

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

-----X
United States of America, :
 :
 - against - : Case No. 3:05CR268 (JBA)
 :
 John M. Lucarelli, :
 : January 15, 2007
 :
 Defendant. :
 :
-----X

**REPLY MEMORANDUM IN FURTHER
SUPPORT OF DEFENDANT JOHN M. LUCARELLI'S
MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL**

Defendant John M. Lucarelli respectfully submits the following reply points in further support of his motion for a judgment of acquittal or, in the alternative, a new trial.¹

I. The Jury's Special Interrogatory Answers Preclude Conviction for Securities Fraud

The jury expressly found in its special interrogatory answers that Mr. Lucarelli lacked an essential element of the crime of securities fraud—specific intent to defraud either the Bank or depositors. (Mem. at 3-8.) The government does not dispute that this finding precludes conviction for securities fraud as a principal.² (Opp. at 17.) Instead, the government offers two arguments that the verdict can be sustained based on an aiding and abetting theory—first, that Mr. Lucarelli could be convicted for aiding and abetting securities fraud based on a lesser *mens*

¹ Mr. Lucarelli's opening memorandum is cited herein as "Memorandum" or "Mem.," while the government's response is cited as "Opposition" or "Opp." Citations to "Amorosa Aff." refer to the Affidavit of Dominic F. Amorosa and accompanying exhibits in support of Mr. Lucarelli's motion.

² In this regard, it is noteworthy that the government offers no argument against the relevance of the civil rule that a court lacks authority to enter a general verdict which conflicts with a jury's special interrogatory answers. *See* Fed. R. Civ. P. 49(b); *Armstrong v. Brookdale Univ. Hosp. & Med. Ctr.*, 425 F.3d 126, 135 (2d Cir. 2004) (holding that "entry of judgment on the general verdict in the face of an interrogatory answer that mandated a contrary result was error"). The government can offer no argument that a criminal defendant should receive less protection in this regard than a civil litigant. *See Thomas v. Whitworth*, 136 F.3d 756, 761 (11th Cir. 1998) ("[T]he constitutional rights granted criminal defendants are more expansive than those ordinarily accorded civil litigants.").

rea than the specific intent to defraud that is required of a principal (Opp. at 18); and second, that the jury may have found the requisite specific intent for accomplice liability notwithstanding the special interrogatory answers because the interrogatory did not explicitly reference aiding and abetting (Opp. at 15). Neither argument succeeds.

First, although the government is correct that “[t]he crime of aiding and abetting is not co-extensive with the separate offense of committing the crime as principal” (Opp. at 18), the intent requirement for both crimes is the same. The government suggests that “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” (Opp. at 18), but the government does not explain how this formulation of intent can be anything less than specific intent to defraud.³ The government cites no case (and we have found none) in which specific intent to defraud was an essential element of the principal offense and a court found aiding and abetting liability based on an intent to facilitate the principal’s crime without sharing in his intent to defraud. The one case cited by the government that involved aiding and abetting of a fraud crime required that the alleged accomplice be “a participant in its criminal purpose” and “participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” *United States v. Defiore*, 720 F.2d 757, 763-64 (2d Cir. 1983) (citation omitted).⁴

³ Indeed, when Mr. Lucarelli’s counsel objected to the Court’s charge on aiding and abetting to the extent that it could be read to require less than specific intent to defraud (Mem. at 9 n.5), the government responded that the charge required that specific intent. (7/20/06 Trial Tr. at 1614-15, wherein the government argued, “I’ll just say on the aiding and abetting then, the charge as agreed says an aider or abettor must know that the crime has been committed and act in a way that is intended to bring about the success of the criminal venture. I believe that hits the issue Mr. Amorosa is talking about, and so I think this charge is proper.”)

⁴ The other cases cited by the government in attempting to foster an impression that the defendant could specifically intend to advance the underlying fraud without himself having the specific intent that someone be defrauded (Opp. at 15) are inapposite cases of accomplice liability premised on crimes requiring knowledge rather than fraud crimes requiring specific intent. See *United States v. Smith*, 198 F.3d 377, 385-86 (2d Cir. 1999) (for aiding and abetting extortion under 18 U.S.C. § 894(a)(1), “[t]he government needs only prove that Smith’s participation was knowing, not that he possessed specific intent”); *United States v. Pipola*, 83 F.3d 556, 559 (2d Cir. . . . continued)

In order to have specific intent to facilitate or advance a crime, the alleged accomplice must share in the principal's intent. See 1 L. Sand, et al., *Modern Federal Jury Instructions—Criminal*, Instr. 11-2, cmt. at 11-11 (2006) (“In order to associate oneself with the underlying crime, the defendant must have shared the principal’s criminal intent.”); *United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991) (noting that aiding and abetting “involve[s] the *intent* to commit the underlying substantive offense”) (emphasis in original); *United States v. Elusma*, 849 F.2d 76, 78 (2d Cir. 1988) (“[A]n aider and abetter must share in the principal’s essential criminal intent.”). When the underlying crime alleged is fraud, this element requires that the defendant share in the principal’s intent to defraud and intend that his act bring about the fraud. For example, in *United States v. Wiley*, 846 F.2d 150 (2d Cir. 1988), the Second Circuit held that the government had to prove that a defendant accused of aiding and abetting wire fraud “acted with the specific intent to defraud potential SCS distributors through the use of the wires.” *Id.* at 154 (reversing conviction for insufficient evidence of aiding and abetting wire fraud). Indeed, despite its suggestions to the contrary, the government itself ultimately concedes that Mr. Lucarelli cannot be convicted as an accomplice without the jury finding that he acted with specific intent to defraud: “[I]n 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” (italics in original, underline added). (Opp. at 16.)

The government is therefore left to argue that the jury somehow found Mr. Lucarelli had specific intent to defraud as an accomplice when it expressly found that he did not act with specific intent to defraud. Here, the government attempts to cast the interrogatory as a question

1996) (aiding and abetting the use or carrying of a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)); *United States v. Gordon*, 987 F.2d 902, 904 (2d Cir. 1993) (aiding and abetting importation of cocaine under 21 U.S.C. § 952(a) and possession of cocaine with intent to distribute under 21 U.S.C. § 841(a)(1)).

concerned only with principal liability because it asked whether the defendant “participated in the fraudulent scheme,” but did not ask whether he “participated in *or aided and abetted* the fraudulent scheme” (emphasis in original). (Opp. at 15.) The word “participated,” however, applied equally to both principal liability and aiding and abetting. The Court instructed the jury that, “[i]n order to aid or abet another to commit a crime, it is necessary that the defendant . . . *participate in* the crime by doing some act to help make the crime succeed” (emphasis added). (Amorosa Aff. Exh. 2, at 53, also instructing the jury to ask, “Did he participate in the crimes charged as something he wished to bring about?”) The interrogatory did not differentiate between principal and accomplice liability, but rather simply asked—in regard to the conviction for securities fraud as a whole—if the jury found that Mr. Lucarelli had a specific intent to defraud the Bank or depositors. The jury answered that he did not.⁵ (Amorosa Aff. Exh. 1, at 2.)

Under these circumstances, the cases cited by the government to argue that a jury may convict a defendant on one theory when another theory suffers from insufficient evidence are inapposite. (Opp. at 17-20.) The government relies on cases in which two factually distinct theories are asserted to support a conviction on a single count. In each of those cases, however, at least one of the alternative theories asserted to support the conviction rested on elements unchallenged either for insufficient evidence or for a contrary interrogatory answer. *See Griffin v. United States*, 502 U.S. 46, 47-48 (1991) (affirming conviction where there was sufficient proof that defendant conspired to defraud IRS even if she did not conspire to defraud DEA); *Turner v. United States*, 396 U.S. 398, 420 (1970) (upholding conviction where sufficient

⁵ The government’s alternative hypothesis that the jury might have applied a different definition of “property” in answering the special interrogatory than it applied in rendering a general verdict (Opp. at 15-16) runs directly contrary to the government’s observation that the jury is “presumed to follow the Court’s instructions” (Opp. at 13).

evidence for one of “several acts in the conjunctive”); *United States v. Young*, 316 F.3d 649, 660-61 (7th Cir. 2002) (finding sufficient evidence that defendant “carried” a gun even if he did not “use” a gun); *United States v. Delano*, 55 F.3d 720, 730-31 (2d Cir. 1995) (finding sufficient evidence that defendant extorted “under color of official right” even if he did not extort “by wrongful use of fear”).⁶ None of these cases involved the critical aspect of this case—an affirmative finding by the jury of the absence of an essential element of the crime. Both principal liability and accomplice liability required a common essential element—specific intent to defraud the Bank or depositors. Because the jury expressly found that Mr. Lucarelli lacked this specific intent, he cannot be convicted of securities fraud under either theory.

II. The Conspiracy Conviction Also Fails for Lack of Specific Intent to Defraud

With regard to conspiracy, the government attempts to portray this case as one of merely inconsistent verdicts on two separate counts, ignoring the core issue that the conspiracy count—like the securities fraud count—fails without the essential element of specific intent to defraud. (Opp. at 22-28.) This straw man approach cannot carry the day.

First, the government does not dispute that a conviction for conspiracy requires that the defendant possess the specific intent to commit the underlying crime. *See United States v. Ceballos*, 340 F.3d 115, 124 (2d Cir. 2003); *United States v. Samaria*, 239 F.3d 228, 236 (2d Cir. 2001). (Mem. at 10-13.) As the Court instructed the jury, the government had to prove beyond a

⁶ Three other cases that the government cites are even further afield. Two are civil cases involving verdict sheets that did not ask for a general verdict, but rather consisted exclusively of special interrogatories that the court was able to reconcile. *See Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 119 (1963) (holding railroad liable for injuries resulting from employee’s insect bite despite jury’s findings that employer was proximate cause of injury but injury was not foreseeable); *Turley v. Police Dept. of the City of New York*, 167 F.3d 757, 761 (2d Cir. 1996) (holding that city’s licensing fee for street musicians was reasonable despite jury’s findings that one rate was reasonable but a lower rate was not). The third concerned a verdict sheet that omitted an essential element of the crime. *See United States v. Edelkind*, 467 F.3d 791, 795 (1st Cir. 2006) (jury asked to find whether bank fraud defendant intended to defraud certain institutions but not asked to find that institutions were federally insured).

reasonable doubt that Mr. Lucarelli “knowingly became a member of the conspiracy *with the specific intent to defraud another of money and property*” (emphasis added). (7/10/06 Trial Tr. at 31; *accord* Amorosa Aff. Exh. 2, at 66, instructing that “[w]hat is necessary is that the defendant must have participated with knowledge of at least one of the unlawful purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.”) Because the jury expressly found that Mr. Lucarelli did not act with specific intent to defraud another of money or property, the conspiracy conviction cannot be sustained. (Mem. at 10-13.)

Second, the government’s argument that “[t]he interrogatories at issue did not relate to Count One” (Opp. at 24) ignores the Court’s statement about the scope of the interrogatory. (Mem. at 10 n.6.) During the charge conference, when counsel for Mr. Lucarelli requested an additional interrogatory to accompany the conspiracy count, the Court made clear that the interrogatory as drafted encompasses conspiracy:

The Court: Count one is the conspiracy count.

Mr. Amorosa: Yes. “If you found the defendant guilty of conspiracy, did you find that he conspired unanimously to defraud the bank of property or did you find—and/or did you find he conspired to defraud the depositors of property or money.” That is the issue that we need.

The Court: Are you sure we don’t get that on the mail fraud?

Mr. Amorosa: Pardon?

The Court: On the mail fraud count, the way we’ve set that out, “Do you find the government proved mail fraud? Did the government prove? If yes, did the government prove that the defendant knowingly participated in the scheme or artifice to defraud with knowledge of its fraudulent—with the specific intent to defraud A and B,” and that gets—

Mr. Amorosa: Well, you are right.

The Court: Don’t you think—

Mr. Amorosa: It does. I do think, but I do agree with the government about all of these other interrogatories.

The Court: Okay.

Mr. Amorosa: That I don't think are necessary for any issue that comes to my mind. The issue of sentencing would go to that interrogatory.

(7/19/2006 Trial Tr. at 92-93.) The jury's finding that Mr. Lucarelli lacked specific intent to defraud applies to the conspiracy count as well as to the securities fraud count.

In light of this internal flaw in both counts, this is not an "inconsistent verdicts" case. (Opp. at 23.) As noted in Mr. Lucarelli's opening memorandum, a conviction may be sustained when it involves merely "inconsistency between verdicts on separate charges against one defendant" or "verdicts that treat codefendants in a joint trial inconsistently." (Mem. at 6, quoting *Harris v. Rivera*, 454 U.S. 339, 345 (1981).) Each of the "inconsistent verdict" cases cited by the government fits into one of these categories (Opp. at 22-28), but the government cites no case upholding a conviction where the jury expressly found an essential element of both crimes to be lacking.⁷ While courts "resist[] inquiring into a jury's thought processes" in a case of inconsistent verdicts, *United States v. Powell*, 469 U.S. 57, 67 (1984), no such forbearance is warranted—or necessary—when the jury affirmatively finds the absence of an essential element

⁷ For example, in *United States v. Acosta*, 17 F.3d 538 (2d Cir. 1994), the Second Circuit reinstated a felony-level conviction of conspiring to adulterate prescription drugs with intent to defraud, after the district court had reduced the conviction to a misdemeanor because the jury convicted two co-conspirators based on a lesser intent. *Id.* at 543-44. The jury did not make any affirmative finding of the absence of an element of the crime as to the defendant. *See id.* (noting also that the verdicts in the case were not inconsistent).

Likewise, none of the other cases cited by the government involved an affirmative finding by a jury that the defendant lacked an essential element of both conspiracy and the substantive charge. *See, e.g., United States v. Chen*, 378 F.3d 151, 164 (2d Cir. 2004) (holding that defendant's acquittal on extortion did not require reversal of conviction for conspiracy to extort where "the proof required to convict on the conspiracy count was . . . not identical to the proof required on the substantive count"); *United States v. Mulder*, 273 F.3d 91, 114 (2d Cir. 2001) (upholding conspiracy conviction despite acquittal on substantive count "because the elements of the two crimes are different"); *United States v. Slocum*, 695 F.2d 650, 656 (2d Cir. 1982) (holding that defendant's acquittal of conspiracy to commit securities fraud did not require acquittal of securities fraud where "the conspiracy and substantive counts required proof of different elements").

of the crime. The jury's answers to the special interrogatory make clear that the conspiracy conviction, like the securities fraud conviction, cannot stand.

III. Mr. Lucarelli Fully Preserved His Objection to the Entry of a Verdict Contrary to the Jury's Special Interrogatory Answers

The government cannot legitimately contend that Mr. Lucarelli should somehow be precluded from seeking relief on the basis of the jury's interrogatory answers (Opp. at 20-21), when Mr. Lucarelli argued then, as he argues now, that the verdict was tantamount to an acquittal. Under Federal Rule of Criminal Procedure 51(b), "a party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b); *see also United States v. Rivera*, 192 F.3d 81, 84 (2d Cir. 1999) (holding that party preserved objection when he "fairly alerted the district court and the government to the nature of his claim").

There can be no doubt that the Court and the government were on notice of the defect in the jury's verdict and the nature of Mr. Lucarelli's objection to it. After the Court informed counsel of the jury's findings (7/28/06 Trial Tr. at 1715), counsel for Mr. Lucarelli argued that in order to be convicted on either of the counts, the jury must have found that the defendant was "seeking to defraud either the bank and/or the 2100 depositors, and if the jury is saying that they are not finding Lucarelli had that specific intent to do either, it cannot convict him of those charges. . . . I do not think the jury could find Lucarelli guilty here unless it found he had a specific intent, whether on the conspiracy or not, to defraud either the bank or the 2100." (*Id.* at 1719-20.) Upon being told that the jury answered "no" to both interrogatories, counsel for Mr. Lucarelli promptly stated, "Well, then, I'd ask for a judgment of acquittal." (*Id.* at 1721.) Mr. Lucarelli thus fairly alerted the court and opposing counsel to the nature of the claim. *Rivera*,

192 F.3d at 84; *cf. Kosmyinka v. Polaris Indus., Inc.*, 462 F.3d 74, 82-83 (2d Cir. 2006) (holding that defendant's objection to inconsistency in negligence verdict was preserved for appeal when court entered verdict over defense counsel's request for mistrial).⁸ It should be noted that the government itself did not ultimately ask that the verdict be sent back for clarification, but rather agreed to determine its significance after trial. (7/28/06 Trial Tr. at 1721-22.) Mr. Lucarelli's objection to the entry of a verdict inconsistent with the jury's findings was duly preserved for the Court's consideration in this post-trial motion.

IV. The Government Fails to Establish that There Was Sufficient Evidence of Specific Intent to Defraud

The second part of the government's opposition (Opp. at 28-36) becomes relevant only if the Court rejects Mr. Lucarelli's claims with respect to the jury's express finding that he lacked specific intent to defraud, as the government's arguments here relate only to the separate grounds for Mr. Lucarelli's motion for judgment of acquittal or new trial based on insufficiency of the evidence. (Mem. at 16-29.) In arguing for the sufficiency of the evidence, the government focuses on evidence tending to establish that Mr. Lucarelli knew the fraudulent nature of the transaction, while ignoring the central arguments that (a) Mr. Lucarelli could not have known or intended that other depositors would be harmed (Mem. at 18-21), and (b) Mr. Lucarelli believed the Bank would not be deceived (*id.* at 22-24). Mr. Lucarelli respectfully refers the Court to the relevant pages of his opening memorandum for discussion of these evidentiary points.

⁸ The cases cited by the government are inapposite, as they involve either a civil litigant's failure to object to an inherent defect in the verdict sheet prior to its submission to the jury, *see Shade v. Housing Auth.*, 251 F.3d 307, 312 (2d Cir. 2001), or a civil litigant's failure to call attention to an inconsistency in the jury's findings prior to the discharge of the jury, *see White v. Celotex Corp.*, 878 F.2d 144, 146 (4th Cir. 1989); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1367 (2d Cir. 1988).

V. The Confusion Caused by the Supplemental Instruction Was Manifest in the Verdict

The government argues that the Court’s supplemental instruction on “disregarding SEC regulations,” taken as a whole with its final paragraph, conveyed the correct legal standard.⁹ (Opp. at 37-38.) The final paragraph of the instruction—which was a nearly verbatim repetition of the preceding paragraph quoted in Mr. Lucarelli’s opening brief (Mem. at 30)—served only to entrench the jury’s confusion by continuing to use the word “intent” together with knowledge and willfulness. As in the preceding paragraph, the Court instructed the jury to “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” (emphasis added). (7/24/06 Trial Tr. at 1650.) This may have misled the jury into believing it could convict Mr. Lucarelli based on “disregarding SEC regulations” even if he lacked specific intent to defraud. In light of the confusion manifest in the jury’s verdict on this very point, there is no way to determine that the ambiguity in the supplemental instruction did not influence the jury’s verdict. *See United States v. Scotti*, 47 F.3d 1237, 1242 (2d Cir. 1995). (Mem. at 29-31.)

CONCLUSION

For the foregoing reasons, as well as those set forth in his opening memorandum, defendant John M. Lucarelli respectfully requests, pursuant to Federal Rules of Criminal Procedure 29 and 33, that the Court set aside the jury’s general verdict and enter an acquittal consistent with its special interrogatory answers or, in the alternative, grant a new trial in the interest of justice, and that the Court grant such other relief as it may deem just and proper.

⁹ As a threshold matter, it is inappropriate for the government to suggest that Mr. Lucarelli somehow acquiesced in the supplemental instruction (Opp. at 38-39), when his counsel repeatedly objected to the Court’s approach to answering the jury’s question and argued that the jury should have been instructed that it could not consider “disregarding SEC regulations” because there were no regulations governing Mr. Lucarelli’s conduct. (7/24/06 Trial Tr. at 1622-24.)

Dated: New York, New York
January 15, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2007, a copy of the foregoing Reply Memorandum in Further Support of Defendant John M. Lucarelli's Motion for Judgment of Acquittal or New Trial 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.

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