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, and ZACHARY WARREN,	:	Indictment Number 773/2014
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE JOINT MOTION *IN LIMINE* OF DEFENDANTS STEVEN DAVIS, STEPHEN DICARMINE AND JOEL SANDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This memorandum of law is submitted in support of the Joint Motion *in Limine* of defendants Steven Davis, Stephen DiCarmine, and Joel Sanders. The Joint Motion asks the Court to grant the following relief: (a) prohibiting the improper use of hearsay; (b) prohibiting inadmissible evidence of a purported conspiracy against the defendants; (c) prohibiting the District Attorney from eliciting testimony, producing evidence or otherwise commenting on job loss, bankruptcy, and pension loss allegedly caused by the defendants; (d) prohibiting inadmissible evidence of uncharged crimes and other purportedly bad acts; (e) prohibiting the District Attorney from mentioning Mr. DiCarmine's cousin, Vincent Basciano, in any way, including during any cross examination of Mr. DiCarmine or any other defendant should any defendant testify on his own behalf, or eliciting any evidence about Mr. Basciano; (f) ordering the District Attorney immediately to provide the defendants with unredacted Plea Agreements and accompanying appendices, as well as complete and unredacted interview notes (*Rosario* material) for the cooperators; and (g) modifying the Protective Order with respect to material provided by the District Attorney as discovery. As defense counsel noted at the last conference, and as the Court acknowledged, grounds for additional relief may become apparent as preparation for trial continues. The defendants thus reserve the right to make additional motions either before or during trial as necessary.

POINT I

PROHIBITING IMPROPER HEARSAY

In March 2014, the District Attorney provided the defendants with the seven cooperators' Plea Agreements, each of which had an accompanying statement describing what the cooperator purported to have done improperly. In addition, on November 7, 2014, the District Attorney provided the defendants with each cooperator's *Rosario* material.

The Statements that accompanied the cooperators' Plea Agreements and the underlying *Rosario* material are replete with hearsay. Though a statement of a co-conspirator in furtherance of a conspiracy is admissible against the remaining conspirators who did not make the statement—an exception to the hearsay rule—such statements may not be admitted to prove the conspiracy. Rather, the statement is admissible against non-speakers only after it has been proven by independent, non-hearsay evidence that the speaker and the person against whom the statement will be used were members of the same conspiracy. *See People v. Caban*, 5 N.Y.3d 143, 148, 800 N.Y.S.2d 70, 74 (2005) (co-conspirator "declarations may be admitted only when a prima facie case of conspiracy has been established...the prima facie case of conspiracy must be made without recourse to the declarations sought to be introduced") (internal quotation marks and citation omitted); *People v. Bac Tran*, 80 N.Y.2d 170, 179-80, 589 N.Y.S.2d 845, 850-51 (1992):

> Of course, the determination whether a prima facie case of conspiracy has been established must be made without recourse to the declarations sought to be introduced .... [and] [w]here circumstantial evidence is weakly held together by subjective inferential links based on probabilities of low grade or insufficient degree, a prima facie case will not be deemed satisfied.

(internal quotation marks and citation omitted); *People v. Cartwright*, 293 A.D.2d 882, 883, 741 N.Y.S.2d 301, 302 (3d Dep't 2002) ("Since the People failed to establish a prima facie case of conspiracy against defendant without recourse to [the co-conspirator's] statement, the statement was clearly inadmissible at the Grand Jury proceeding under the coconspirator declaration exception to the hearsay rule.").

During his first interview, Frank Canellas allegedly told the prosecutors that Sanders would tell Canellas that "the Steves" had said that they have to meet the number. (Affirmation of Austin V. Campriello, dated February 13, 2015 ("Campriello Aff."), Ex. 1 (Excerpts of the *Rosario* Material Pertaining to Frank Canellas), NYDA 0008446.) During the same interview,

Canellas purportedly said that Mr. DiCarmine and Mr. Davis knew about adjustments because Mr. Sanders would tell Canellas that the instructions to do something came from Mr. Davis and Mr. DiCarmine. In addition, Canellas allegedly reported that Mr. Sanders said that "the Steves" said that they had to make the numbers or all the partners would leave. (*Id.* at NYDA 0008452.) Unless and until there is sufficient proof of a conspiracy among Canellas and Mr. Sanders, Mr. Davis and Mr. DiCarmine, this kind of testimony is not admissible against the latter two defendants.

While some courts have permitted the introduction of hearsay co-conspirator testimony "subject to connection," the defendants respectfully request that the Court exercise its discretion and refuse to accept premature hearsay testimony in this fashion. If the appropriate connections are not ultimately proven by the prosecution—and we believe they cannot be proven in light of the evidence offered by the prosecution to date—the jury will be faced with the near-impossible task of distinguishing between the admissible and inadmissible evidence it has heard. Given the estimated length of the trial, an instruction to disregard this evidence months after its admission will be completely ineffectual. In light of these difficulties, courts have made the sound decision to require the prosecution to establish a *prima facie* case of conspiracy before hearsay testimony is admitted. *People v. Nicholas*, 118 A.D.3d 1183, 988 N.Y.S.2d 277, 280 (3d Dep't 2014) ("Where, as here, the People seek to elicit declarations made by a coconspirator, a prima facie case of conspiracy must be established before such declarations may be admitted. This requires proof 'of an agreement to commit a crime and an overt act towards carrying out that agreement.'") (citations omitted); *People v. Sledge*, 223 A.D.2d 922, 925-26, 636 N.Y.S.2d 930, 933 (3d Dep't 1996) ("After a prima facie showing of conspiracy, any declaration by a

conspirator made during the course of and in furtherance of the conspiracy is admissible against a coconspirator as an exception to the hearsay rule") (emphasis added).

Accordingly, the defendants respectfully request that the Court require an offer of proof from the prosecution identifying specifically its relevant, admissible evidence that the prosecution claims will connect each defendant to the conspiracy charged, thus allowing the Court to consider separately and initially whether a *prima facie* case of conspiracy has been established as to each of the defendants. Unless and until there is admissible proof of a conspiracy and the involvement of each of the defendants, alleged co-conspirator hearsay statements are not admissible against each of the defendants.

POINT II

PROHIBITING INADMISSIBLE CONSPIRACY EVIDENCE AGAINST THE DEFENDANTS

The prosecution have attempted to fashion a *prima facie* conspiracy case against Mr. Davis based entirely on inadmissible evidence, in particular a series of e-mails cited by the prosecution in the indictment (*see* Campriello Aff., Ex. 2 (the Indictment), at ¶¶ 5-6, 10, 25-27, 32-33, 36, 43, 47), and various hearsay statements by one of the alleged co-conspirators, Frank Canellas (*see* Campriello Aff., Ex. 5 (Canellas Plea and Cooperation Agreement), App. A ("Canellas Allocution").) None of this evidence should be admitted at trial, against Mr. Davis or his co-defendants, absent an offer of proof consisting of admissible evidence with respect to the defendants' alleged participation in the purported conspiracy.

It is the Court's responsibility to determine admissibility: "[T]he established rule is that it is for the court and not the jury to decide questions of fact preliminary to determining the admissibility of evidence." *People v. Marks*, 6 N.Y.2d 67, 74-75, 188 N.Y.S.2d 465, 470 (1959); *People v. Blackman*, 110 A.D.2d 596, 598, 488 N.Y.S.2d 395, 397 (1st Dep't 1985) ("'[T]he

traditional view and the accepted principle is that the trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence.'") (*citing* McCormick, Evidence § 53, 123 (7th ed. 2013)). The Court must exercise this important authority to prevent the premature and prejudicial admission of improper evidence against the defendants.

A. The Prosecution May Not Establish a *Prima Facie* Case of Conspiracy Against The Defendants with Inadmissible Hearsay

In their Opposition to Defendants' Motions to Dismiss (the "Prosecution's Opposition"), the prosecution cited an e-mail chain dated December 31, 2009 through January 2, 2010, consisting entirely of hearsay statements as evidence supporting its *prima facie* conspiracy case against Mr. Davis.[1] As fully explained in the Reply Memorandum of Law in Further Support of the Motion to Dismiss on Behalf of Steven Davis ("Davis Reply"), the prosecution's argument that these e-mails constitute non-hearsay evidence is wrong. (*See* Campriello Aff., Ex. 4 (Excerpts of the Davis Reply), at 4-5.) Despite their contention that the e-mails were offered only for the fact that they were said and their effect on Mr. Davis, "the distinction the People make [is] unconvincing" because "the prosecution obviously want[] and expect[] the jury to take the statements as true." *People v. Goldstein*, 6 N.Y.3d 119, 127-28, 810 N.Y.S.2d 100, 105 (2005) (holding admission of hearsay evidence was a prejudicial error and ordering a new trial).

---

[1] In this chain, a finance department employee sent Mr. Sanders and Mr. Canellas a draft form e-mail to be sent to various partners, which stated, "It is imperative that you contact every one of these clients first thing Monday morning [January 4] and ask them to send us a check dated 12/31 for the amount listed above." (Campriello Aff., Ex. 3 (E-mail Chain, dated December 31, 2009 - January 2, 2010.) On January 1, 2010, Mr. Sanders forwarded the e-mail to Mr. Davis and Mr. DiCarmine, writing, "Any Comments? I'd like to send this to each partner that has a balance that we think we might be able to get. I'd like to get these out tomorrow." *Id.* On January 2, 2010, Mr. Davis replied, "I would change the wording of the last sentence slightly to say 'It is imperative that you contact each of these clients on Monday morning. All payments through checks dated December 31 will be included in revenues for 2009.'" *Id.*

The remaining e-mails and co-conspirator statements identified in the charging documents as purported conspiracy evidence against Mr. Davis suffer from precisely the same deficiency. They consist of hearsay statements by unproven alleged co-conspirators offered to show that Mr. Davis was generally aware of (1) the Firm's dire financial straits, (2) purported frauds employed to dress up the financials, and (3) another example of purported "backdating." (*See* Campriello Aff., Ex. 2, at ¶¶ 5-6, 10, 25-27, 43, 47; Ex. 5, App. A, at 1, 3-5.)

For example, Mr. Canellas states in his Allocution that in a late 2011 meeting attended by Mr. Davis, "we discussed inappropriate adjustments." (*See* Campriello Aff., Ex. 5, App. A, at 5.) However, that statement is ambiguous as to what Mr. Canellas and Mr. Davis actually discussed. It does not suggest that Mr. Canellas or anyone else explicitly described the adjustments as "inappropriate" or specifically discussed the propriety of the adjustments in any manner.[2] The evidence that Mr. Canellas discussed "inappropriate" adjustments with Mr. Davis is derived entirely from hearsay, by combining Mr. Canellas's recollection that he and Mr. Davis "discussed adjustments" with other hearsay, namely that Mr. Canellas "understood from *conversations with Sanders*" that Mr. Davis was aware of inappropriate adjustments. (*Id.* at 4 (emphasis added).) The hearsay e-mails and statements at issue, clearly offered for their truth, are inadmissible and cannot sustain the prosecution's burden to make out a *prima facie* case of conspiracy against Mr. Davis.

---

[2] According to the handwritten notes taken during the prosecution's interview of Mr. Canellas discussing this meeting, Mr. Canellas merely asserted that he, Mr. Sanders and Mr. Davis "discussed adjustments" at the meeting. (See Campriello Aff., Ex. 1 at NYDA 0008482.) Absent from the prosecution's notes and Mr. Canellas's Allocution is any evidence that Mr. Canellas or Mr. Davis actually discussed the fact that the adjustments were "inappropriate," nor do the notes or Allocution contain any non-hearsay basis for Mr. Canellas's belief that Mr. Davis understood that to be the case.

B. The Prosecution May Not Establish a *Prima Facie* Case of Conspiracy Against The Defendants with Irrelevant Evidence

In addition to their inadmissibility on hearsay grounds, the e-mails and alleged co-conspirator statements offered by the prosecution as *prima facie* evidence of Mr. Davis's agreement to participate in an alleged conspiracy are inadmissible because they are irrelevant to that contention. *See People v. Crea*, 126 A.D.2d 556, 560, 510 N.Y.S.2d 876, 880 (2d Dep't 1987) (testimony to prove conspiracy ruled irrelevant and inadmissible where "[n]o significant evidence was presented connecting [testimony] to the alleged conspiracy").

Again the December 31, 2009 through January 2, 2010 email chain is illustrative. The prosecution seek to offer this e-mail chain entirely out of context—a context that makes clear that the communications in no way show criminal knowledge and intent on the part of Mr. Davis. Numerous emails and documents show that at the time Mr. Davis received Mr. Sanders's December 31, 2009 e-mail and wrote his January 2, 2010 response, he had no reason to believe that counting checks received in January as December revenue, or requesting an antedated check (*i.e.*, a check written in January but dated as of December 31), were in any way improper.[3] Rather, the e-mails and other documents show that Mr. Davis and Mr. Sanders believed that the doctrine of constructive receipt not only allowed, but required a check received in the current year and dated in the previous year to be included in the previous year's taxable income, based on accounting advice the Firm had previously received from Ernst & Young LLP ("E&Y") and PricewaterhouseCoopers ("PwC"), as well as on their understanding of Firm practice. Similarly, there is no evidence to suggest that Mr. DiCarmine had any reason to believe that it was improper to include a check received in the current year and dated in the previous year in the previous year's taxable income.

---

[3] *See* Campriello Aff., Exs. 6-25.

The Firm received Letters of Representation from E&Y on a yearly basis in which E&Y provided representations that the Firm's financial statements fairly presented assets, liabilities, fees, and expenses in conformity with the United States Federal income tax basis of accounting. Mr. Davis signed each Letter of Representation. In the years preceding the December 31, 2009 through January 2, 2010 e-mail chain, these letters specifically addressed the issue of constructive receipt. (*See* Campriello Aff., Exs. 6 and 7 (E&Y Letters of Representation dated July 31, 2008 and June 25, 2009, respectively).) For fiscal year 2007, E&Y included the following description in its Letter of Representation:

> The Firm has included in fees for the year ended December 31, 2007 approximately $20 million that pertains to an amount that was actually received from a client on January 4, 2008 on the basis of constructive receipt. This fee was available to the Firm in 2007 had the Firm sought to obtain it in 2007. Fees from this particular client were routinely reported in this manner by the predecessor partnership of Dewey and no tax benefit has been derived from this method reporting. The Firm recognizes that a failure to include this amount in 2007 fees may result in the tax authorities concluding that such amount should have been reported in 2007 because of constructive receipt; and the Firm prefers to avoid the risk of the tax authorities taking such a position. All appropriate footnote disclosures have been made regarding this matter.

(Campriello Aff., Ex. 6 at 3.) E&Y included a substantially similar description in the following year of a $6.7 million fee received from a client on January 2, 2009 and included in the Firm's fees for the year ended December 31, 2008. (*See* Campriello Aff., Ex. 7 at 2-3.)

Having read and signed each of these Letters of Representation, Mr. Davis understood from E&Y that constructive receipt requires that funds set aside for the Firm's services in the previous year and actually received by the Firm in the current year must be recorded in the year in which they were set aside. Mr. Davis's January 2, 2010 e-mail stating that "[a]ll payments through checks dated December 31 will be included in revenues for 2009" comports precisely with this understanding.

The Firm's predecessor, Dewey Ballantine LLP, also received approval from PwC to adopt the use of constructive receipt when it switched from the modified accrual basis of accounting to the modified cash basis. On December 7, 2007, a partner at PwC provided a brief description of how the methodology was approved, writing in an e-mail to Joel Sanders: "This practice [constructive receipt] which is used by other firms, was discussed with all parties including senior financial management of the firm, PwC tax and audit personnel. The term constructive receipt was reviewed in detail and the principles were incorporated into the Firm[']s policy." (Campriello Aff., Ex 8 (E-mail Chain, dated December 7, 2007 - December 10, 2007).) Indeed, as PwC and E&Y both confirmed, the Firm was required to include any items constituting gross income in the taxable year in which they were actually or constructively received. 26 CFR § 1.446-1(c)(1)(i).

In addition to the advice Mr. Davis received from outside auditors, Mr. Davis's numerous e-mails with various partners during year-end collection efforts over the course of the three years preceding the December 31, 2009 through January 2, 2010 e-mail chain demonstrate his understanding that December-dated checks were properly recorded as of the date of the instrument. (*See* Campriello Aff., Ex. 9-25 (Collection of E-mails Regarding December-dated checks).) Mr. Davis's frank and open communication about this issue makes clear that he and many other partners—including tax partners, experienced white collar partners, members of the Firm's Executive Committee, and a former federal prosecutor—understood the practices of (1) requesting antedated checks (*see* Campriello Aff., Exs. 11-15, 20-24), and (2) recording December-dated checks received in January in the taxable year of the dated instrument (*see* Exs. 9-10,16-19, 25), to be entirely proper and legal. Indeed, after reviewing nearly two million e-mails, we have found no evidence that any partner expressed concerns to Mr. Davis about

either of these approaches. To the contrary, numerous partners advised Mr. Davis in January that they had or would ask their clients—including sophisticated, well-respected public companies and financial institutions—for checks dated December 31. (*See* Campriello Aff., Exs. 23-25.) These facts support Mr. Davis's belief that the Firm's year-end collection practices, such as he understood them, were entirely proper and refute the prosecution's unsupported assertion that it is *self-evident* that they were not. (*See* Campriello Aff., Ex. 26 (Excerpts of the Prosecution's Opposition), at 54.)

In sum, the prosecution's effort to cherry-pick one or two such e-mails completely out of context notwithstanding, these e-mails are not competent and admissible *prima facie* evidence of Mr. Davis's agreement to participate in a conspiracy.

The remaining evidence that the prosecution have cited to support its *prima facie* conspiracy allegation is also irrelevant to this contention. As detailed above, upon closer examination the statement by Mr. Canellas that he and Mr. Davis discussed "inappropriate" adjustments (*see* discussion *supra* at Part II.A), in addition to being hearsay, is ambiguous and lacks any probative value. Mr. Davis's general awareness of the Firm's financial condition is not in dispute, nor is the fact that Mr. Davis understood that legitimate accounting treatments, "including constructive receipt," was a tool that the firm, like every major company, used in calculating its year-end financials. (*See* Campriello Aff., Ex 2, at Indictment ¶ 26.) The e-mails and statements cited by the prosecution thus far are irrelevant to its objective: proving Mr. Davis's knowledge of and agreement to participate in *improper* accounting adjustments. The prosecution should not be permitted to open the floodgates of co-conspirator evidence against Mr. Davis, or any other defendant, by resting on a dubious argument at odds with the evidence. Unless and until the prosecution are prepared to offer relevant, admissible evidence as to this

point, and thereby make a *prima facie* showing of conspiracy, they should not be permitted to introduce any co-conspirator statements in the case against Mr. Davis.

POINT III

PROHIBITING THE PROSECUTION FROM ELICITING TESTIMONY, PRODUCING EVIDENCE OR COMMENTING ON JOB LOSS, BANKRUPTCY, AND PENSION LOSS ALLEGEDLY CAUSED BY THE DEFENDANTS

In their omnibus motion to dismiss the indictment, the defendants asked the Court to strike inflammatory language from the indictment that alleged that as a result of the defendants' conduct "the Firm declared bankruptcy; thousands lost their jobs; and the Firm's creditors were left owed millions of dollars." Although the Court found that "there was nothing particularly inflammatory in the indictment which would prejudice trial jurors," the Court also noted that "the court retains the discretion to limit the extent to which [the language] may be read to the jurors." (Campriello Aff., Ex. 27 (Decision, November 7, 2014), at 13, n. 5.) For reasons set forth in the Joint Omnibus Motion, the defendants ask the Court not to read that language to the jury and to prohibit the prosecution from eliciting testimony, producing evidence or commenting on job loss, bankruptcy, and pension loss allegedly caused by the defendants. *See People v. Cirillo*, 100 Misc. 2d 527, 528, 419 N.Y.S.2d 820, 822 (Sup. Ct. Bronx Cnty. 1979) (striking extraneous and inflammatory language from the indictment where this language "serve[d] no purpose other than to inflame and prejudice the jury").

POINT IV

PROHIBITING PROOF OF UNCHARGED CRIMES AND OTHER PURPORTEDLY BAD ACTS

The schemes to defraud alleged in Counts One and One Hundred And Five of the indictment, and the Conspiracy alleged in Court One Hundred and Six are extraordinarily broad as written. The Court should prohibit the prosecutors from submitting evidence during the trial

of uncharged crimes not expressly identified or described in the indictment as parts of the alleged scheme to defraud and conspiracy. *See* CPL § 200.50:

> An indictment must contain: ... A plain and concise factual statement in each count which, without allegations of an evidentiary nature, ... asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation

People v. Iannone, 45 N.Y.2d 589, 599, 412 N.Y.S.2d 110 (1978) (noting that "[i]t is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense"); *People v. Sanchez*, 84 N.Y.2d 440, 445, 618 N.Y.S.2d 887 (1994).

The Court will recall that at the discovery conference held on September 30, 2014, Mr. Sanders's lawyer asked the Court to treat the prosecution's responses to the defense requests as responses to a Request for a Bill of Particulars, so that the prosecution's proof at trial would be so limited. The Court declined to do so. As a result of the breadth of the charges coupled with that ruling, the defendants lack sufficient notice as to what the prosecutors intend to try to prove as parts of those counts. Consequently, the defendants ask the Court to prohibit proof of alleged criminal conduct that is not expressly identified or charged in the indictment.[4] In the alternative, if the Court declines to grant this request, the defense asks the Court to order the prosecutors to provide the defendants not later than three weeks before the scheduled starting date of the trial with a list of "sub-schemes" or components of these changes.

A variation on this request arose during the discovery conference the Court conducted with the parties. The District Attorney took the novel position that it was improper for a firm to

[4] The defendants are reluctant to list examples in this submission lest the list identify a concern about a line of evidence the prosecutors have not considered thereby engendering their interest. However, the defense will, if the Court deems it helpful, submit in camera and ex parte a list.

book into prior year income checks issued/dated in the prior year but received/deposited in January (as opposed to "backdated" checks). The Court appeared to be surprised by this peculiar position, pressed the prosecutors on it, and when they did not relent, said that the Court would deal with it at trial. The defendants ask the Court to deal with this issue now and preclude the prosecutors from presenting any evidence or making any argument that suggests that there is anything wrong with what the defendants believe is a commonly accepted practice.

Moreover, the District Attorney has suggested that this trial will last four to six months. The defendants have suggested that there very likely will be a defense case. If the defendants are compelled to defend crimes not identified in the indictment, the trial is likely to last much longer than predicted. That will make it much more difficult to select a fair and impartial jury.

If the defendants do not get this relief, the federal and state rights to proper notice of the charges against them, to due process and to a fair trial will be violated.

POINT V

PROHIBITING ANY EVIDENCE RELATING TO OR MENTION OF DEFENDANT DICARMINE'S COUSIN, VINCENT BASCIANO

Mr. DiCarmine has a first cousin, Vincent Basciano. Federal authorities have accused Mr. Basciano of being a high ranking member of an organized crime family, he has been convicted in federal court of murder, and is serving a life sentence. Mr. Basciano had nothing to do with the allegations in this case. Mr. DiCarmine had nothing to do Mr. Basciano's activities. Although we cannot imagine the New York County District Attorney's Office trying to slip this relationship into this trial, out of an excess of caution we ask that it be prohibited from doing so. For example, Mr. DiCarmine may (or may not) testify in his own defense. If he does so, it is likely that his family background will be elicited on direct examination. We need to be certain that eliciting that kind of testimony will not be held to have opened the door to his relationship to

Mr. Basciano. Indeed, any uncertainty could keep Mr. DiCarmine from testifying, thereby impinging on his constitutional right to testify in his own defense.

This issue not only is of critical importance to Mr. DiCarmine; any mention of Mr. Basciano would pollute the trial with respect to Mr. Davis and Mr. Sanders as well.

POINT VI

COMPLETE AND UNREDACTED PLEA AGREEMENTS, STATEMENTS AND *ROSARIO* MATERIAL

The seven cooperators' Plea Agreements, with the accompanying statements, provided by the District Attorney in March 2014, contain numerous redactions. Similarly, the *Rosario* materials pertaining to the seven cooperators also have been heavily redacted.

Whatever reason may have existed for redacting those documents then surely cannot trump the defendants' right to prepare for trial at this late date. Moreover, we anticipate that we will be receiving additional *Rosario* material. We can think of no reason to redact future *Rosario* material as we go forward. This is not an organized crime or narcotics case where the prosecution may have legitimate concerns about witness tampering or intimidation. Indeed, the defendants are lawyers with previously unblemished records. The Court has repeatedly commented positively on the record about the caliber of defense counsel, so presumably neither the Court nor the prosecution has concerns about misconduct by counsel. Several of the redactions appear right in the middle of witness statements regarding the substantive facts at issue in this case, strongly suggesting that the redacted material is either additional witness statements recorded by the note-taker or questions that were posed to the witness that provide critical context and meaning to the witness statements that follow. (*See*, *e.g.*, Campriello Aff., Ex. 28 (Excerpts of the *Rosario* Material Pertaining to Thomas Mullikin), at NYDA 0009188 – 9189; Campriello Aff., Ex 1. at NYDA 0008575-8578, NYDA 0008581.) The notes of Mr.

Mullikin's interview on March 21, 2013, are completely redacted. (*See*, *e.g.*, Campriello Aff., Ex. 28, at NYDA 0009182.) Witness statements are not the only material subject to *Rosario*. The prosecutions' "notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of...Rosario" as well. *People v. Consolazio*, 40 N.Y.2d 446, 453-54, 387 N.Y.S.2d 62, 66 (1976).[5]

Moreover, there are proffer agreements signed by certain witnesses on several dates for which no witness interview notes have been provided to the defendants. Mr. Alter signed a proffer on January 6, 2014 but no notes were produced to the defendants, and similarly Ms. Rodriguez signed a proffer on February 25, 2014 but we have no notes from those sessions. (*See* Campriello Aff., Exs. 30-31 (Proffer Agreements Pertaining to Ilya Alter and Lourdes Rodriguez, respectively), at NYDA 0008407; NYDA 0009560.) When "a defendant can articulate a factual basis for the assertion that a prosecutor is improperly denying the existence of prior statements or a prosecutor admits the existence of such statements but contends that they are irrelevant to the testimony of the witness," the trial court should conduct an *in camera* review of the redacted material to resolve the dispute. *People v. Poole*, 48 N.Y.2d 144, 149, 422 N.Y.S.2d 5, 8 (1979). Even if the prosecution does not believe that the cited materials require disclosure, they nonetheless bear an "obligation to inform the trial court of the existence of [such] material...as to which there may exist any element of doubt." *People v. Gonzalez*, 74

[5] There is also one set of notes, concerning the interview of David Rodriguez that took place on November 25, 2013, that are essentially illegible. (*See* Campriello Aff., Ex. 29 (Excerpts of the *Rosario* Material Pertaining to David Rodriguez) at NYDA 0009498-9504.) Counsel for Mr. Sanders contacted the prosecution on December 4, 2014, to request a readable transcript for the six pages of interview notes but there has been no response to date. The continued failure to provide the defendants with a legible version of these materials may constitute a *Rosario* violation if it is not timely addressed. *Cf. People v. Willis,* 140 A.D.2d 394, 395, 527 N.Y.S.2d 870, 871 (2d Dep't 1988) (finding no *Rosario* violation where defense counsel failed to request a timely remedy for a "partially illegible photocopy of a *Rosario* statement" and the defendant was provided with a duplicative equivalent of the statement).

A.D.2d 763, 765, 425 N.Y.S.2d 601, 604 (1st Dep't 1980). The defendants respectfully request that the Court order the prosecution to produce, for the Court's review, the unredacted Plea Agreements, interview notes, and any other interview notes not previously provided to the defense. In the alternative, given the absence of any danger of inappropriate witness contact, the defendants ask the Court to order the District Attorney immediately to provide each defendant with unredacted copies of these materials.[6]

POINT VII

MODIFYING THE PROTECTIVE ORDER OF APRIL 21, 2014

The District Attorney declined to provide certain discovery to the defendants unless they agreed to the terms of a Protective Order, which the Court signed on April 21, 2014. The Protective Order sets conditions on the defendants' use of material received from the prosecution. In particular, the Protective Order provides that "Personal Identifying Information" shall not be disclosed to any third parties or witnesses, and defines "Personal Identifying Information" as (a) the name of any person who has not been charged with a crime related to his or her conduct at Dewey & LeBoeuf; and (b) with respect to any person, any address, phone number, date of birth, driver's license number, social security number, place of employment, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card or debit

[6] We do not object at this time to the redaction with respect to social security number, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card or debit card account number or code, ATM number or code, any taxpayer identification number, computer system password, copy of a signature, electronic signature, any unique biometric data that is a fingerprint (provided that any criminal record information is provided to us), any voice print, any retinal image or iris image of another person, any telephone calling card number, and any mobile identification number or code, and any electronic serial number or personal identification number.

card account number or code, ATM number or code, any taxpayer identification number, computer system password, copy of a signature, electronic signature, any unique biometric data that is a fingerprint, any voice print, any retinal image or iris image of another person, any telephone calling card number, any mobile identification number or code, and any electronic serial number or personal identification number.

The Protective Order further provides that the Court may grant relief upon good cause shown. It is obvious that there will be a trial in this case, and the Court has set a firm trial date of April 27, 2015. While the defendants do not object to non-disclosure of social security numbers, driver's license numbers, or personal bank account information, defendants must be able to use the names and basic identifying information of the individuals identified in the material received from the District Attorney at trial and while preparing for trial. The time has come—we would argue is past—when the defendants should have unfettered use of the discovery materials to which they are entitled. Therefore, the defendants ask the Court to modify the April 21, 2014 Protective Order accordingly.

CONCLUSION

For the foregoing reasons, the defendants respectfully submit that the Court should (a) prohibit the improper use of hearsay; (b) prohibit inadmissible conspiracy evidence against the defendants; (c) prohibit the District Attorney from eliciting testimony, producing evidence or otherwise commenting on job loss, bankruptcy, and pension loss allegedly caused by the defendants; (d) prohibit inadmissible evidence of uncharged crimes and other purportedly bad acts; (e) prohibit the District Attorney from mentioning Mr. DiCarmine's cousin, Vincent Basciano, in any way, including during any cross examination of Mr. DiCarmine or any other defendant should any defendant testify on his own behalf; (f) order the District Attorney immediately to provide the defendants with unredacted Plea Agreements and accompanying appendices, as well as complete and unredacted interview notes (*Rosario* material) for the cooperators; and (g) modify the Protective Order with respect to material provided by the District Attorney as discovery.

Dated: February 13, 2015
New York, New York

MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
By: Elkan Abramowitz
565 Fifth Avenue
New York, New York 10017
Tel: 212-856-9600
Fax: 212-856-9494

Attorneys for Defendant Steven Davis

BRYAN CAVE LLP

By: _____
Austin V. Campriello

1290 Avenue of the Americas
New York, New York 10104

Tel: 212-541-2000
Fax: 212-541-4630

Attorneys for Defendant Stephen DiCarmine

THE LAW OFFICES OF
ANDREW J. FRISCH
By: Andrew J. Frisch
40 Fulton Street
23rd Floor
New York, New York 10038
Tel.: (212) 285-8000
Fax: (646) 304-0352

Attorneys for Defendant Joel I. Sanders

Of Counsel:

MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
Lawrence S. Bader
Jasmine Juteau
Priya Raghavan

BRYAN CAVE LLP
Anne T. Redcross

THE LAW OFFICES OF ANDREW J. FRISCH
Amanda L. Bassen