

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA : Crim. No. 3:05CR268 (JBA)  
 :  
 v. :  
 :  
 JOHN M. LUCARELLI : December 15, 2006

**UNITED STATES' RESPONSE TO DEFENDANT LUCARELLI'S POST-TRIAL MOTIONS**

**Introduction**

Defendant Lucarelli has filed a motion for a judgment of acquittal and a motion for a new trial as well as a supporting memorandum of law and attorney's affidavit attaching several trial exhibits and portions of trial transcripts [doc. nos. 163, 164, & 165]. This memorandum responds to each of the defendant's motions. For the reasons stated below, the defendant's motions should be denied.

**Procedural Background**

On October 14, 2005, a federal grand jury seated in New Haven, Connecticut, returned a twelve-count indictment charging defendant John M. Lucarelli with conspiracy (count one); mail fraud (counts two through four); and securities fraud (counts seven through twelve.) On July 28, 2006, after a jury trial with 8 days of evidence and 6 days of deliberations, the jury convicted defendant Lucarelli on Count One, conspiracy in violation of 18 U.S.C. § 371, and Count 12 securities fraud in violation of 18 U.S.C. § 1348.

When the jury returned its verdict, the verdict form indicated that it had found the defendant guilty on Count One (conspiracy) and Count 12 (securities fraud.) Having found the defendant guilty on Count 12, the verdict form indicated that the jury should answer with respect to Count 12, the following special interrogatory: "If you found the defendant guilty on any of Counts 2-4 or 7-12, did you find the defendant participated in the fraudulent scheme with the specific intent to defraud: (a)

The Bank of property: Yes \_\_\_ No \_\_\_ (b) Depositors of money or property: Yes \_\_\_ No \_\_\_.” The jury marked no for both (a) and (b).

The court had instructed the jury on each element of the crime of conspiracy and each element of the crimes of mail fraud and securities fraud, and had instructed the jury that it needed to find each element beyond a reasonable doubt in order to find the defendant guilty. (Jury Instructions at 10, 49-52.) However, the Court had not instructed the jury on the verdict form generally or on the special interrogatory. (Trial Tr., Jul. 28, 2006, at 1722 (“[The Court] did not explain the verdict form to them and [ ] did not explain the special interrogatory at any point.”))

When the verdict form was handed to the Court, the Court called counsel to the bench to discuss how best to proceed. During the discussion, counsel for the Government suggested that the jury be provided additional instructions to clarify the verdict form. Government counsel suggested that the jury be informed that each of the fraud counts requires specific intent to defraud another of money or property, and that the special interrogatory was inquiring as to which of the two options provided the jury found to be present. Counsel further suggested that the jury be instructed that the defendant could be found to have intent as either an aider and abettor or as a principal. (Trial Tr., Jul. 28, 2006, at 1720.) Defendant’s counsel opposed providing any additional clarifying instructions and took the position that the verdict was a judgment of acquittal and that the Court should take the verdict “as is.” (*Id.* at 1721.) The Court again raised the possibility of sending the jurors back to reconsider their verdict (*id.* at 1722), and defendant’s counsel again asked no clarification made and that the verdict be taken.

The Court did not send the jurors back to reconsider their verdict in light of additional instruction and did not seek to clear up their possible confusion – if any. The Government took the

position that additional instructions might be appropriate and defense counsel opposed the suggestion. As the Court made clear, defense counsel was “not requesting any clarification, and the chips will fall as they will post-trial.” (Trial Tr., Jul. 28, 2006, at 1723.)

### **Offense Conduct**

As proven at trial, the charges arose out of a scheme through which the defendant and other members of the conspiracy, including Robert R. Ross and George J. Kundrat, both of whom testified, illegally obtained shares of NewAlliance Bancshares, Inc. The defendant and his co-conspirators conspired to, and did, provide funds to persons who were eligible to obtain the shares, with the understanding that these persons would transfer the shares to the conspirators. (*See e.g.* Landino Tr., Jul. 12, 2006, at 545.) They did so by causing the depositors to falsely state in connection with their purchase of the stock that they were making the purchase with their own funds and that there was no agreement to transfer the shares. (*See inter alia* Gov. Ex. 7, 8, 9, 10, 11.) A number of depositors who were approached by the defendant and his co-conspirators purchased stock at the initial public offering price, and thereafter transferred the stock to the conspirators who sold it at a substantial profit. As proven at trial, the defendant sought out eligible depositors, contacted them by phone, participated in meetings with them, picked-up the stock certificates after they had been executed for transfer, physically transported the certificates to the other co-conspirators, and shared in the proceeds of the illegal activity.

New Haven Savings Bank (“NHSB” or the “bank”) was organized in 1838 as a Connecticut-chartered mutual savings bank. (Gov. Ex. 1.) In 2003, NHSB decided to convert from a mutual savings bank to a Connecticut-chartered capital stock savings bank. (*Id.*; Gov. Ex. 16-B; Blanksteen Tr., Jul. 11, 2006, at 313-15.) The shares of common stock of NABC were offered through an initial

public offering (“IPO”), conducted as a “subscription offering.”<sup>1</sup> (*Id.*; Henrie Tr., Jul. 12, 2006, at 457-458.)

As a “mutual” savings bank, NHSB was nominally owned by its depositors. (*See* Blanksteen Tr., Jul. 11, 2006, at 318; Henrie Tr., Jul. 12, 2006, at 457.) As such, the terms of the offering, as detailed in the prospectus and in compliance with the OTS regulations as codified at 12 C.F.R. § 563b, gave first priority for buying the shares to the depositors. (*See* Blanksteen Tr., Jul. 11, 2006, at 318; Henrie Tr., Jul. 12, 2006, at 471.) More specifically, the right to buy the shares (*i.e.*, the “subscription rights”) were granted to potential purchasers in five tiers, in descending order of priority from tier one to tier five. (Gov. Ex. 1, 56, 185-A; Blanksteen Tr., Jul. 11, 2006, at 322-25; *see* Henrie Tr., Jul. 12, 2006, at 481-82.) Tier-one was comprised of depositors who had aggregate balances of \$50.00 or more in their accounts on June 30, 2002, the “record date.” (Gov. Ex. 1, 56. Blanksteen Tr., Jul. 11, 2006, at 323-24; Henrie Tr., Jul. 12, 2006, at 458.) Pursuant to the plan of conversion as well as OTS regulations, the subscription rights were non-transferable and each depositor purchasing stock was required to certify that he was purchasing the stock solely for his own account and that there was no agreement or understanding regarding the sale or transfer of the shares or the right to subscribe for the shares. (Gov. Ex. 1, 56, 68; Blanksteen Tr., Jul. 11, 2006, at 325-28; Henrie Tr., Jul. 12, 2006, at 478.)

The offering was oversubscribed in tier-one, meaning that the tier-one depositors submitted stock order forms requesting more stock than was available. (Blanksteen Tr., Jul. 11, 2006, at 345, 354.) As a result, shares were allocated in accordance with the plan of conversion that based

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<sup>1</sup> NABC filed an application with the Board of Governors of the Federal Reserve to become a bank holding company, and did not issue stock prior to the 2004 initial public offering. NABC registered the shares under Section 12 of the Securities Exchange Act of 1934, and, upon registration, NABC became subject to the Securities and Exchange Commission’s (“SEC”) proxy solicitation rules and periodic reporting requirements. (Gov. Ex. 1.)

allocations primarily on the amount of money on deposit in an eligible account holder's account, and the proportion that those deposits bore to the total amount of deposits of all eligible account holders whose subscriptions remained unfilled. (Jean Tr., Jul. 18, 2006, at 1283-86.) Thus, the stock was not sold beyond the first-tier, and certain first-tier account holders were not able to receive the full amount of stock that they requested. (Blanksteen Tr., Jul. 11, 2006, at 345, 358; Henrie Tr., Jul. 12, 2006, at 417, 507; Jean Tr., Jul. 18, 2006, at 1286-90; 1301-04.) Conspirators Ross, Kundrat, Vought, and Lucarelli were not tier-one depositors. Nonetheless, they wanted to participate in the IPO and to profit from the bank conversion. (Ross Tr., Jun. 12, 2006, at 664-66; 996-70.) To accomplish this, these four individuals conspired to, and did, commit mail fraud and securities fraud. (Ross Tr., Jul. 12, 2006, at 645.)<sup>2</sup>

In approximately February 2004, Ross met with Kundrat in Ross and Vought's Madison Avenue Offices in New York City. They discussed the IPO as well as their plan to purchase stock at the \$10.00 IPO price by using the subscription rights of tier-one depositors. Because they were not tier-one depositors, they sought out account holders to determine if those depositors had first-tier subscription rights, and if they would be interested in entering into arrangements to buy stock. (Ross Tr., Jul. 12, 2006, at 670-72; 676; Kundrat Tr., Jul. 17, 2006, at 1111.) Defendant Lucarelli acted as a "scout," and in that role he contacted NHSB depositors to see if they would be interested in purchasing stock for the conspirators. (Kundrat Tr., Jul. 17, 2006, at 1111; Ross Tr., Jul. 12, 2006, at 677-79, 686-87; Ross Tr., Jul. 13, 2006, at 746.) When Ross first approached Lucarelli about finding NHSB depositors eligible to purchase stock, he explained to Lucarelli that there were regulatory restrictions prohibiting what they were doing. (Ross Tr., Jul. 12, 2006, at 681, 682.) Ross told Lucarelli to "be

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<sup>2</sup> As they testified to at trial, Ross entered a guilty plea to securities fraud on June 30, 2005, and Kundrat entered a plea of guilty to conspiracy on July 7, 2005.

discreet” in finding depositors, and not to “shout from the roof or advertise,” because of the regulatory restrictions. (Ross Tr., Jul. 12, 2006, at 682-83.) Having worked in the securities industry as a registered representative and having taken and passed the Series 7 exam, Lucarelli undoubtedly knew about the securities industry, securities laws and regulations, and the regulatory and criminal consequences of violating the regulations. (Gov. Ex. 191; Le Tr., Jul. 12, 2006, at 519, 521-22.)<sup>3</sup>

In spite of Ross’s warnings, defendant Lucarelli contacted a number of eligible account holders (*i.e.*, tier-one account holders or depositors) and proposed to them an arrangement for using their subscription rights. (Ross Tr., Jul. 12, 2006, at 681; Ross Tr., Jul. 13, 2006, at 718-19, 746; Kundrat Tr., Jul. 17, 2006, at 1111); Querker (the younger) Tr., Jul. 10, 2006, at 77 (testifying that Lucarelli “had mentioned he wanted me to meet someone who might be helpful in acquiring the New Haven Savings Bank stock.”) Lucarelli told the depositors about the proposed transaction. For instance, Robert Landino testified that Lucarelli explained the transaction to him, outlined the documents that Landino would need, told him he would put Ross in touch with him, and told him what percent of the profits he would be receiving. (Landino Tr., Jul. 12, 2006, at 540, 541, 542; Morant Tr., Jul. 17, 2006, at 1092-93.) Lucarelli also gathered information from the account holders about the balances and attempted to determine whether the depositors were in fact eligible account holders with significant balances as of the record date. (Ross Tr., Jul. 13, 2006, at 746-747; Gov. Ex. 103 (Morant passbook.))

Defendants Lucarelli and Ross spoke with and met with eligible account holders on a number of occasions prior to the IPO. (Ross Tr., Jul. 12, 2006, at 687-90; Ross Tr., Jul. 13, 2006, at 718-20, 726-29, 732, 746, 748-50.) During these meetings, they discussed with the account holders the details of the proposed transactions. (Ross Tr., Jul. 12, 2006, at 689-94; Ross Tr., Jul. 13, 2006, at 719-24.)

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<sup>3</sup> Lucarelli received an M.B.A. from Yale, took the Series 7 licensing exam, and was a registered broker-dealer. (Gov. Ex. 200; Le Tr., Jul. 12, 2006, at 514-31.)

At a number of meetings that defendant Lucarelli attended, including meetings with Bob James and Linda Morant (Morant Tr., Jul. 17, 2006, at 1092-93) and a meeting with Mr. Accettullo, it was explained, among other things, that the transaction would be financed by Ross and his investors; that the account holders would be required to transfer the stock certificates to the members of the conspiracy after they received them; and that the account holders would receive a percentage of the anticipated profits. (Ross Tr., Jul. 12, 2006, at 690; Ross Tr., Jul. 13, 2006, at 720-24; 731-33; Morant Tr., Jul. 17, 2006, at 1092-93; Accettullo Tr., Jul. 10, 2006, at 159-62.)

At one such meeting held at Geppi's restaurant in New Haven, an article that had been published in the *New Haven Advocate* was shown to everyone, including Lucarelli. The article discussed the illegal nature of the venture they were proposing. (Querker (the younger) Tr., Jul. 10, 2006, at 93-94, 98-99.) Ross compared the risks involved in the proposed transaction as being akin to "walking past a lawn that has a . . . 'Do not step on the grass' sign and that, if you walk on the grass too many times, you could eventually get caught." (Accettullo Tr., Jul. 10, 2006, at 161-62.) After this meeting, Ross's reiterated this very conversation directly to Lucarelli.

After his initial meeting with Ross and Lucarelli at Geppi's, Mr. Accettullo conducted some research and found a case – *SEC v. Salzhauer* – that involved similar illegal conduct arising from the conversion of a mutual bank in New York. (Accettullo Tr., Jul. 10, 2006, at 163.) The *Salzhauer* case caused Accettullo concern "because it was prosecuted" (*id.*), and because the deal done in the *Salzhauer* case was very similar, if not exactly the same, as the deal being proposed by Ross. (*Id* at 169; Gov. Ex. 115.) Accettullo had a second meeting with Lucarelli. At this second meeting, Accettullo showed Lucarelli the case and Lucarelli said "he was familiar with [the case]," (Accettullo Tr., Jul. 10, 2006, at 167.) Even after seeing the *Advocate* article, hearing the warnings, and

discussing the SEC enforcement action, Lucarelli continued to work with Ross to set up these illegal stock purchases.

After speaking with Ross and Lucarelli, a number of depositors agreed to enter into agreements with the conspirators. (*See e.g.*, Gov. Ex. 77; Ross Tr., Jul. 13, 2006, at 736-41.) As part of the agreements these depositors were to sign the NABC stock order forms in a way that made them materially false and fraudulent representations to the bank, by certifying that they were purchasing the stock solely for their own account, and that there was no agreement or understanding regarding the sale or transfer of the shares or the right to subscribe for the shares. (*See* Gov. Ex. 7, 8, 9, 10, 11, 12 (Stock order forms) *see also e.g.*, Landino Tr., Jul. 12, 2006, at 545-49.))

As part of the fraudulent scheme and conspiracy, defendants Vought and Kundrat wired money to Robert Ross's People's Bank account in Connecticut. (Cuff Tr., Jul. 19, 2006, at 1414-15.) Ross, in turn, using these funds as well as his own (Ross Tr., Jul. 12, 2006, at 668, 672), obtained seven cashier's checks from People's Bank, each in the amount of \$700,000, and each made payable to New Haven Savings Bank. These checks were then used to purchase the stock. Ross met with the depositors, obtained the falsely executed stock order forms, and paired the forms with the People's Bank cashier's checks. (Ross Tr., Jul. 13, 2006, at 732-36; Landino Tr., Jul. 12, 2006, at 545-49.) Ross then arranged for the stock order forms and checks to be sent from his offices on Madison Avenue in New York City, by Federal Express, to New Haven Savings Bank in New Haven, Connecticut. (Ross Tr., Jul. 13, 2006, at 736, 741-42, 751-52.)

On March 8, 2004, mere days before the stock order deadline, the *New Haven Register* published an article about the New Haven Savings Bank conversion. That article discussed the illegality of the precise type of scheme Lucarelli was furthering, specifically stating, "non-depositors

are trying to convince depositors to illegally invest money on their behalf . . .” (Gov. Ex. 80.) The *Register* article quoted a Bank vice president who stated “[t]he kinds of transactions we are hearing about are prohibited by law... these types of arrangements are prohibited.”) *Id.* John Querker Jr. (the younger) testified that he had seen the article and faxed it to Ross. He also testified that he “generally” discussed articles about the conversion with the defendant. The jury could reasonably infer that Querker (the younger) and Lucarelli discussed the contents of the *New Haven Register* article based on the fact that he discussed articles “in general” with Lucarelli; that he had faxed the article to Ross (Gov. Ex 80); and based on phone records showing that Querker (the younger) had a telephone call with Lucarelli’s on the same day the *Register* article had been published. (*See Querker (the younger) Tr.*, Jul. 10, 2006, at 111-15) (Gov. Ex. 408-B.). The additional article notwithstanding, Lucarelli continued along with Ross in his scheme.

As a result of this scheme, the bank and its underwriter allocated stock to the account holders, relying on the falsely executed stock orders. If the true facts had been revealed in these orders, the bank would not have allocated stock to these account holders, but would have provided it to other account holders who were unable to purchase all of the stock that they sought to purchase. (Gov. Ex. 18-C, 18-D. *See also Blanksteen Tr.*, Jul. 11, 2006, at 358; *Henrie Tr.*, Jul. 12, 2006, at 507; *Jean Tr.*, Jul. 18, 2006, at 1286-90, 1301-04.)

After the account holders received their fraudulently obtained stock, they endorsed the stock certificates, and gave the certificates to Lucarelli who delivered them to Ross. (Ross Tr., Jul. 13, 2006, at 743-45, 752-55.) The conspirators, sold the fraudulently obtained shares at prices well above the \$10 IPO price and made a profit of more than \$1.7 million. (Ross Tr., Jul. 13, 2006, at 743-45, 753; *Cuff Tr.*, Jul. 19, 2006, at 1427-28; Gov. Ex. 181, 182, 183, 184.)

The profits were divided between the co-conspirators and the depositors whose subscription rights were used to purchase the stock. (*See* Ross Tr., Jul. 12, 2006, at 684; Gov. Ex 180.) Ross provided Lucarelli with cash as well as a check for \$88,000 as his cut of the profits. As established by bank records and the testimony of Joseph A. Pecora, Lucarelli directed the \$88,000 that he had received from Peninsula Capital Management (Robert Ross's company) to Lucarelli's wife's account at Greenwich Investments and indicated to Pecora that it was his own money. (Pecora Tr., Jul. 17, 2006, at 1065-66.)

On or about July 20, 2004, Agent Cuff went to Robert Ross's house and left his business card. (Cuff Tr., Jul. 19, 2006, at 1446-47.) Shortly after this visit, Ross had a conversation with Lucarelli in which Ross told Lucarelli about the criminal investigation and that it was "serious" and that it might be time for Lucarelli to get a lawyer. (Ross Tr., Jul. 13, 2006, at 809-13.) Pecora testified that in late July (after the criminal investigation began), Lucarelli asked Pecora to return the \$88,000 directly to Ross, without having the money go through Lucarelli's account. (Pecora Tr., Jul. 17, 2006, at 1066-69 (testifying that something was different in Lucarelli's voice "he was nervous and there was something going on"); Cuff Tr., July 19, 2006, at 1447; Gov. Ex 407.) Approximately ten days after Ross told Lucarelli about the criminal investigation Ross received a self serving letter from Lucarelli (Gov. Ex. 162) indicating that he was returning the \$88,000. The jury could well have inferred that after Lucarelli learned of the investigation and knowing his conduct was wrong, he sought to cover his tracks, distance himself from the fraudulent transactions and rid himself of the fruits of the crime by having Greenwich Investments send the money directly back to Ross, to try, in vain, to exculpate himself.

The defendant's financial motive was established by the testimony of Pecora who said that the defendant was building a new house and the cost of "in the range of \$850,000." (Pecora Tr., Jul. 17,

2006, at 1070.) Ross testified that he also provided Lucarelli with cash that Lucarelli had said he would use to pay for a new septic tank he was installing. Charles Weiss of J. Bond Septic testified as to the cost of the septic work, and the cost was very virtually the exact amount Lucarelli had told Ross that he needed for the septic work. (Weiss Tr., Jul. 17, 2006, at 1081.) Based on the testimony of Pecora and Weiss, the jury could reasonably infer that Lucarelli was in need of money to finance his \$850,000 new house, and this financial need motivated him to break the law and join the conspiracy and commit (or aid and abet) securities fraud.

### Legal Standards

#### **1. Motion for Judgment of Acquittal**

A “defendant shoulders a heavy burden in challenging the sufficiency of evidence supporting a conviction.” *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (internal quotation marks and citation omitted.) In deciding a motion for judgment of acquittal, the Court views the evidence presented in the light most favorable to the Government, and draws all reasonable inferences in the Government’s favor. *Id.* E.g., *United States v. Henry*, 325 F.3d 93, 103 (2d Cir. 2003); *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002.) The evidence must be considered in its totality, not in isolation, and the Government need not negate every theory of innocence. *Autuori*, 212 F.3d at 114. The Court must be careful to avoid “usurping the role of the jury,” *id.* (quoting *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999)), and accordingly may not substitute its own determinations of credibility or relative weight of the evidence for that of the jury. *Autuori*, 212 F.3d at 114. The Court “must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.” *Id.* (quoting *United States v. Mariani*, 725

F.2d 862, 865 (2d Cir. 1984.)) If the Court concludes that either a verdict of guilty or not guilty was possible based on the evidence, it must uphold the jury's guilty verdict. *See Autuori*, 212 F.3d at 114. Put another way, the Court may "not disturb a conviction on grounds of legal insufficiency of the evidence at trial if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pimentel*, 346 F.3d 285, 295 (2d Cir. 2003) (internal quotation marks and citations omitted.) This deference to the jury is especially important in conspiracy cases, as "a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (quoting *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir.1992).) In short, reversal is warranted only if no rational fact finder could have found the crimes charged proved beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

## **2. Motion for New Trial**

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "The rule by its terms gives the trial court 'broad discretion ... to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.'" *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992) (alterations by the Court)). In exercising its discretion conferred by Rule 33, the Court may weigh the evidence and evaluate the credibility of witnesses. *Sanchez*, 969 F.2d at 1413. In so doing, however, the Court must defer to the jury's assessment of these matters. *Sanchez*, 969 F.2d at 1414; *see also Ferguson*, 249 F.3d at 133-34 ("because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may

intrude upon the jury function of credibility assessment.”)

The burden of persuasion is on the defendant to demonstrate that a new trial is appropriate. *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995.) “Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority ‘sparingly’ and in ‘the most extraordinary circumstances.’” *Ferguson*, 249 F.3d at 134 (quoting *Sanchez*, 969 F.2d at 1414.) “The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice.” *Ferguson*, 249 F.3d at 134.

### **Discussion**

Viewed in the light most favorable to the government and deferring to the jury’s resolution of conflicting evidence and assessment of witness credibility, none of defendant’s arguments merit a judgment of acquittal or a new trial.

#### **I. The Jury’s Verdict of Guilt Coupled with the Answers to the Interrogatories Do Not Compel This Court to Grant a Judgment of Acquittal or a New Trial on Either Count One or Count Twelve**

As an initial matter, the Court should not lose sight of the fact that the jury found defendant Lucarelli guilty on Count One and Count 12. The jury charge properly instructed the jury as to the crimes of conspiracy and of securities fraud. The jury charge also properly instructed the jury that in order to find the defendant guilty of the charged offenses it needed to find each element beyond a reasonable doubt. Additionally, the jury was properly instructed that the defendant could also be found guilty on the substantive counts as an aider and abettor. The Government proceeded under both theories and the jury was free to find the defendant guilty under either theory or both. Juries are presumed to follow the Court’s instructions and there was nothing about the instructions or the

proceedings that would indicate the jury did not properly follow the Court's instructions. Since the instructions were a correct statement of the law, it can be presumed that the jury applied the instructions correctly and did not apply them against the defendant without sufficient evidence to support such a finding. *See Griffin v. United States*, 502 U.S. 46, 60 (1991.) *See also United States v. Delano*, 55 F.3d 720, 730 (2d Cir 1995) (when confronted with multiple theories in an indictment "juries can be trusted to distinguish factually supported theories of crime from those that are inadequate.") Accordingly, as set forth below, the guilty verdicts should stand on both counts.

A. The Jury's Answers to the Interrogatories Do Not Undermine The Validity of the General Verdict on Count Twelve Where the Verdict Can Be Reconciled.

The jury found defendant Lucarelli guilty on Count 12. The Government proceeded under two theories of defendant's guilt, as a principal and as an aider and abettor. The Government, in both its initial closing argument as well as in its rebuttal close, advanced the argument that the jury could well find that Lucarelli aided and abetted Ross in his scheme. The Government did not seek to cast them as equals, but instead argued that the defendant played an essential part in Ross's scheme. (Closing Tr., Jul. 20, 2006, at 1505.) It would have been entirely proper for the jury to convict the defendant of Count 12 as an aider and abettor.

The aiding and abetting statute, 18 U.S.C. § 2(a) provides that: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." It is axiomatic that under the federal aiding and abetting statute, it is not necessary for the Government to show that the defendant himself committed the crimes with which he is charged in order to find the defendant guilty of those crimes as an aider and abettor. Nonetheless, a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

To convict a defendant of aiding and abetting a substantive crime, the Government must prove that “the underlying crime was committed by someone other than the defendant and that the defendant [acted] . . . , with the specific intent of advancing the commission of the underlying crime.” *United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996). As stated in *United States v. Smith*, 198 F.3d 377 (2d Cir. 1999), “[m]uch like a conspiracy charge, in order to prove that a defendant aided and abetted a substantive crime, the government must prove that the defendant joined and shared in the underlying criminal endeavor and that his efforts contributed to its success.” *See also United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993); *United States v. DeFiore*, 720 F.2d 757, 764 (2d Cir. 1983). The Second Circuit has stated that in the aiding and abetting context “[t]he requirements this court has established for the offense of aiding and abetting are that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” *DeFiore*, 720 F.2d at 764 (internal quotations omitted.) As the Court properly instructed “[i]n order to aid or abet another to commit a crime, it is necessary that the defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed.” (*See Jury Instructions at 52-53*).

Even though the Government proceeded under both theories, the interrogatory did not include any reference to aiding and abetting, nor was guidance provided in this regard. The interrogatory in relevant part stated “did you find the defendant participated in the fraudulent scheme . . .” It did not say “did you find the defendant participated in *or aided and abetted* the fraudulent scheme . . .” The court did not instruct the jury that in answering the interrogatory they should consider the earlier instructions on aiding and abetting to be equally applicable to the interrogatory.

Moreover, the jury was not instructed that in answering the interrogatories they should apply

the same definition of property as previously given in the Court's charge, specifically including in the definition of property the Bank's right to control its property. It is quite possible that having not been given such an instruction, a jury of lay persons understood the word property in the interrogatory as referring to property only as used in common parlance, not in the legal sense of a property right. *See, e.g., Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 121 (1963) (concluding in the civil context that a permissible finding of verdict was to assume the jury's lay understanding of a particular legal concept differed from the court's.))

The verdict of guilty on Count 12 and the answers to the interrogatories of "no," are not inconsistent given the evidence supporting aiding and abetting, the extent to which the Government argued that Lucarelli aided and abetted Ross as well, as the wording of the interrogatory and absence of instructions. There is nothing legally insufficient in such a reading and, in fact, such a view of the case is entirely consistent with the way the case was presented. The jury returned the general verdict of guilty on Count 12, and all the elements that it necessary needed to find in order to make such a determination were explained to them. (Trial Tr., Jul. 28, 2006, at 1722.) Accordingly, in returning a general verdict of guilty on Count 12, the jury *necessarily* found that Lucarelli *did have* specific intent to defraud or else they could not have returned a verdict of guilty for Count 12. The view that the interrogatory did not inquire about aiding and abetting reconciles any seeming inconsistency, does not eviscerate the jury's verdict on the count itself, and does not result in manifest injustice.

The Supreme Court and the Second Circuit have held as a general principle in the civil context, that "[w]hen confronted with a potentially inconsistent jury verdict, the court must adopt a view of the case, if there is one, that resolves any seeming inconsistency." *Turley v. Police Dept. of the City of*

*New York*, 167 F.3d 757, 760 (2d Cir. 1999).<sup>4</sup> Moreover, it is well settled in the criminal context that where the evidence is sufficient to support one theory of committing an offense – here aiding and abetting a securities fraud – but insufficient to support another theory – here committing securities fraud as a principal with the insufficiency being based solely on the answers to the interrogatories – and where both theories are submitted to the jury, a general verdict should be sustained on the assumption that the jury rested its verdict on the valid theory. *See Griffin v. United States*, 502 U.S. 46 (1991); *see also United States v. Vasquez*, 85 F.3d 59, 61 (2d Cir. 1991.) In *Griffin* the jury returned a general verdict of guilty, convicting the defendant of conspiracy to defraud two government agencies - a dual object conspiracy. The Supreme Court affirmed the conspiracy conviction despite the absence of sufficient evidence to support a conviction on one of the two charged objects, both of which had been submitted to the jury. The court reasoned that the jury rested its verdict on the valid theory. *Griffin*, 502 U.S. at 47-48. *See also Turner v. United States*, 396 U.S. 398, 420 (1970) (“when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive. . . the verdict stands if the evidence is sufficient with respect to anyone of the acts charged.”). *Accord United States v. Delano*, 55 F.3d 720, 730 (2d Cir 1995.)

Applying these principles to the case at hand, it is certainly a fair reading of the verdict, where

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<sup>4</sup> “Before a court may set aside a special verdict as inconsistent and remand the case for a new trial, it must make every attempt ‘to reconcile the jury's findings, by exegesis if necessary.’” *Turley*, 167 F.3d at 760 (*quoting Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 119 (1963). *Accord Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) (“where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way”); *Duk v. MGM*, 320 F.3d 1052, 1058-59 (9th Cir. 2003) (“A trial court is rarely entitled to disregard jury verdicts that are supported by substantial evidence. The Supreme Court has held that a trial court has a duty to attempt to harmonize seemingly inconsistent answers to special verdict interrogatories, ‘if it is possible under a fair reading of them.’” (*quoting Gallick*, 372 U.S. at 119 (1963))).

the jury found the defendant guilty either as a principal or as an aider and abettor, to conclude that the general verdict should stand in light of the overwhelming evidence of guilt as an aider and abettor. Such a holding would not be a manifest injustice. The negative answers to the interrogatories do not preclude a finding of guilt on Count 12, as the answers do not preclude the view that the defendant had the specific intent to facilitate or advance Ross's commission of the underlying securities fraud. As a scout, Lucarelli knowingly associated himself with Ross's criminal venture and acted with the specific intent to contribute to the success of the underlying crime. The crime of aiding and abetting is not co-extensive with the separate offense of committing the crime as principal. The factual underpinning differ. Accordingly, the Court should sustain the general verdict of guilt here on the theory of aiding and abetting. *See Griffin*, 502 U.S. at 47-48; *Delano*, 55 F.3d at 730.

The analogous case of *United States v. Young*, 316 F.3d 649 (7th Cir. 2002) is both instructive and persuasive. In *Young*, the defendant was convicted under 18 U.S.C. 924 (c)(1) (A) which makes it a crime for any person who, during and in relation to any crime of violence . . . , uses or carries a firearm or who in further of any such crime possesses a firearm. Young was convicted of counts two and three. In a special interrogatory on count two the jury stated that it did not find beyond a reasonable doubt that Young "used" a dangerous weapon. *Id* at 656. The Court nonetheless entered the verdict of guilty. The defendant challenged the conviction. The Seventh Circuit upheld the conviction on count two, the count to which the interrogatory applied, and reasoned that since the crime prohibited one from using *or* carrying the firearm, the interrogatory did not preclude a finding of guilt where the evidence supported the alternative theory of prosecution. *Id.* at 660-61. In *Young*, as *the jury found the defendant guilty* but answered the special interrogatory in the negative.<sup>5</sup> Clearly, the

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<sup>5</sup> The *Young* court stated that even if the interrogatory on count two and the conviction of  
(continued...)

Court cannot disregard the general verdict of guilty and grant a judgment of acquittal as defendant argues. To do so in the face of a guilty verdict would be judicial usurpation of the jury function. *See United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984) (reversing judgment of acquittal as improper and reinstating guilty verdict.)<sup>6</sup> To the contrary, the Court should follow the lead of the Seventh Circuit and – in light of the general verdict of guilty – look to the sufficiency of the evidence supporting the alternative theory on which the jury is deemed to have found the defendant guilty. Here as in *Young*, the jury returned a verdict of guilty on a count, but found one of the possible ways the defendant could have committed the crime to be inapplicable. Since aiding and abetting was not addressed in the interrogatory, the guilty verdict which is not in direct conflict with the interrogatory should stand. *See Griffin*, 502 U.S. at 47-48.

The First Circuit recently addressed a case in which a jury convicted a defendant and but the wording of the special verdict form raised the possibility that the jury returned a finding of guilt while omitting an essential element. *See United States v. Edelkind*, 467 F.3d 791, 796 (1st Cir. 2006). In *Edelkind* the defendant was convicted of four counts of bank fraud in violation of 18 U.S.C. § 1344.

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<sup>5</sup>(...continued)

count two were determined inconsistent, it would not invalidate count three. *Young*, 316 F.3d at 662.

<sup>6</sup> Defendant cites *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), for the proposition that a defendant might be able to get a new trial where an interrogatory is contrary to a general verdict of guilt. However, as defendant concedes, the Court never reached that issue and instead reversed on unrelated grounds. The Court simply stated, in dicta, that the defendant could perhaps “at best” receive a new trial. Defendant posits what other lesser form of relief could be meted out if a new trial was the “best” he could do. The answer to the rhetorical question is, of course, that it is more than likely that no relief at all was warranted and a affirmance of the general verdict was the appropriate result. The other cases cited by defendant in this regard (*See* Def. Br. at 16 n.8) each speak to a similar result, namely, no possibility of a judgment of acquittal.

The district court used a special verdict form that asked whether the jury unanimously found that the government had “proven beyond a reasonable doubt that the defendant knowingly executed or attempted to execute a scheme to defraud.” The question omitted the element of the banks being federally insured. *Id.* at 794.

The jury answered yes to each of the four questions. When the verdict was taken, defense counsel did not object to the verdict form and the potential omission of the essential element. The First Circuit concluded that there was no prejudicial error in the omission of the element, reasoning that “special verdicts are not required in criminal cases,” and, that the essential aspect is that the jury be ‘instructed’ as to all elements. *Id.* at 795. The First Circuit held that the “jury was specifically instructed that they ‘must be convinced beyond a reasonable doubt’ of each of the four elements of the offense, including (as one of the four elements) that ‘the financial institution in question was federally insured.’” *Id.* Thus the correctness and completeness of the jury instructions cured any error.

A second issue arose with respect to the fourth count on which “both the verdict form and the instructions were deficient.” *Id.* at 796. The verdict form made only passing mention of [the federally insured entity] and as worded the jury ostensibly found defendant guilty without finding the essential element. The First Circuit found that since counsel did not object to the verdict form at the time, there needed to be a finding of plain error which there was not. *Id.* at 797 (*citing Neder v. United States*, 527 U.S. 1, 9-10 (1999)).

Defendant’s argument seeking a new trial based on what the defendant calls the “incoherent guilty verdict” (Def. Br. at 16) should be viewed with great skepticism, given the fact that counsel asked the Court not to return the jury to deliberate further with additional instructions. At sidebar, the Government suggested such a course of action, but defense counsel opposed it and claimed the verdict

“as is.” Counsel did not object to the verdict but embraced it and opted for what he now terms an “incoherent guilty verdict,” in what appears to have been the strategic hope that such a verdict would yield a judgment of acquittal.

In this regard, Court’s have long held the need to object in a timely fashion to be paramount. *See United States v. Edelkind*, 467 F.3d 791, 796 (1st Cir. 2006) (failure to object to the verdict form makes errors reviewable only for plain error.) Moreover, in the civil context, the Second Circuit has held that a defendant can be deemed to have waived the right to a new trial based upon potential internal inconsistencies in the jury verdict by failing to bring alleged inconsistencies in the verdict sheet to the court's attention before the jury has been discharged. *Shade v. Housing Authority of City of New Haven*, 251 F.3d 307 (2d Cir. 2001). If trial counsel fails to object to any asserted inconsistencies and does not move for resubmission of the inconsistent verdict before the jury is discharged, the party's right to seek a new trial is waived. *See White v. Celotex Corp.*, 878 F.2d 144, 146 (4th Cir. 1989). The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury. *White*, 878 F.2d at 146. This prevents a dissatisfied party from misusing procedural rules and obtaining a new trial for an asserted inconsistent verdict. *Id.* “[A] party's failure to bring alleged inconsistencies in the verdict sheet to the court's attention before the jury has been discharged waives the right to have the alleged inconsistencies remedied by a new trial.” *United States Football League v. National Football League*, 842 F.2d 1335, 1367 (2d Cir.1988.)

Having welcomed the potentially inconsistent verdict at the time, defendant’s counsel certainly faces an uphill battle in arguing that justice now requires a new trial because of the verdict form that he

previously embraced.<sup>7</sup>

B. The Jury's Answers to the Interrogatories Do Not Undermine the Validity of the Guilty Verdict on Count One.

As the interrogatory answers for Count 12 were not part of Count One, the Court need only engage in a determination of the sufficiency of the evidence as to count one. Thus, as it is clear that the evidence was unequivocally sufficient to support Lucarelli's conviction of conspiracy in violation of Title 18 U.S.C. § 371 defendant's motion should be denied.

The conspiracy count and the substantive counts are *separate*. See *United States v. Cianci*, 378 F.3d 71, 92 (1st Cir. 2004) (stating "conspiracy count and substantive RICO counts are *separate*," and finding the interrogatories to be part of the substantive RICO counts only. *Accord Powell* 469 U.S. at 62 ("each count in an indictment is regarded as if it was a separate indictment.") As the Second Circuit has repeatedly held, "[i]t has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not ground for reversal of the verdicts of guilty. *United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994.) "The convicted defendant's protection against an irrational verdict is his ability to have the courts review the sufficiency of the evidence." *Id.* Thus, a sufficiency analysis is all that need be done to sustain Count One. A guilty verdict is viewed independently of any acquittal, making the 'not guilty' verdict irrelevant to the court's review of the evidence supporting the guilty verdict. *United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995.)

Lucarelli incorrectly argues that the negative answers to the interrogatories, precludes a conviction on the separate conspiracy count. First, it bears repeating that the defendant was not

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<sup>7</sup> It bears mention that the inclusion of the interrogatory was driven largely as a convenience for the Court and parties with respect to the potential sentencing issues (i.e., number of victims), and unlike a RICO case, there was no predicate finding or special finding that the jury needed to make prior to finding the defendant guilty.

acquitted on Count 12 but was convicted. Second, even if the court were to view the Jury's answers to the interrogatories as tantamount to an acquittal such a finding would not mandate a judgment of acquittal or the granting of a new trial on Count One.

As the Supreme Court has made clear that a defendant may not attack the sufficiency of the evidence on the basis of an inconsistent verdict. *See United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932); *see also United States v. Gaind*, 31 F.3d 73, 79 (2d Cir. 1994) (inconsistent verdicts provide no grounds for reversal as a matter of law.) The Second Circuit in *Acosta* explained the analysis to be applied in situations of inconsistent verdicts as follows:

In *Powell*, the Supreme Court noted that the jury, though presumed to follow the instructions of the trial court, may make its ultimate decisions “ ‘for impermissible reasons,’ ” 469 U.S. at 63, (quoting *Harris v. Rivera*, 454 U.S. at 346), such as “mistake, compromise, or lenity,” *Powell*, 469 U.S. at 65, but its power to do so is “ ‘unreviewable,’ ” *id.* at 63 (quoting *Harris v. Rivera*, 454 U.S. at 346). When verdicts are inconsistent, “ ‘[t]he most that can be said ... is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt,’ ” *id.*, 469 U.S. at 64-65 (quoting *Dunn v. United States*, 284 U.S. at 393). The *Powell* Court rejected as imprudent and unworkable[ ] a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. 469 U.S. at 66. Thus, the court is not to try to guess which of the inconsistent verdicts is “ ‘the one the jury ‘really meant.’ ” *Id.* at 68.

*Acosta*, 17 F.3d at 545.

Even assuming *arguendo* that the jury's answers to the interrogatories *with respect to Count 12* mean that it reached the conclusion that the Government did not meet its burden of proving that Lucarelli had the requisite specific intent either as a principal or an aider and abettor *with respect to*

*Count 12*, this would not preclude an independent finding that Lucarelli nevertheless conspired to defraud the bank and depositors *as found separately in Count One*.

The jury returned a verdict of guilty as to Count One and accordingly they necessarily found each of the elements of Count One to be present. The interrogatories at issue did not relate to Count One and, as the jury is presumed to follow the Court's instructions, *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987), it cannot be presumed that they failed to find the requisite intent as to Count One. In fact the opposite presumption must be true. *See Accosta*, at 545. *See also Zafiro v. United States*, 506 U.S. 534, 540-41 (1993) (emphasizing that juries are presumed to follow their instructions.)

Even if there had been an acquittal on Count 12, it would not be inconsistent to conclude that Lucarelli was guilty of *conspiring* to acquire NewAlliance stock through securities fraud and mail fraud but not of committing the *substantive offenses*, since the elements of conspiracy are different. (Jury Instructions at 62-69.)

Additionally, the evidence of the conspiracy was not coextensive with that of the substantive counts. For instance, Mr. Accettullo provided persuasive detailed testimony that did not directly relate to the stock purchase charged in Count 12. The same could be said for Mark Grey, who provided testimony that was not directly related to a particular transaction charged as a substantive count. Specifically, Mr. Grey testified that he knew the proposed transactions were wrong. (Grey Tr., Jul. 18, 2006, at 1252.) The jury could well have concluded based on Mr. Accettullo's testimony regarding meeting at Geppi's and the subsequent conversation about the *Salzhauer* case, that Lucarelli had joined the conspiracy. (Accettullo Tr., Jul. 10, 2006, at 165-69.)

The Court can not know if the jury afforded this persuasive evidence greater weight – rightly or wrongly – with respect to the conspiracy as compared with the substantive counts. Regardless of the

jury's thought process, the Court can well conclude that the evidence introduced at trial provided more than a reasonable basis for the jury to find that Lucarelli agreed to join with Ross and others in his efforts to buy NewAlliance stock, and that Lucarelli was an active participant in the conspiratorial endeavor.<sup>8</sup>

The interrogatories do not undermine the conviction on Count One because the conviction on Count One was clearly supported by the evidence. *See United States v. Clemente*, 22 F.3d 477 (2d Cir. 1994) (upholding guilty verdict on a Hobbs Act conspiracy where no other counts resulted in a guilty verdict and in response to the interrogatories the jury indicated that none of the forty alleged racketeering acts had been proved, and finding of "no moment" that the jury found that none of the alleged racketeering acts proved.)

In *United States v. Acosta*, 17 F.3d 538 (2d Cir. 1994), the Court held that answers to interrogatories that relate to certain counts cannot be used to upset an independent verdict of guilt for which sufficient evidence was adduced at trial. *Acosta*, 17 F.3d at 545. In *Acosta*, the jury, in answering a three-part verdict form, found defendant Acosta guilty of conspiracy 'with intent' to defraud but found the co-conspirators guilty without the same level of intent. The district court granted Acosta's motion for a judgment of acquittal and adjudged him guilty only of the misdemeanor level

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<sup>8</sup> The Second Circuit has held, deference to a jury verdict is "especially important when reviewing a conviction of conspiracy," *Pitre*, 960 F.2d at 1121 (citing *United States v. Nusraty*, 867 F.2d 759, 762 (2d Cir. 1989)), given the secretive nature of conspiracies, which hinders the laying out of precise evidence. *Id.* (quoting *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980).) Once the existence of a conspiracy has established, "only slight evidence is required to link another defendant with [that] conspiracy." *Aleskerova*, 300 F.3d at 292 (quoting *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998)); *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (where the existence of a conspiracy has been proved, evidence sufficient to link another defendant with it need not be overwhelming and it may be circumstantial in nature.)

offense of conspiring ‘without intent’ to defraud. The district court found that although there was sufficient evidence to support the conviction, the felony conviction for conspiracy ‘with intent,’ could not stand in light of the jury’s findings that his co-defendants did not have similar intent. *Id.* at 542. The Second Circuit disagreed, reversed, and reinstated the verdict. In reversing the district court, the Second Circuit reasoned that the verdicts were not necessarily inconsistent and even if they were, found that “it has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not a ground for reversal of the verdict of guilty.” *Id.* at 545 (*citing inter alia* *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Dotterweich*, 320 U.S. at 279; *Harris v. Rivera*, 454 U.S. 339, 345 (1981); *United States v. Powell*, 469 U.S. 57, 62-65, (1984).

This long established rule applies with equal force in situations where a defendant is convicted on one count and not on others. *See United States v Chang An-Lo*, 851 F.2d 547, 559-60 (2d Cir. 1988.) In *Chang An-Lo*, three defendants who were convicted of conspiracy which involved conduct identical to that charged as predicate acts of racketeering in the RICO counts for which they were acquitted, argued that the convictions were so logically inconsistent that reversal of their conspiracy convictions was warranted. The Court disagreed and held that there was “no basis for reversal of the guilty verdicts” even observing that the RICO counts and non-RICO counts charged identical conduct. The Second Circuit, citing *inter alia* *Dunn* and *Powell* explained that “a defendant will not be allowed to attack a conviction on the ground of inconsistent verdicts” as “[s]uch challenges would either be based upon pure speculation or would improperly intrude upon the jury's deliberations.” *Id.* at 559-60 (string citations omitted.) *Accord, United States v. Chen*, 378 F.3d 151, 164 (2d Cir. 2004) (finding as a matter of law that an acquittal on a substantive count does not prevent a conviction on a conspiracy count to commit the offense substantively charged, and reasoning that the proof required to convict was

not identical); *United States v. Mulder*, 273 F.3d 91, 114 (2d Cir. 2001) (holding that “the jury’s decision to acquit [the defendant] on the substantive count does not indicate that it found he did not conspire because the elements of the two crimes are different”); *United States v. Slocum*, 695 F.2d 650, 656 (2d Cir. 1982) (holding that because conspiracy to sell unregistered securities to the public employing fraudulent means and the parallel substantive offense had different elements, district court did not err by refusing to find that an acquittal on conspiracy count required acquittal on substantive counts).

The First Circuit reached the same conclusion in the case of *United States v. Cianci*, 378 F.3d 71 (2004), where the jury convicted defendant Cianci of the RICO conspiracy count but returned a verdict form with the word “no” check for each of the racketeering acts (with one left blank), indicating that the government failed to prove those racketeering acts. The defendant argued that as a matter of law the evidence failed to support the conviction on count one, conspiracy. The First Circuit disagreed and upheld the conviction finding that the interrogatories were part of the substantive counts only, and that the conspiracy count could not be overturned. *Accord Young*, 316 F.3d at 662 (even if special interrogatory and conviction on separate count were inconsistent, “inconsistent verdicts do not invalidate the verdict.”)

Thus, even assuming that in this case the verdicts on Count One and Count 12 were found to be inconsistent, which is less than certain where the jury returned a general verdict of guilty, this would still not be a basis for reversal of the guilty verdict on Count One. Further, defendant’s attempt to bootstrap the interrogatory answers into Count One runs contrary to the established precedent cited above. Any contrary finding by the Court would undermined the function of the jury and would be the equivalent of presuming the jury did not follow the Court’s instructions in its consideration of Count

One. That is a presumption in which the Court can not engage. *Powell*, 469 U.S. at 63.<sup>9</sup>

**II. The Court Should Not Order a Judgment of Acquittal or a New Trial As There Was Ample Evidence of Specific Intent to Defraud and Ample Evidence of Knowledge That The Conduct Engaged in Was Criminal**

As set forth above and in more detail here, there was ample evidence introduced at trial to support the jury's finding that Lucarelli and his co-conspirators agreed to, and did, have the specific intent to engage in a fraudulent undertaking and that the defendant had both the intent to deprive the bank of its right to control its assets, and to deprive the depositors of their right, and ability, to purchase the sought after shares.

“[T]he question of [a defendant's] intention is primarily one of inference from his actions, and thus one especially suited for resolution by a trial jury.” *United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003); *see also Cheek v. United States*, 498 U.S. 192, 203 (1991). A person's state of mind “is rarely susceptible to proof by direct evidence, and usually must be inferred from evidence of his or her acts, but is no less a question of fact for that.” *Crowley*, 318 F.3d at 409. In the instant case, the evidence presented at trial provided more than a reasonable basis for the jury to infer that Lucarelli agreed to join with Ross and others in their efforts to buy NewAlliance stock, that Lucarelli was an active participant in the conspiratorial endeavor, and that he knew the goal of the endeavor, namely, to deprive the bank of its right to control the distribution of its assets and to deprive rightful depositors of stock.

The evidence at trial established that the defendant and his co-conspirators knew that the

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<sup>9</sup> The cases cited by the defendant in section D of his brief, namely, *United States v. Ceballos*, 340 F.3d 115 (2d Cir. 2003); *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001); and *United States v. Pickney*, 85 F.3d 4, 8 (1996) are cases addressing sufficiency of the evidence and simply do not support defendant's proposition that an interrogatory for a certain count can impact a conviction on a separate count to which it does not apply.

Bank's IPO was intended to be sold to depositors and that the bank had every intention of selling the stock to its depositors in the first instance – not third parties. Lucarelli knew this, the jury could infer, based on various articles as well as conversations with his co-conspirators. Both the *New Haven Advocate* and the *New Haven Register* articles discussed the fact that the Bank sought to make the stock available to the depositors. (See Gov. Ex. 80 *New Haven Register* (“[w]e want our depositors to get the benefit of this, not third parties”); Gov. Ex. 72 *New Haven Advocate*.) The jury could reasonably infer that Lucarelli was familiar with the contents of both articles.

The jury heard testimony from Querker (the younger) that when Ross and Lucarelli arrived at the meeting at Geppi's, the *New Haven Advocate* article was shown to everyone, including Lucarelli, and that everyone, including Lucarelli, looked at the article. (Querker (the younger) Tr., Jul. 10, 2006, at 93-94, 98-99.) Based on this testimony alone, the jury could have reasonably inferred that Lucarelli knew the contents of the *Advocate* article and with that knowledge joined or continued with the conspiracy.

Similarly, the jury could reasonably infer that Querker (the younger) and Lucarelli discussed the contents of the *New Haven Register* Article. (Gov. Ex. 80.) This conclusion is based on: the testimony that Querker (the younger) discussed articles in general with Lucarelli; that Querker the younger faxed the article to Ross on March 8, 2004 (Gov. Ex. 80); and based on phone records introduced that established that Querker (the younger) had a telephone call with Lucarelli, the same day on which the *Register* article was published. (See Querker (the younger) Tr., Jul. 10, 2006, at 111-15) (Gov. Ex. 408-B.) That article discussed the illegal nature of their scheme, specifically stating, “non-depositors are trying to convince depositors to illegally invest money on their behalf . . .” (Gov. Ex. 80.) The *Register* article quoted a Bank vice president who stated “[t]he kinds of transactions we are

hearing about are prohibited by law... these types of arrangements are prohibited.”) *Id.*

Again, based on this article the jury could well infer that Lucarelli knew the gravamen of the plan was to frustrate the Bank’s chosen method of distribution and acquire the stock for Ross and others through depositor-straw buyers. (*See* Kundrat Tr., Jul. 17, 2006, at 1111 (“the ‘scout’ [Lucarelli] was locating depositors of New Haven Savings Bank who had an account at the bank prior to June 30, 2002, that they were willing to enter into agreements with us, and those agreements called for them to transfer shares.”) Moreover, Lucarelli’s co-conspirators testified that they were well aware that it was the depositors who were eligible to buy the stock, not the investors. (*See* Kundrat Tr., Jul. 17, 2006, at 1115 (“well, as a depositor of a mutually-owned bank, you are then eligible to purchase stock if the bank goes public.”) Even the depositors were well aware that the stock was being made available to them, as depositors, and that transferring the stock was prohibited. (Grey Tr., Jul. 18, 2006, at 1252.)

The defendant was also well aware that there was a limited pool of stocks to be purchased and that in order to acquire stock the investors would have to “jump the line,” and necessarily cause other entitled persons to be deprived of their right to buy these stocks. Indeed, the defendant could not have proceeded in Ross’s scheme without knowing that they were “jumping the line” and cutting off other potential purchasers. The whole purpose of their “vetting” process was to find straw purchasers who had sufficient deposits on the record date so that the conspirators could purchase large quantities of stock. As the scout, it was one of Lucarelli’s jobs to find out what the depositors’ balances were on the record date so as to insure they had sufficient funds to be effective straw buyers. (*See* Kundrat Tr., Jul. 17, 2006, at 1111 (“The type of depositors that one sought to get were depositors who had a significant balance in the account on June 30, 2002.”) *Id.* at 1134 (“I had indicated to him [Ross] that the more

money a depositor had in their account, the more likely they will receive more shares”); Querker (the younger) Tr., Jul. 10, 2006, at 78-79; Morant Tr., Jul. 17, 2006, at 1090-93 (testifying Lucarelli took a copy of her passbook for June 30, 2002)(Gov. Ex. 103)). The jury could reasonably infer from Lucarelli’s actions – inquiring about the depositors balances on the record date – that he had the intent to assist Ross (*i.e.*, aid and abet Ross) in his “jumping of the line” and acquiring the most shares possible. *See Crowley*, 318 F.3d at 409 (evidence of intent inferred from defendant’s acts.) The effects of Ross’ “line jumping” was shown by demonstrating what would have happened if Lucarelli had not arranged for the depositors to act as straw buyers. (*See Jean Tr.*, Jul. 18, 2006, at 1283-86.)

Additionally, the jury could infer that Lucarelli joined Ross and Kundrat in their understanding of how some depositors would be denied stock. Lucarelli’s co-conspirators testified that it was their belief and understanding, that the offering was going to be oversubscribed and some depositors would obtain fewer shares than requested. (Ross Tr., Jul. 17, 2006, at 1022.) “If there is an over subscription, some of the people who applied for stock won't obtain what it is they hoped to get or what they applied for.” (*See also Kundrat Tr.*, Jul. 17, 2006, at 1136.) This precise deprivation was also discussed in the above described articles that the defendant had seen. (*See Gov. Ex. 72 New Haven Advocate* “it cheats other New Haven Savings depositors. . . . the stock offering can become oversubscribed. That limits how much stock the legitimate depositors can buy.”)

The conspirators knew that by getting depositors with large balances, they would be better positioned to acquire more stock. They executed their plan with the belief that the offering would be over subscribed. The fact that the precise process used by Crowe Czick was not known to them is wholly irrelevant to their intent. The relevant inquiry is whether they intended to deprive the bank and the depositors. Based on the clear statements in the articles, as well as the actions by Lucarelli of

seeking out depositors with large balances, the jury could well infer that Lucarelli knew that the bank would be deprived of its right to control its assets and the depositors would be deprived of stock. Moreover, John Querker (the younger) testified that there was money to be made and he was willing to close his eyes, to what was in the articles in order to make money (Querker (the younger) Tr., Jul. 10, 2006, at 146.) The jury could well infer Lucarelli had the same mind set and did likewise.

The jury also heard evidence that Lucarelli had knowledge of the illegal nature of the transaction. Specifically, the above described articles quoted a U.S. Attorney's Office representative and the State Department of Banking who stated that the types of stock transactions Lucarelli was helping to put together, were illegal. The articles stated that under the terms of the NHSB prospectus, depositors could not legally transfer their stock to non-depositors and such transfers could harm legitimate depositors. (*See Gov. Ex. 72 Advocate; Gov. Ex. 80 Register.*)

Lucarelli's intent was also shown by his utter disregard for an SEC enforcement action about which he was aware. Mr. Accettullo testified that after his initial meeting with Ross and Lucarelli, he conducted some research and found a case – *SEC v. Salzhauer* – that involved similar illegal conduct arising from the conversion of a mutual bank in New York. (Accettullo Tr., Jul. 10, 2006, at 163.) The *Salzhauer* was very similar, if not exactly the same, as the deal being proposed by Ross. (*Id* at 169; Gov. Ex. 115.) Accettullo showed Lucarelli the case and Lucarelli said “he was familiar with [the case],” (Accettullo Tr., Jul. 10, 2006, at 167.) The fact that Lucarelli, a licensed broker, with extensive background on Wall Street was presented with and acknowledge familiarity with an SEC enforcement action prohibiting the precise conduct that he was engaging in cannot be trivialized. The jury heard extensive testimony regarding Lucarelli's educational and professional investment-related background, as well as his training and experience in the securities and banking industries. (Gov. Ex. 200; Le Tr.,

Jul. 12, 2006, at 514, 530-31.) By virtue of having taken and passing the Series 7 exam, Lucarelli was expected to know and the jury could infer did know about the securities industry, about securities laws and regulations, and the regulatory and criminal consequences of violating them. (*See* Gov. Ex. 191; Le Tr., Jul. 12, 2006, at 519, 521-22.)

Obviously, Lucarelli's continued involvement after acknowledging to Accettullo his awareness of this case provided the jury compelling evidence that he had the requisite knowledge and intent. In *United States v. Ceballos*, 340 F.3d 115 (2d Cir. 2003), a case cited by defendant, the court looked towards actions undertaken by the defendant after learning the nature of a second conspiracy as a way of evaluating whether the defendant joined that second conspiracy.

Using the *Ceballos* reasoning here, it is clear Lucaralli had the requisite intent. For instance, after attending the Geppi's meeting and after telling Accettullo he was familiar with the *Salzhauer* and even after the *Register* article, Lucarelli took significant steps to advance the conspiracy. He picked up the stock certificates from the Querkers, the Landino, and Ms. Morant. (*See* Querker (the elder) Tr., Jul. 11, 2006, at 250 (testifying "we walked out of the branch, and John Lucarelli was in the parking lot waiting for us"), Landino Tr., Jul. 12, 2006, at 558; Morant Tr., Jul. 17, 2006, at 1103-04 (testifying Lucarelli met her at the bank to collect the stock certificates). Lucarelli also helped Ms. Morant and Bob James execute the signature guarantee. (Morant Tr., Jul. 17. 2006, at 1103-04; James Tr., Jul. 13, 2006, at 872-73.) Lucarelli also brought the certificates to Ross. (Ross Tr., Jul. 13, 2006, at 744 (Querkers'), 769 (Morant); and Landino Tr., Jul. 12, 2006, at 558-59.

After learning of the illegal nature, Lucarelli discussed payment with Ross, (Ross Tr., Jul. 13, 2006, at 790--99), received payment, (Ross Tr., Jul. 13, 2006, at 787-93, and Gov. Ex. 146, 147, 149, 193), and sought to hide receipt of the payment by receiving a portion in cash and directing a large

portion of it directly to his wife's account at Greenwich Investments. (*See Pecora Tr.*, Jul. 17, 2006, at 1065-67; *see also Ross Tr.*, Jul. 13, 2006, at 789).

The jury heard extensive testimony that illegal nature of the conspiracy was discussed. For instance, the jury heard Ross testify that when he first approached Lucarelli about finding eligible NHSB depositors to purchase stock in the IPO, he explained to Lucarelli the illegal nature of the conspiracy, *i.e.*, that there were regulatory restrictions prohibiting what they were doing. (*Ross Tr.*, Jul. 12, 2006, at 681, 682.) In fact, Ross testified that he told Lucarelli to "be discreet" in finding depositors, and not to "shout from the roof or advertise," in part, because of the regulatory restrictions. (*Ross Tr.*, Jul. 12, 2006, at 682-83.)

Accettullo also testified that at the meeting at his restaurant, Lucarelli was present for a portion of the conversation in which Ross compared the risks involved in the proposed transaction as being akin to "walking past a lawn that has a . . . 'Do not step on the grass'" sign and that, if you walk on the grass too many times, you could eventually get caught. (*Accettullo Tr.*, Jul. 10, 2006, at 161-62.) Ross's testified that he relayed the contents of this very conversation directly to Lucarelli as Lucarelli drove Ross home from this meeting. (*Ross Tr.*, Jul. 13, 2006, at 724.)

Considering the state of person's mind "is rarely susceptible to proof by direct evidence, and usually must be inferred from evidence of his or her acts," *Crowley*, 318 F.3d at 409. The Second Circuit in *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001), a case also cited by defendant, articulated some indicia that can be looked to in order to determine a defendant's specific intent. These indicia include the following: (i) defendant's participation in conversations directly related to the substance of the conspiracy, (ii) defendant being mentioned in documents important to the conspiracy, (iii) defendant having received a share of the profits, and (iv) defendant being told by a co-conspirator

the nature of the activity. *Id.*

Each of the above listed indicia were clearly established at Lucarelli's trial as follows: (i) Lucarelli participated in conversations with Ross, with Querker (the younger), with Landino, with James and Morant, and with Accettullo, that were directly related to the substance of the conspiracy and at which the substance was discussed; (ii) Lucarelli witnessed and signed an agreement with Bob James and Linda Morant, which was a key document that was important to the conspiracy (Gov. Ex 104A and 104B)<sup>10</sup> (iii) Lucarelli received a share of the profits of over \$100,000; and (iv) Lucarelli was told by his co-conspirator Ross on a number of occasions the nature of the activity and that the conduct was prohibited.. These factors all militate heavily in support of the jury's verdict that Lucarelli had the requisite specific intent.

Finally, the sheer extent of Lucarelli's involvement in arranging the transactions and seeing them through supports the jury's finding that he was a knowing and willful participant who possessed the requisite intent. It simply belies credulity to think that he could play such an instrumental role, make \$100,000, and be blind to the illegality. As Ross told the jury, Lucarelli's role in the conspiracy was "obviously a key element." (Ross Tr., Jul. 13, 2006, at 803.) Lucarelli found six of the seven depositors who ultimately purchased stock for the conspirators. Lucarelli arranged meetings. Lucarelli spoke with depositors prior to Ross to determine if they would be suitable. (*See* James Tr., Jul.13, 2006, at 865-66); Ross Tr., Jul. 13, 2006, at 746 (Lucarelli arranged for Ross and Landino to meet Lucarelli told Ross "[Landino] would be suitable.") Lucarelli gathered preliminary information from the depositors about account balances as of the record date.

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<sup>10</sup> Any argument that Lucarelli did not know the details of the arrangements Ross had with depositors is belied by this document that he signed.

Linda Morant testified that she and Robert James met with Lucarelli on several occasions, that he told her what the transaction would entail and how much her profits would be, and took her bank passbook. (Morant Tr., Jul. 17, 2006, at 1090-93.) Querker (the younger) testified that Lucarelli asked him how many accounts he had at the bank and about the monetary balances. (Querker (the younger) Tr., Jul. 10, 2006, at 78.) Moreover, the jury heard evidence that Lucarelli was also instrumental in “working together” with Ross to “gather all the paperwork” from the depositors. (Ross Tr., Jul. 13, 2006, at 745.) For example, the jury heard testimony that Robert James had contacted Lucarelli to tell him that he wanted a clearer agreement setting forth the division of profits. (Ross Tr., Jul.13, 2006, at 760-61; *see also* Gov. Ex. 104-A and 104-B.) Lucarelli relayed the request to Ross and even signed this new agreement as a witness. (Ross Tr., Jul.13, 2006, at 760-61, 766.)

Once Morant, Landino, and the Querkers received their stock certificates, Lucarelli assisted the depositors in getting their signatures guaranteed on the stock transfer forms, picked up their stock certificates, and delivering these certificates to Ross. (*See, e.g.*, Morant Tr., Jul. 17, 2006, at 1103-04; James Tr., Jul. 13, 2006, at 872-73; Landino Tr., Jul. 12, 2006, at 558); Ross Tr., Jul. 13, 2006, at 744 (stating that Lucarelli picked up the Querkers’ certificates, had their signatures guaranteed, and brought the items to Ross’s office.) Clearly, there was sufficient evidence to establish that Lucarelli knew the nature of the activities, agreed to join in the conspiracy, and took affirmative steps to bring about the successful completion of the crime. Accordingly, defendant’s motions based on insufficiency of the evidence should be denied.

### **III. There Was No Error In The Supplemental Jury Instruction**

The defendant next argues that a new trial is warranted because the Court provided an erroneous jury instruction. Defendant asserts that the Court “conflated” the instructions of knowledge

and willfulness with those pertaining to specific intent to defraud and that the Court misled the jury on the correct legal standard. (Def. Br. at 31.) This argument is without merit.

The supplemental instruction was not erroneous as it provided the jury with a correct statement of the law. As the Second Circuit has held, “a jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.” *United States v. Mulder*, 273 F.3d 91, 105 (2d Cir. 2001.) In reviewing the challenged instruction, the defendant must establish that viewing the charge given as a whole, he was prejudiced. *Id.* (citing *inter alia* *United States v. Pujana-Mena*, 949 F.2d 24, 27 (2d Cir.1991.)) The court must look to “the charge as a whole” to determine whether it “adequately reflected the law” and “would have conveyed to a reasonable juror” the relevant law. *Id.* (citing *United States v. Jones*, 30 F.3d 276, 284 (2d Cir. 1994.))

Turning to the challenged instruction, which was given in response to a question from the jury during deliberations, it is clear that the instruction was not erroneous, did not mislead the jury, and taken as a whole conveyed the correct legal standard. The Court properly instructed the jurors that while it is correct that a violation of an underlying regulation is not a substitute for proof of intent, such a violation can be considered by the jury. *See United States v. Sawyer*, 85 F.3d 713, 728-29 (1st Cir. 1996) (reversing conviction where district court instructed jury that a violation of state ethics law alone would satisfy criminal intent.)

Defendant, in his brief, quotes a portion of the Court’s instruction but cuts-off the Court’s quote in mid-sentence. (See Def. Br. at 30.) Viewing only a portion of the supplemental charge does not accurately convey the totality of the supplemental charge. Viewed in its entirety, it is clear that the Court did not cause confusion and did not conflate or combine knowledge and willfulness with specific intent and it is also clear that no reasonable juror would have been confused. The Court’s response is

as follows:

Court: The clarification portion is the whole thing, and it refers you, with respect to your term "the act of disregarding the SEC regulations," to page 71 which clarifies that the Defendant is not charged with violating the regulations and laws of the FDIC and the banking laws. So read page 71 again, but understand that your inquiry, which relates to page 43, the second element of mail fraud, that is, whether the defendant participated in the scheme to defraud knowingly and willfully and with the specific intent to defraud others of money or property, *in your consideration of whether the defendant acted knowingly and willfully, you may consider* -- you consider whether his participation was with intent to do something with bad purpose either to disregard or disobey the law, including any agency rules or regulations, or whether he acted with a belief in good faith that he was acting properly. Please consider that clarification and focusing, and let me know if I may be of further assistance to you. Okay. (Jury exited the courtroom.)

THE COURT: All right, we will mark this as Court Exhibit A. (Trial Tr., at 1651)

(emphasis added.) Obviously, the Court's response went beyond that quoted in defendant's brief and made it clear that the instruction was in response to their question and was to be used in their consideration of whether the defendant "acted knowingly and willfully." The reference to the specific intent to defraud was a correct statement of the law and was mentioned as a point of reference even mentioning the particular page, page 43, of the whole jury instructions, a copy of which the jury had with them. *See United States v. George*, 386 F.3d 383, 391-92 (2d Cir. 2004.) Accordingly, taken as a whole, the jury instructions adequately reflected the law and conveyed to the jury the relevant law. *See Sawyer*, 85 F.3d at 728-29. *See also Mulder*, 273 F.3d at 105.

It should not be overlooked that defense counsel played an active role in crafting the instruction that was eventually given to the jury. Specifically, defendant Lucarelli's counsel requested that the jury be directed to page 71 of the instructions, and the court included a repeated reference to page 71 in its supplemental instructions. (Trial Tr., 1634-35.) Moreover, the Court included repeated references to the good faith instruction. Thus, not only was the instruction an accurate statement of the law (*see Sawyer*, 85 F.3d at 728-29) but it was well-balanced and provided language favorable to and

suggested by defendant. *See* Trial Tr., at 1649-52; *see also, Mulder*, 273 F.3d 91 at 105 (setting forth the legal standards.)

Finally, while it is clear there was no error here, even if there were, any such error was clearly harmless. *See United States v. Kim*, 303 F. Supp 2d 150, 157 (D. Conn 2004.) In *Kim*, the Court, denied defendant Kim's challenge to the jury instructions, finding that since "the government submitted an abundance of evidence from which the jury could have concluded the defendant was guilty" *id.*, at 158, it was impossible that any error in the jury instructions seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* (citing *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir.2001.) Here as in *Kim*, the instructions given were a proper statement of the law, were based largely on Sand et al's *Modern Federal Jury Instructions*, and moreover, there was an abundance of evidence from which the jury could have concluded the defendant was guilty. Therefore, defendant's challenge to the jury instructions necessarily fails.

**Conclusion**

For the foregoing reasons, the defendants' motions should be denied.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Michael S. McGarry". The signature is fluid and cursive, with a large, sweeping flourish at the end.

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**CERTIFICATION**

I hereby certify that on December 15, 2006, a copy of foregoing United States' Response to Defendant Lucarelli's Post-trial Motions was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

A handwritten signature in black ink, appearing to read "Michael S. McGarry". The signature is fluid and cursive, with a large loop at the end.

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