Jordan Belfort ("The Wolf of Wall Street") or Bernard Madoff, whose extravagance speaks to excess in wealth and greed conspicuously lacking in this case.

Cases within this Circuit illustrate when any inference of motive is outweighed by unfair prejudice. For example, in *United States v. Stahl*, the Circuit reversed a bribery conviction on the ground that a "young prosecutor did in fact intend to arouse prejudice against the defendant because of his wealth and engaged in calculated and persistent efforts to arouse such

prejudice throughout the trial." 616 F.2d 30, 32 (2d Cir. 1980). The curative instruction in *Stahl* was insufficient to eliminate the taint caused by the prosecutor's references to the defendant's money and his wealth. *Id.* at *33.*

These cases present two animating principles – each case must be decided on its own unique circumstances, and "[t]he real issue is whether the relevance of motive is outweighed by unfair prejudice as contemplated by Fed. R. Evid. 403" and due process. *Jackson-Randolph*, 282 F.3d at 377-78. Here, Mr. Sanders' compensation is not a material issue in this case and is, as the prosecution acknowledged, "besides the point." Reference to his compensation amounts to an improper appeal to class prejudice and should be excluded from evidence. *Socony-Vacuum*, 310 U.S. at 239 ("appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them").

F. Non-expert Witnesses Should Not be Permitted to Testify that Accounting was "False"

Throughout the trial, the prosecution asked leading questions of cooperators that improperly elicited their view that accounting treatments were "false." The following are four of many examples of this improper questioning:

> *See* T 1771-72 (Mullikin: Q. Was this accounting treatment correct or false? A. Based upon my understanding, it was false based on the agreement that the firm had with these partners);
>
> T 1908-09 (Mullikin: Q. Was it correct or false from an accounting perspective to once again reverse the same two point four million dollar amount? A. It was false);
>
> T 6855-56 (Cascino: Q. Were these adjustments that you did legitimate adjustments or false adjustments? A. False adjustments);

> T 6271-73 (Lourdes Rodriguez: Q. And was that a legitimate reason or a false reason to create an invoice? . . . A. False).

Non-expert witnesses should be precluded from using the word "false" to characterize accounting methods. This improper testimony was provided in response to leading questions, and created confusion, causing the jury during deliberations to ask:

> We the jury request the following questions be answered: Does false, parenthesis, in reference to adjustments in accounting, close parenthesis mean illegal. And the second question is does inappropriate, in parenthesis, in reference to adjustments in accounting, close parenthesis, mean illegal.

Court Exhibit 26.

The rules of evidence in New York, similar to Rule 701 of the Federal Rules of Evidence, have long recognized that "the opinion rule requires the ordinary lay witness to confine his testimony to a report of facts and, in the absence of a probative need, exclude his inferences, conclusions or opinions." Edith L. Fisch, *Lay Opinions in New York*, 37 Cornell L. Rev. 32 (1951) (citing *Ferguson v. Hubbell*, 97 N.Y. 507, 49 Am. Rep. 544 (1884)). The reasons for the opinion rule for non-expert witnesses is simple: improper opinion testimony deprives a defendant of the right to a jury trial:

> [S]uch testimony invades the province of the jury. It has been frequently asserted that when a witness reports conclusions and opinions his judgment is substituted for that of the jury, which should draw its own conclusions and inferences. The function of the jury is thereby usurped and the parties deprived of their right to a jury trial.

Id. at 33 (*citing Harris v. Panama R.R.*, 3 Bosw. 7, 14 (N.Y. 1858); Curtis, New York Law of Evidence §§ 521, 533 (1926); *Moran v. Standard Oil Co.*, 211 N.Y. 187, 105 N.E. 217 (1914); *McCarraigher v. Rogers*, 120 N.Y. 526, 24 N.E. 812 (1890); *Morehouse v. Matthews*, 2 N.Y.

514 (1849); *Lincoln v. Railway Co.*, 23 Wend. 425 (N.Y. 1840); *see also Morehouse*, 2 N.Y. at 515-16 ("The general rule upon the subject is that witnesses must be confined to the communication of *facts*, and not *opinions* or conclusions which they may have formed about facts, whether known to themselves, or derived from the testimony of others. It is the special duty of the jury to draw conclusions, and not of the witness) (emphasis in original).

The word "false" is both an opinion and legally-operative conclusion based on the cooperating witnesses' own evaluation of the facts. Moreover, there are no circumstances in which the prosecution here can lay a proper foundation to establish the narrow exception to the rule excluding non-expert opinion evidence: (1) the actual facts relating to the accounting adjustments *are not* incapable of description; (2) accounting methodologies themselves (as opposed to conclusions) *do require* expert knowledge; and (3) the witnesses *are not* qualified to give an expert opinion. *See e.g., People v. Sanchez*, 129 Misc. 2d 91, 491 N.Y.S.2d 682 (Sup. Ct. Bronx Co. 1985).

To avoid encroaching on the function of the jury and violating a defendant's right to a jury trial, non-expert witness testimony should be confined to facts, leaving the jury to draw any conclusions from those facts. *See Morehouse*, 2 N.Y. at 515-16. For this reason,

the prosecution should be precluded from eliciting any testimony from its non-expert witnesses, whether by leading questions or otherwise, referencing adjustments in accounting as "false."

Respectfully submitted,

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