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

THE PEOPLE OF THE STATE OF NEW YORK -against- STEVEN DAVIS, STEPHEN DICARMINE, JOEL SANDERS, ZACHARY WARREN, Defendants.	Indictment No. 0773/2014

MEMORANDUM IN OPPOSITION TO MOTION BY DEFENDANT ZACHARY WARREN FOR A SEVERANCE

This memorandum is respectfully submitted in opposition to defendant Zachary Warren's motion for a severance and his MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANT ZACHARY WARREN FOR A SEVERANCE (the "Severance Motion"). Defendant Warren argues that he would be unduly prejudiced by a joint trial, because he left Dewey in mid-2009 to attend law school, and the evidence that post-dates his departure from the Firm is inadmissible against him, in part because, according to a bald assertion by defendant Warren, the People will be unable to establish a *prima facie* case of conspiracy against him. Severance Motion at 10. He also asserts, again without any support, that a trial against him alone would last no more than two weeks. Severance Motion at 1.

1. Defendant Warren fails to acknowledge the strong presumption in favor of joint trials. He also brushes aside the fact that he has been charged in a scheme to defraud and conspiracy running into 2012. Evidence relevant to or in furtherance of both crimes, including conduct engaged in and statements made by his coconspirators, can be introduced against defendant Warren, whether

in a joint or severed trial, and defendant Warren's departure from Dewey does not change this. Even if it did, a trial against defendant Warren alone would last far longer than two weeks, as evidenced by the facts detailed below, which facts are just some of the evidence involving defendant Warren. These facts also demonstrate that the People will be able to make out a *prima facie* case of conspiracy against defendant Warren. Defendant Warren fails to identify any unfair prejudice that will substantially impair his defense and therefore cannot overcome the strong public policy favoring a single trial of codefendants. His motion should therefore be denied.

INTRODUCTION AND PROCEDURAL HISTORY

2. Defendants were employees and a partner at the now-bankrupt law firm Dewey & LeBoeuf LLP ("Dewey" or the "Firm"). They are charged with conspiracy, scheme to defraud and various other crimes related to their participation in a scheme to defraud Dewey's lenders and others that ran from 2008 into 2012.

3. The People began an investigation into the financial affairs of Dewey in late April 2012, and Dewey declared bankruptcy in late May 2012. During the course of the People's investigation, defendant Warren participated in two pre-arranged interviews. The first interview, which was scheduled by the People in late March 2013 and conducted by telephone on April 1, 2013, while Defendant Warren was clerking for a federal district court judge in Maryland, lasted approximately one and one-half hours. The second interview was scheduled by individuals at the United States Securities and Exchange Commission, who were conducting their own investigation, in the last two weeks of October, 2013. Within a few days, the People learned that the meeting had been scheduled and requested to participate. In the latter part of October, defendant Warren agreed to allow the People to participate in the interview, and that interview was conducted in person in

Washington, D.C., on November 15, 2013, while defendant Warren was clerking for a judge of the United States Court of Appeals for the Sixth Circuit.

4. In the latter half of December 2013, the Grand Jury returned Indictment 5393/2013 (the "2013 Indictment"), charging defendant Warren alone with six counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10. In late February 2014, the Grand Jury returned Indictment 0773/2014 (the "Indictment") charging all four defendants with one count of Scheme to Defraud in the First Degree, in violation of Penal Law § 190.65(1)(b) and one count of Conspiracy in the Fifth Degree, in violation of Penal Law § 105.05(1). The Indictment also charges defendants Davis, DiCarmine, and Sanders with multiple counts of Grand Larceny in the First Degree, in violation of Penal Law § 155.42, one count of violation of the Martin Act, General Business Law § 352-c(5), and various multiple counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10. Five of the Falsifying Business Records counts in the 2013 Indictment relate directly to Falsifying Business Records counts in the Indictment. On March 6, 2014, the defendants were arraigned on the two indictments.

5. On May 13, 2014, the People moved to dismiss the sixth Falsifying Business Records count against defendant Warren and to consolidate the 2013 Indictment into the Indictment for trial. Both motions were granted. On that same date, defendant Warren filed his Severance Motion.

6. In the Severance Motion, defendant Warren paints an impressive picture of himself and his educational accomplishments, accomplishments that left him well-able to understand the criminal nature of his conduct at Dewey and his subsequent interactions with the People. In spite of this, defendant Warren complains that "at the start of his law practice, he never expected to be

standing trial for criminal charges resulting from his two-year stint, right out of college, at Dewey & LeBoeuf." Severance Motion at 6. Considering that just last November, during his interview in Washington, D.C., defendant Warren asked the People if they were offering him immunity from prosecution,[1] his complaint is surprising, at best. This is particularly true in light of the fact that defendant Warren was told during that same interview that the People had serious concerns about his conduct at Dewey and that the People did not believe he was being honest and forthcoming. Nonetheless, defendant Warren was also told that if his memory improved or if he retained counsel, he should reach out to the People, and we would start with a clean slate. Defendant Warren, a trained lawyer who by that time had worked for two different federal judges, chose not to act on the People's invitation, so it is hard to imagine where else he expected to be standing at this point.

FACTS[2]

Background

7. Dewey was an international law firm headquartered in New York County. It was formed on October 1, 2007, through the combination of two existing law firms, Dewey Ballantine LLP and LeBoeuf, Lamb, Greene & MacRae LLP. At its height, approximately 1,300 partners and employees worked in the Firm's Manhattan office and approximately 3,000 partners and employees worked for the Firm worldwide. In 2012, the Firm collapsed and declared bankruptcy.

8. Defendant Warren was hired by the Firm in early 2007 as a Client Relations Coordinator. In July 2008, defendant Warren was promoted to be Dewey's Client Relations

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1 Unless directly quoted, all questions and statements are provided in substance.

2 These are some of the facts the People intend to adduce at trial.

Manager, and began reporting directly to defendant Sanders, the Firm's Chief Financial Officer.[3] Defendant Warren remained in that position until he left the firm to attend law school in mid-2009. Defendant Davis was the Firm's Chairman until 2012, when he was stripped of his title, and defendant DiCarmine was the Firm's Executive Director.

9. Dewey's first full year of operations was 2008. The merger, coming just before the financial crisis, was troubled from the start, and the Firm's first year financial performance was severely below expectations. By the end of that year, the Firm had more than $100 million in term debt outstanding and available lines of credit of more than $130 million with four banks. Dewey's credit agreements with these Banks contained several covenants, including a cash flow covenant (the "Cash Flow Covenant") requiring the Firm to maintain a minimum year-end cash flow – defined as net income plus depreciation and amortization – of at least $290 million. Because of its poor financial performance, the Firm was unable to meet the Cash Flow Covenant in 2008.

10. The defendants and others at the Firm were aware that the failure to meet the Cash Flow Covenant during the 2008 credit crisis could have disastrous effects on the Firm. To avoid this, the defendants and others at the Firm engaged in a scheme to defraud the Firm's lenders and others by, among other things, misrepresenting the Firm's financial performance and compliance with the Cash Flow Covenant. The scheme, which began while defendant Warren worked for Dewey, continued into 2012.

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[3] At year-end 2008, nine managers and directors reported directly to defendant Sanders, including among others: defendant Warren, the Client Relations Manager; Francis Canellas, the Director of Finance; Dianne Cascino, the Revenue Support Manager; Lourdes Rodriguez, the Director of Billing; and Ilya Alter, the Director of Budget & Planning. Canellas, Cascino, Rodriguez, Alter, and three other individuals who reported directly or indirectly to Canellas have accepted responsibility for their respective roles in the fraudulent scheme at issue in the Indictment and have pleaded guilty to various crimes.

11. As part of the efforts to ensure the success of the scheme, the defendants and others at the Firm lied to and otherwise misled Dewey's partners and auditors, as well as others. Defendant Warren was not the mastermind of the Dewey fraud scheme, but he certainly was a willing foot soldier: He participated in the formation of the scheme and intentionally aided its implementation; he helped craft and disseminate lies that were necessary to keep the scheme going by covering up fraudulent entries; and he monitored client accounts affected by the fraudulent entries to ensure the scheme was concealed, another task necessary to ensure the scheme's success. And perhaps most strikingly, he directly demanded, even after he left the firm, that he be compensated for his criminal activity.

Defendant Warren Was Aware of the Firm's Debt

12. Defendant Warren was aware that Dewey had substantial debt, including lines of credit, and acknowledged as much in his interviews with the People. Defendant Warren stated that he knew that the Firm had significant debt and a line of credit and that there were concerns at the Firm about the bank tightening the credit available to the Firm.

13. Defendant Warren's knowledge of the Firm's debt profile is borne out by Firm emails. For example, in late August 2008, Dewey drew $20 million on a new line of credit. Canellas received an email that the $20 million had been received, which he forwarded to defendant Warren stating, "Big deposit day!!!" Defendant Warren responded, "Can we apply it against some old [Partner B] and [Partner M] invoices?!?" Canellas replied, "That, my friend,

would be called fraud!" As another example, in March 2009, Canellas wrote to defendant Sanders:

> Just want to put our 2010 cash (debt) situation on everyone's radar:
>
> 1. 60M revolver expirers May 2010
>
> 2. The $55M in term debt we borrowed in December 2007 begins to amortize at a clip of 18.3M a year (a 5 year term loan - with 2 years interest only)
>
> Let [sic] talk if you'd like.

Canellas forwarded this email to defendant Warren, writing, "Scarry [sic] or what???" Defendant Warren responded, "Ouch."

Defendant Warren Knew the Firm Had to Comply with Debt Covenants

14. Defendant Warren was also aware that the Firm's debt contained covenants with which the Firm was required to comply. As discussed in more detail below, defendant Warren was involved in discussions about making fraudulent changes to the Firm's accounting system in order to meet the Cash Flow Covenant, and as part of the scheme, defendant Sanders promised defendant Warren a large bonus if the Firm met its bank covenants.

15. In his first interview with the People, defendant Warren stated that he recalled becoming aware of the covenants from Canellas in the fall or winter of 2008, and that Canellas was interested in predicting cash flow in relation to the covenants. He also stated that Canellas and defendant Sanders were worried about achieving a certain cash flow.[4]

Defendant Warren Understood the Firm's Financial Accounting Policies

16. Defendant Warren spent much of his time at the Firm dealing with client invoices. Client invoices typically consisted of two components: fees and disbursements. Fees were

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[4] Defendant Warren's memory about the Firm's covenants ostensibly seemed to fade significantly by his second interview.

amounts owed for work performed by lawyers and others at the Firm. Disbursements were amounts owed for costs incurred by the Firm on a client's behalf – such as photocopying, legal research time on Lexis or Westlaw, airline tickets, and car services.

17. Under the accounting policies employed by Dewey, the payment of fees had a very different effect on the Firm's bottom line than the payment of disbursements. Likewise, the write-off of fees had a very different effect on the Firm's bottom line than the write-off of disbursements. In short:

- Fee payments– constituted revenue and increased the Firm's net income
- Disbursement payments – had no effect on the Firm's net income

- Fee write-offs – had no effect on the Firms net income
- Disbursement write-offs – constituted an expense and decreased the Firm's net income

Defendant Warren understood these differences and that they could be used to manipulate various results at the Firm.

18. For example, partners were evaluated, in part, on the total amount of fee payments made by their clients. Disbursement payments made by their clients had no effect on this metric. By the same token, this metric was unaffected by disbursements that were written off. Yet disbursement write-offs decreased the Firm's net income.

19. Defendant Warren was concerned that this situation created a perverse incentive for partners: If a client did not want to pay a bill in full, the partner would be incentivized to collect the fees and write off the disbursements, which would benefit the partner but not the Firm. To counter this, defendant Warren suggested that the Firm reapply client payments in situations where disbursements had been written off. He wrote in an April 2009 email to defendant Sanders and others:

> Would it make sense to adopt a policy that any disbursements for which we are not reimbursed by the client will be paid out of previously received fee income[?] … [I]f we incur an expense with the expectation that it will be

> reimbursed, and the client subsequently refuses to pay the expense, then we will reverse a payment that was previously applied to fees on that matter and apply it to the expenses instead, thus reducing the fee credit given to that partner. *This would have the broader effect of reducing the Firm's annual fee revenue, but also reducing costs by eliminating disbursement write offs.*

(Emphasis added.)

20. The last sentence demonstrates how well defendant Warren understood how fees and disbursements were accounted for at Dewey; namely, that failing to collect fees reduced Firm revenue and that writing off disbursements was a cost to the Firm.[5] His point was simple: The Firm could ding partners who wrote off disbursements by reapplying fee payments as disbursement payments and writing off the fees instead. The Firm would lose the fee revenue but avoid a write-off expense, so there would be no effect on the Firm's net income.

Defendant Warren's Involvement in the Creation of the Master Plan

21. By late 2008, as it became clear that Dewey would fail to satisfy the Cash Flow Covenant, defendant Sanders and Canellas met, at the instruction of defendants Davis and DiCarmine, to determine, among other things, ways to ensure that the Firm was able to maintain and draw on its financing facilities, by, among other things, identifying fraudulent adjustments that could be made to the Firm's accounting system to make it appear as if the Firm had satisfied the covenant. Defendant Sanders told Canellas that they had to find adjustments that would not be caught by the Firm's auditors.

22. Two types of fraudulent adjustments that are particularly relevant to this motion response involved reclassifying disbursement payments as fee payments (the "Disbursement Reclass Adjustments")[6] and reversing disbursement write-offs (the "Disbursement Write-off

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[5] Defendant Warren told law enforcement he did not know how write-offs affected Dewey's books.

[6] In certain respects, these fraudulent adjustments were the opposite of what defendant Warren would later suggest in April 2009. The Disbursement Reclass Adjustments involved reclassifying disbursement payments as fee

Adjustments"). Adjustments of these sorts were right in defendant Warren's wheelhouse, and as evidenced by the April 2009 email he sent to defendant Sanders and others, he understood perfectly the effect they would have on the Firm's bottom line.

23. Prior to December 29, 2008, defendant Sanders and Canellas met and came up with several possible fraudulent adjustments, including the Disbursement Reclass Adjustments. As discussed in greater detail below, adjustments of this sort involved falsely backing out disbursement payments that had been made by a client during the year – these payments had no effect on the Firm's revenue and net income – and generally reapplying such payments to fees owed by the client, which would falsely make it appear that the Firm's revenue and net income were higher.[7]

24. On December 30, with year-end looming and not enough net income in sight, Canellas wrote to defendants Sanders and Warren, "We should meet tonight to discuss a plan." A few hours later, in anticipation of that meeting, Canellas forwarded defendant Warren a list of fraudulent adjustments that Canellas and defendant Sanders had determined could be made with limited risk of discovery, including the Disbursement Reclass Adjustments. The list, which did not include the Disbursement Write-off Adjustments, still left the Firm $53 million short on the Cash Flow Covenant.

25. Following on Canellas's suggestion, defendant Sanders, defendant Warren and Canellas met that evening to come up with a plan. They began their planning at about 7:30 PM over a steak dinner at Del Frisco's Double Eagle Steak House in midtown Manhattan. During

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payments falsely to boost Firm net income; defendant Warren would later suggest reclassifying fee payments as disbursement payments in order to achieve a different end.

[7] In fact, on December 29, 2008, defendant Sanders wrote in an email to defendant DiCarmine regarding these adjustments, "We came up with a big one. Reclass the disbursements." Defendant DiCarmine responded, "You always do in the last hours. That's why we get the extra 10 or 20% bonus. Tell [your wife], stick with me! We'll buy a ski house next. Just need to keep the ship a float [sic] . . . ."

this dinner, defendant Sanders told defendant Warren that defendant Warren would receive his full bonus if the Firm met its bank covenants.

26. During dinner or shortly thereafter, at about 9:18 PM, Defendant Sanders sent an email to defendants DiCarmine and Davis that was consistent with Canellas's estimate of the Firm's projected revenue shortfall, after factoring in the fraudulent adjustments Canellas and Sanders had come up with at that point. The email read, "We need $50M tomorrow to meet our covenant." Later that night, Davis responded, "Ugh." At about 9:36 PM, Defendant Sanders sent a separate email to defendant DiCarmine that read, "I'm heading back to the office. We could be in deep shit - are you going back?" About an hour later, defendant DiCarmine responded, "Yes, on my way."

27. After dinner, defendant Sanders, defendant Warren and Canellas returned to the Dewey offices and met in defendant Warren's office to discuss additional fraudulent methods that could be implemented to meet any shortfall, should the Firm fail to collect $50 million the next day.

28. Among other things, defendant Sanders and Canellas suggested new fraudulent entries and discussed how much closer these entries would get the Firm to meeting the Cash Flow Covenant. These ideas were written on a flipchart, and as a sheet on the flipchart was filled, one of the three men would remove it and tape it to the wall in defendant Warren's office. One of the ideas suggested during this meeting was Disbursement Write-off Adjustments. As discussed in greater detail below, these adjustments involved reversing disbursement write-offs and putting them back on the Firm's balance sheet as unbilled receivables, thereby falsely making it appear that the Firm's expenses were lower and its net income higher. These were disbursements the

Firm had no intention of collecting, and all three men knew it. Indeed, that's why the amounts had been written off in the first instance.

29. A little after 11:00 PM that evening, Canellas forwarded by email to defendant Warren a draft Firm income statement so that the various adjustments—both those that defendant Sanders and Canellas had come up with previously and those that had been discussed that night—could be added to it, to determine where net income would end up after being fraudulently adjusted. It appears that everyone went home before this was done.

30. The next day, December 31, 2008, at about 4:45 PM, Canellas forwarded a second draft Firm income statement to defendant Warren, updated with the accounting entries from the last day of the year. Canellas thereafter went to defendant Warren's office and, with defendant Warren present, updated the income statement with the various fraudulent adjustments listed on the flip chart pages on defendant Warren's office walls. Canellas named this document the "Master Plan."

31. A little before 7:00 PM that evening, Dianne Cascino, the Firm's Revenue Support Manager, wrote to Canellas and defendant Warren, "Have a great new years[.] Hope you guys get to enjoy it." At 7:24 PM, after completing the Master Plan in defendant Warren's office, Canellas responded, "I think we fixed everything so don't worry to [sic] much. Lots of work to do Friday but we will be ok. Happy new year." At the same time, Canellas wrote to defendant Warren, "Great job dude. We kicked ass! Time to get paid." About ten minutes later, defendant Warren responded, "Hey man, I don't know where you come up with some of this stuff, but you saved the day. It's been a rough year but it's been damn good. Nice work dude. Let's get paid!" Canellas and defendant Warren then left the office to enjoy New Year's Eve.

32. On Friday, January 2, 2009, a little before 11:00 AM, defendant Warren forwarded the Master Plan to Canellas, knowing it contained the framework of fraudulent adjustments that would be used to cook Dewey's books to falsely show compliance with the Cash Flow Covenant, and knowing that he would receive a sizeable bonus once that happened. Among the adjustments contained in the Master Plan were the Disbursement Reclass Adjustments, the Disbursement Write-off Adjustments, an adjustment to reclassify a disbursement retainer, an adjustment to reclassify an expense related to the Firm's office space in London, and an adjustment to reclassify an expense related to the Firm's office space in Austin, Texas. These five adjustments, which were expected falsely to increase the Firm's net income by over $20 million, form the basis of the five falsifying business records counts with which all four defendants are charged in the consolidated Indictment.

Defendant Warren's Involvement in the Implementation, Concealment, and Cover-up of Fraudulent Accounting Entries Which Were Necessary to Ensure the Success of the Scheme

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

The Disbursement Write-off Adjustments

34. At Dewey, disbursements that were uncollectible were typically written off.[8] As stated, a disbursement write-off was a Firm expense, which lowered net income. As part of the Master Plan, defendant Sanders, defendant Warren, and Canellas planned to have approximately $4 million worth of disbursement write-offs put back on the Firm's balance sheet as unbilled receivables – the Disbursement Write-off Adjustments. In early 2009, Canellas instructed Cascino to make the accounting entries required to put disbursement write-offs back on the Firm's books, which she did. Defendant Sanders made clear to Canellas that, should the auditors question the Disbursement Write-off Adjustments, they were to be told that the Firm planned to collect these amounts from clients, even though in truth there was no intention to do so.

35. The Firm's auditors weren't the only concern; there was also a risk that partners might notice the unbilled disbursement amounts that suddenly appeared on client accounts. This is exactly what happened. The partners couldn't be told the same lie as the auditors; the partners knew these amounts would never be billed to clients. Indeed, it was often the Firm's partners who had the amounts written off in the first instance. This is where defendant Warren came in; he helped disseminate the lie to keep the partners at bay and further perpetuate the scheme. Near the end of February 2009, Employee H, who worked for Lourdes Rodriguez, the Firm's Director of Billing, left a voicemail for Cascino regarding a Disbursement Write-off Adjustment of

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[8] Uncollectible disbursements were *typically* written off, but not always. At times, approved write-offs were left on the Firm's books to make the numbers look better or to falsely demonstrate compliance with certain bank covenants. For example, in February 2009, a $32,000 write-off was approved by the Firm's Billing and Collection Committee. Employee V, who worked for Cascino, forwarded the approval to defendant Warren, asking, "Is it just write-offs over $50K we cannot do yet? This one is for $32K. Can it be done?" Defendant Warren responded, "I think we should postpone all write offs over 25k for now -- once the inventory levels climb a little bit, we can start processing the write offs. This doesn't apply to foreign write offs and invoices more than a year old." Employee V replied, "Just let us know when we can process the ones we are holding. Thanks!"

approximately $178,000 that appeared on the account of one of the Firm's clients, Client E. Employee H stated in her voicemail:

> Hi, Dianne. It's [Employee H] calling. Um, I was just on the phone with [Partner C] and [Partner B], who are needing a full explanation and accounting for that large, um, non-billable disbursement that wound up on [Client E], matter 57. Um, I can't give them a full accounting for it, but I thought that you might be able to do so, so if you could give me a call back that would be great . . . . Thanks, bye.

36. Cascino, who was worried the scheme would be discovered, forwarded the voicemail, attached to an email, to defendant Warren. She wrote, "What should we say????" Within five minutes, defendant Warren responded:

> That we are examining all of the disbursement write offs we did in 2008 to determine how to recover some of those costs and minimize our write offs in 2009. We're in the process of hiring someone to lead this effort, so please ignore the non-billable disbursement for now.
>
> It's [Partner B] and [Partner C], I think they will be satisfied if you just ask them not to worry about it.

37. Defendant Warren knew this wasn't true. He acknowledged as much in his second interview, although he claimed to have no memory of the email or why he wrote it. Cascino forwarded the lie to Employee H, Partner B, and Lourdes Rodriguez, and it worked: The matter was dropped.

Disbursement Reclass Adjustments

38. Most invoices produced by Dewey and sent to clients contained both fee amounts and disbursement amounts. As previously explained, when a client paid a fee amount, it constituted revenue to the Firm and increased net income. When a client paid a disbursement amount, it relieved a receivable but did not constitute revenue to the Firm and had no impact on net income. Defendant Sanders and Canellas realized that if they backed out disbursement payments made by a client during the year and generally reapplied those payments to fee

amounts due on open invoices for that client, Firm revenue would increase for the current year, thereby increasing Dewey's net income.

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

40. This is where defendant Warren came in again. With at least one client, he sought to conceal and further the scheme by instructing others to apply new payments to the old disbursement amounts as quickly as possible. That client, Client A, was a significant account for Dewey; its average monthly billing was close to $2 million. To pay its Dewey invoices, Client A wired money to the Firm, and the money was deposited into a trust account, sometimes referred to as an escrow account. Periodically, Partner N, the partner in charge of Client A, would authorize a payment from the trust account to outstanding Dewey invoices. Employee I, a senior associate at the Firm who worked for Partner N, would notify individuals in the finance department to transfer money from the trust account and apply it to certain invoices. For example, on December 23, 2008, Employee I instructed Canellas and others by email, "Kindly apply $3 million from the [Client A] trust account towards August (remaining balance), September (full payment) and October (partial payment) 2008 invoices." Canellas forwarded this email to defendant Warren and Cascino the same day.

41. Prior to the Disbursement Reclass Adjustments, Client A's open invoices at the end of 2008 were as follows:

Invoice	Invoice Date	Fees Owed	Disbursements Owed	Total Owed
546146	November 14, 2008	$1,218,213.29	-	$1,218,213.29
549882	**December 29, 2008**	**$1,587,327.50**	**$44,442.96**	**$1,631,770.46**

42. At Canellas's instruction, on January 5, 2009, Cascino reapplied the disbursement payments on Client A from throughout 2008 to the open fee amount on invoice 549882. After the reclassifications on Client A's account, Dewey's 2008 revenue had falsely increased by nearly $1.5M, and Client A's open invoices were as follows:

Invoice	Invoice Date	Fees Owed	Disbursements Owed	Total Owed
517004	November 10, 2007	-	$183,190.65	$183,190.65
520096	December 20, 2007	-	$129,644.69	$129,644.69
521920	January 22, 2008	-	$122,181.26	$122,181.26
524392	February 29, 2008	-	$93,132.19	$93,132.19
526047	March 26, 2008	-	$70,883.72	$70,883.72
526425	March 31, 2008	-	$77,457.24	$77,457.24
528550	April 25, 2008	-	$94,997.68	$94,997.68
529942	May 27, 2008	-	$79,977.85	$79,977.85
532474	June 25, 2008	-	$79,275.72	$79,275.72
534689	July 31, 2008	-	$157,364.68	$157,364.68
538760	September 15, 2008	-	$126,590.13	$126,590.13
541497	September 26, 2008	-	$71,949.10	$71,949.10
543346	October 27, 2008	-	$132,129.06	$132,129.06
546146	November 14, 2008	$1,218,213.29	$49,268.13	$1,267,481.42
549882	**December 29, 2008**	**$119,285.40**	**$44,442.96**	**$163,728.36**

43. As one would expect, Employee I questioned why very old—and long ago paid—Client A invoices were suddenly showing amounts due. It was defendant Warren who responded by email near the end of January 2009:

> [Employee I],
>
> [Employee J] mentioned that you were wondering why there are outstanding disbursements on several older [Client A] invoices. We will have everything cleaned up by the end of the day today, once the escrow money is

applied to the outstanding balances. If you would like additional details, [defendant Sanders] asked that you drop by and speak with him."

Defendant Sanders wrote separately to Employee I, "It's an accounting issue – I'll fill you in." But defendant Sanders did not need to fill Employee I in, because defendant Warren had already spoken to Employee I and covered things up. Employee I responded to defendant Sanders, "It's taken care of as [defendant Warren] explained it to me." At the same time, Canellas wrote to defendant Warren, "What did you tell [Employee I]? He is all over me." Defendant Warren responded, "I just talked to him 1 minute ago. We're good."

44. A little less than two weeks later, on February 1, Employee I wrote to Canellas that he needed to know the total amount of outstanding Dewey invoices for Client A, in order to provide that amount to Client A. Canellas forwarded the email to defendant Warren and wrote, "Did we fix the invoices in the system?" Defendant Warren responded, "No, but the total outstanding amount in the system is correct." Two days later, when money finally came in from Client A, it was defendant Warren who made sure it was applied in a way to conceal the fraudulent entry. He wrote to Employee K, who worked for Cascino, instructing her to apply the

45. payment in a way that would close out the invoices that were opened up as a result of the Disbursement Reclass Adjustments, as displayed in paragraph 42:

[Employee K],

$4M is being transferred into the operating account from the [Client A] escrow account. Please apply it to the invoices below:

517004 $183,190.65
520096 $129,644.69
521920 $122,181.26
524392 $93,132.19
526047 $70,883.72
526425 $77,457.24
528550 $94,997.68
529942 $79,977.85
532474 $79,275.72
534689 $157,364.68
538760 $126,590.13
541497 $71,949.10
543346 $132,129.06
546146 $1,267,481.42
549882 $163,728.36
549920 $1,232.73
550621 $1,148,783.52

Thanks.

Defendant Warren's Motive for Engaging in Criminal Conduct

46. Defendant Warren was well-compensated for his conduct in the ongoing scheme. His salary as the Firm's Client Relations Manager was $100,000 per year, but he was only in that position for six months in 2008. At the Del Frisco's dinner on December 30, 2008, defendant Sanders told defendant Warren that defendant Warren would receive his full bonus if the Firm met its banks covenants. Defendant Warren did his part in making sure that happened: meeting to come up with additional fraudulent adjustments; forwarding the list to Canellas for implementation; disseminating the lie used internally to cover up the Disbursement Write-off Adjustments; and taking steps necessary to conceal the Disbursement Reclass Adjustments, among other things. Defendant Warren did his part to ensure the ongoing scheme's success, and

he wanted to make sure he'd be paid. In early February, defendant Warren wrote to defendant Sanders:

> Joel,
>
> I was wondering if you had a chance to determine 2008 bonuses yet. I know there is a lot going on right now, so I don't expect that this is your priority, but I just didn't know the timing of the whole process. *When you, [Canellas], and I were talking toward the end of December, you mentioned that you would be able to pay us 100% if we made the covenants.* I only ask because I'm trying to plan my finances for the next year, since I'm planning on leaving after the mid-year close and won't have any income after that.
>
> Thanks,
>
> Zach

(Emphasis added).

47. The next day, defendant Sanders responded, "[Defendant DiCarmine] is finalizing them. I'll check with him." Five days later, defendant Warren replied, "Joel, have you had a chance to speak with [defendant DiCarmine]? I was hoping to get the number confirmed this week. If there are any issues you would like to discuss, would it be possible to meet sometime tomorrow or Wednesday?" On February 20, defendant Sanders wrote to defendant Warren, "[Defendant DiCarmine] just finished the Director bonuses. I'm trying to get yours through in advance of the other managers. I put you in for 100%."

48. By February 23, defendant Warren's bonus had been approved at 100%, which defendant Sanders took to mean $25,000. Employee X, the Firm's Director of Administrative Human Resources, contacted defendant Warren to give him the news. A $25,000 bonus would be 50% of the base salary he made as the Client Relations Manager in 2008. But defendant Warren wasn't happy. He wanted, and expected, more. A little after 4:00 PM on February 23, Employee X wrote to defendant Sanders:

Joel:

> I spoke to Zach to give him the update on the bonus. His understanding of the bonus was a total of $75,000 based on [a June 2008 email]. He said that you had reset his target in late October that he would get his bonus if you made 80% of net income. *He said that you and Frank then had a dinner in late November*[9] *where you mentioned that if they met the bank covenants that he would get his full target (he took this to mean $75,000).*
>
> Should I process the additional $50,000 on top of the $25,000 for Zach?

(Emphasis added.)

49. In less than three hours after this email was sent to defendant Sanders, defendant Warren's bonus was bumped to $75,000, and he received this bonus on February 27. But the gravy train didn't stop there. Defendant Warren left Dewey in early July 2009. He was given an additional $40,000 bonus for his work during the first half of 2009.[10]

50. In all, defendant Warren received $115,000 in bonus compensation in 2009. Out of over 1,800 employees paid in Dewey's U.S. operations in 2009, including all of Dewey's U.S. associates, only five individuals received higher bonus compensation than defendant Warren did, including Defendant DiCarmine ($1.5 million in bonuses), Defendant Sanders ($1.5 million in bonuses), Canellas ($200,000 bonus), and two others. Even Dewey's Chief Information Officer, Chief Human Resources Officer; and Chief Human Resources Officer – Legal received less in bonuses than defendant Warren did.

The Scheme and Conspiracy Going Forward

51. Defendant Warren left Dewey in July 2009, but he continued to be involved in the scheme and conspiracy, and with his coconspirators. In September 2009, he began chasing down

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[9] Defendant Warren confirmed in his second interview that there was no dinner in late November, and any discussion about his bonus took place at the Del Frisco's dinner in late December, not in late November.

[10] Defendant Warren was promised this money before he left and was advanced $20,000 – almost the entire net – in 2009. The bonus was not recorded as compensation by the Firm until April 2010. This inappropriate play kept the expense off Dewey's books for nearly an entire year.

the additional bonus that defendant Sanders promised him. Defendant Warren wrote to defendant Sanders on September 16, 2009, "I was just hoping to catch up with you at some point this week or early next week. I've tried calling a few times of the last couple weeks, but you were on vacation for a few days, and in meetings the other times." Defendant Sanders responded, "If you're wondering about your bonus I have you down to receive $40k right after our year end close." Defendant Warren replied on September 21, "Is there any chance that the timing is flexible? . . . I didn't take out any loans this semester because I was anticipating the bonus to be paid in the fall, *as we had discussed before I left*." (Emphasis added.) Defendant Warren communicated with defendant Sanders and Canellas again in November 2009 about the bonus and was advanced $20,000 shortly thereafter. Defendant Warren again communicated with individuals in March 2010 to get the remainder of this bonus. Defendant Warren received the remaining net pay, approximately $1,400, in April 2010. Defendant Warren also otherwise remained in contact with Canellas, Cascino, and Lourdes Rodriguez, and even applied for a job as a summer associate at Dewey in the Fall of 2010.

52. Moreover, even with respect to the particular fraudulent adjustments that defendant Warren helped cover up and conceal in order to ensure the ongoing scheme's success, more work was left to be done after defendant Warren left. As just one example, the Disbursement Write-off Adjustments that were made in early 2009 had to be reversed as part of the scheme. These reversals continued into 2010. One of the objects of the scheme and the conspiracy was to ensure that the Firm maintained and was able to draw on its financing facilities. Dewey continued to draw on its lines of credit into 2012 as a direct result of, among other things, the fraudulent methods employed at year-end 2008.

53. In order to ensure the success of the ongoing scheme, some of the fraudulent methods that defendant Warren took part in implementing were repeated year after year at Dewey, as part of the scheme and conspiracy. For example, Disbursement Reclass Adjustments and Disbursement Write-off Adjustments were made every year-end through 2011. In October 2011, Cascino wrote to defendant Sanders, "Per your instructions on cleaning up the old A/R the following disbursement amounts were written off and were not budgeted for this year. Do you want me to reverse these write-offs?" Sanders responded, "We can't take the expense hit this year." The write-offs were reversed. Unsurprisingly, as part of the scheme and conspiracy, defendant Warren's coconspirators also instituted additional and related fraudulent methods to ensure the Firm maintained and was able to draw on its financing facilities.

ARGUMENT

54. Strong public policy favors a single trial of codefendants. Accordingly, codefendants may properly be charged in a single indictment when their crimes arise from a common scheme or plan. CPL § 200.40(1)(b). Where such charges are to be proven by overlapping evidence, severance is warranted only for the "most cogent" reasons, where "unfair" prejudice will "substantially impair" the defense. People v. Mahboubian, 74 N.Y.2d 174, 183-84 (1989); see People v. Bornholdt, 33 N.Y.2d 75, 86-87 (1973). Judged by these standards, defendant Warren has not identified any basis for severance.

55. The defendants in this case were properly joined for trial. "Two or more defendants may be jointly charged in a single indictment provided that," among other things, "all the offenses charged are based upon a common scheme or plan; or all the offenses charged are based upon the same criminal transaction . . . ." CPL § 200.40(1)(b) & (c). Here, the defendants were properly joined; indeed, they each were charged with participating in an overarching

scheme to defraud and conspiracy to commit that scheme. In fact, defendant Warren does not contend otherwise. Instead, he argues that he will be unfairly prejudiced by a joint trial, because evidence of conduct engaged in and statements made by his coconspirators after he left Dewey in mid-2009 is inadmissible against him.[11] He also argues that a separate trial against him would be shorter.[12]

56. But defendant Warren's argument fails to account for the fact that substantially all, if not all, of the criminal conduct engaged in by his coconspirators and others after he left Dewey, as well as statements made by them that would be offered at trial, were in furtherance of the ongoing scheme and conspiracy of which he was a part.[13] "It has long been the law in New York that the acts and declarations of one coconspirator which occur while the conspiracy is in progress and which are in furtherance of the common scheme are admissible and provable as to all other coconspirators . . . ." People v. Rastelli, 37 N.Y.2d 240, 244 (1975). The fact that

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[11] Defendant Warren twice states that the People have conceded that his involvement in the scheme ended when he left Dewey in 2009. See Severance Motion at 8 & 10. The People have made no such concession. We have simply stated that defendant Warren helped plan the fraudulent entries and took part in covering them up while he was at the Firm.

[12] Defendant Warren asserts he would be prepared to commence trial in October of this year. He selectively quotes a well-known treatise to argue that "the order of [severed] trials is left to the sound discretion of the court." Severance Motion at 1, n.1. Defendant Warren's argument ignores well over a century of practice in this State:

> When prisoners are jointly indicted, and they elect to have separate trials, it has always been allowed to the district attorney to determine which of them he will first put upon his trial. It is purely a matter of discretion with him, and as he is by far the most competent, from his familiarity with the facts expected to be proved, to judge in this matter, his discretion will not be interfered with by the court, and a refusal thus to interfere forms no ground of exception.

Patterson v. The People, 46 Barb. 625 (N.Y. Sup. Ct. 1866). Indeed, the treatise selectively quoted by defendant Warren actually provides the exception that proves this long-standing rule. Quoted in a less selective way, the treatise provides that, "on occasion a defendant may assert that his or her co-defendant will offer exculpatory testimony if, and only if, after severance the co-defendant's case is tried first. *In that event*, the order of trials is left to the sound discretion of the court." Marks et al., 7 New York Practice: New York Pretrial Criminal Procedure § 5:22 (2d ed.) (emphasis added). There is no claim here that defendant Warren would offer exculpatory evidence for one of his co-defendants. Were the Court to grant severance, the People would request an opportunity to be heard separately on the issue of trial order.

[13] Unburdened by any facts, defendant Warren argues that the People will be unable to establish a *prima facie* case of defendant Warren's participation in a conspiracy without reference to statements by his codefendants that would otherwise be hearsay. Severance Motion at 10. Defendant Warren's own statements and other facts referenced herein suggest otherwise.

defendant Warren left the Firm in mid-2009 to attend law school did not stop him from continuing to commit overt acts in furtherance of the conspiracy and scheme. In fact, defendant Warren's efforts to secure payment for his participation in the conspiracy and scheme continued into 2010. Even if his commission of overt acts ceased when he left the Firm, defendant Warren doesn't thereby cease being a member of the conspiracy and a participant in the scheme to defraud. Mere cessation of activity is not enough to relieve him of culpability for the ongoing conspiracy and scheme to defraud. "Having joined forces to achieve collectively more evil than he could accomplish alone, [defendant Warren] tied his fate to that of the group. His [decision to attend law school] could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved." Smith v. U.S., 133 S. Ct. 714, 721 (2013).

57. Even were the long-established law regarding the declarations and acts of coconspirators disregarded, a separate trial against defendant Warren would nonetheless include substantially all of the evidence that would be presented at a joint trial. As is clear from the limited facts above, a separate trial would include, among other things, evidence regarding Dewey's accounting system and practices; the Firm's structure and performance; its credit profile and obligations with multiple lenders; and its audit history and practices. Additionally, the direct results of defendant Warren's conduct, including the fraudulent methods he directly participated in implementing, concealing, and covering up, in furtherance of the scheme and conspiracy, would surely be admissible against him to prove the crimes with which he is charged. As just one example, as stated, one of the objects of the scheme and the conspiracy was to ensure that the Firm maintained and was able to draw on its financing facilities. Dewey continued to draw on its lines of credit into 2012 as a direct result of, among other things, the

criminal conduct engaged in at year-end 2008. The falsified audited financial statements that were a result of the year-end 2008 conduct were the official audited financial statements provided to the financial institutions and insurance companies that took part in Dewey's 2010 refinance, and it was these entities that continued to loan Dewey money into 2012. Even were the Court to set aside years of legal precedent in New York, evidence of the 2010 Dewey refinance would be admissible in a separate trial to prove the scheme and conspiracy of which defendant Warren was a part. See Mahboubian, 74 N.Y.2d at 183 n. 1 (rejecting claim that many witnesses would be unnecessary in a separate trial because they were necessary to prove the defendant's guilt of conspiracy and attempt to commit the substantive crime).

58. In short, were defendant Warren granted a separate trial, the same witnesses, quite a few of whom would have to travel from out-of-State or out of the country, would give the same testimony twice; the court would sit through the same multi-month trial twice; and two different juries would be required to hear the same evidence in a multi-month trial. To the extent defendant Warren's trial would be shorter, it would only be so because witnesses would be subject to just one cross examination, rather than four. But this is not a ground for severance. "Some degree of prejudice is of course inherent in every joint trial. But that alone does not outweigh the factors favoring joinder of defendants; more is required." Id. at 183-84. In fact, a consideration of the relevant factors leads only to the conclusion that defendant Warren's case should not be severed:

> [W]here proof against the defendants is supplied by the same evidence, only the most cogent reasons warrant a severance. While that is particularly true where the defendants are charged with acting in concert, in all cases a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses. In balancing these policy considerations against defendants' claim of undue prejudice, we therefore also consider that the trial in this case lasted five weeks and required the testimony of several foreign and out-of-State witnesses.

Id. at 183 (internal citations, alterations, and quotation marks omitted).

59. The cases cited by defendant Warren do not advance his quest for severance. This is not a case where defendant Warren will be unduly prejudiced by a codefendant's statements to law enforcement, see People v. Payne, 35 N.Y.2d 22 (1974), or where a defense raised by a codefendant will require the introduction of significant evidence of criminal conduct that predated and was unrelated to the crimes with which defendant Warren has been charged, see People v. Papa, 47 A.D.2d 902 (2d Dep't 1975), or even where there is a threat of the introduction of an excessive number of statements admissible only against a codefendant, People v. Rossi, 270 A.D. 624 (3d Dep't 1946). Instead, because defendant Warren has been charged with conspiracy and scheme to defraud, this is a case where "[e]vidence relating to the acts of the codefendants [will be] admissible against defendant [Warren] and necessary to prove the charged offenses," People v. Shields, 100 A.D.3d 549, 551 (1st Dep't 2012), and in such a case there is no good cause for severance. Id. See also, People v. Council, 98 A.D.3d 917, 918 (1st Dep't 2012) ("The motion and trial courts properly denied defendant's severance motion, as evidence relating to the acts of his codefendants was admissible against defendant and necessary to prove conspiracy."); People v. De Los Angeles, 270 A.D.2d 196, 197-98 (1st Dep't 2000) (severance motion properly denied "since most of the People's evidence was introduced to establish the joint enterprise" and thus "applied to all defendants" and, in an eight-month trial with 70 witnesses, "to have conducted multiple trials. . . would have turned an already extended trial into several such trials"); People v. Vails, 56 A.D.2d 939, 939 (2d Dep't 1977) (holding trial court did not "abuse its discretion in denying appellant's request for a severance and a separate trial, because the acts of a coconspirator, committed during the progress of the conspiracy and in

furtherance of a common scheme or plan, are admissible and provable as against all coconspirators").

CONCLUSION

WHEREFORE, it is respectfully requested that defendant Warren's motion for a severance be denied in all respects.

Dated: New York, New York
June 13, 2014

Respectfully Submitted,

Peirce R. Moser
Assistant District Attorney

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

THE PEOPLE OF THE STATE OF NEW YORK

-against-

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

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION BY DEFENDANT ZACHARY WARREN FOR A SEVERANCE

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