

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

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United States of America,	:	
	:	Case No. 3:05CR268 (JBA)
- against -	:	
	:	
John M. Lucarelli,	:	October 11, 2006
	:	
Defendant.	:	
	:	
-----X	:	

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

Defendant John M. Lucarelli respectfully requests that the Court enter a judgment of acquittal or grant a new trial on the two charges of which he was convicted, conspiracy in violation of 18 U.S.C. § 371 (Count 1) and securities fraud in violation of 18 U.S.C. § 1348 (Count 12). The jury's finding in response to a special interrogatory that Mr. Lucarelli did not act with specific intent to defraud either the Bank or the depositors, an essential element of both crimes, requires an acquittal on both counts. In the alternative, if the Court declines to enter a judgment of acquittal, the contradiction between the jury's answers to the special interrogatory and its general verdict warrants a new trial in the interest of justice. Viewed alongside other errors at trial, the contradictory verdict makes clear that Mr. Lucarelli was convicted without an essential element of the crimes charged.

**BACKGROUND**

The government charged Mr. Lucarelli with three counts of mail fraud, six counts of securities fraud, and one count of conspiracy to commit mail and securities fraud in connection with the conversion of New Haven Savings Bank into a capital stock savings bank. The jury found Mr. Lucarelli not guilty on all three mail fraud counts and five of the six securities fraud

counts, rendering a verdict of guilty only on the conspiracy count and the final securities fraud count. On the verdict form, the jury also answered the following special interrogatory: “If you found the defendant guilty on any of Counts 2-4 [mail fraud] or 7-12 [securities fraud], did you find the defendant participated in the fraudulent scheme with the specific intent to defraud: (a) [t]he Bank of property . . . (b) [d]epositors of money or property . . . .” The jury marked “no” in response to both parts of the interrogatory. (Amorosa Aff. Exh. 1.)<sup>1</sup>

### **STANDARD FOR DECISION**

After the jury has returned a guilty verdict, the Court may either set aside the verdict and enter a judgment of acquittal or grant a new trial in the interest of justice. Under Federal Rule of Criminal Procedure 29(c), “[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.” Fed. R. Crim. P. 29(c)(2). “[T]he court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). In deciding a Rule 29 motion, the court must ask whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Resto*, 824 F.2d 210, 212 (2d Cir. 1987).

Under Federal Rule of Criminal Procedure 33, by contrast, “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.

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<sup>1</sup> As used herein, “Amorosa Aff.” refers to the accompanying Affidavit of Dominic F. Amorosa in Support of Defendant John M. Lucarelli’s Motion for Judgment of Acquittal or New Trial.

1992)). “The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice.” *Id.* at 134 (quoting *Sanchez*, 969 F.2d at 141). As this Court has noted, “[t]here are numerous grounds on which the [Rule 33] motion may be predicated.” *United States v. Washington*, 263 F. Supp. 2d 413, 420 (D. Conn. 2003) (citing 3 Wright, King & Klein, *Federal Practice & Procedure: Criminal* §§ 555-56 (2d ed. 1982 & Supp. 2003)), *reaff’d on reconsider.*, 294 F. Supp. 2d 246 (D. Conn. 2003).

### **ARGUMENT**

#### **I. The Jury’s Finding that Mr. Lucarelli Did Not Act with a Specific Intent to Defraud Requires a Judgment of Acquittal or, at Minimum, a New Trial in the Interest of Justice**

The jury’s finding that Mr. Lucarelli did not act with specific intent to defraud either the Bank or the depositors precludes conviction for any crime of which specific intent to defraud is a required element. The general verdict convicting Mr. Lucarelli of securities fraud and conspiracy—two crimes which require specific intent to defraud—violates his constitutional right to be convicted only upon a jury’s finding, on proof beyond a reasonable doubt, of every element of the crimes charged. The convictions therefore must be set aside.

#### **A. The Jury’s Special Interrogatory Answers Preclude Conviction for Any Crime of Which Specific Intent Is a Required Element**

“The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *United States v. Brunshtein*, 344 F.3d 91, 99 (2d Cir. 2003) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)), *cert. denied*, 543 U.S. 823 (Oct. 04, 2004); *see also Dretke v. Haley*, 541 U.S. 386, 395 (2004) (“[D]ue process requires proof of each element of a criminal offense beyond a reasonable doubt.”). Similarly, “[t]he Sixth Amendment guarantees the accused a trial by jury.” *Id.* “Taken together, these rights indisputably entitle a criminal defendant to a jury

determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)); *see also United States v. Gaudin*, 515 U.S. 506, 510 (1995) (observing that these rights “require criminal convictions to rest upon a jury determination that a defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”); *United States v. Baker*, 262 F.3d 124, 132-33 (2d Cir. 2001).

The conviction of Mr. Lucarelli in spite of the jury’s special finding squarely implicates these core constitutional principles and embodies the concerns of cases that have applied them.<sup>2</sup> Indeed, the result feared in such cases has been realized here: because the jury’s answers to the special interrogatory demonstrate that it did not find proof beyond a reasonable doubt that he acted with specific intent to defraud, Mr. Lucarelli has been convicted and faces sentencing for crimes as to which the jury did not determine every element beyond a reasonable doubt.

In light of this constitutional shortcoming, the general verdict should not have been entered. In the civil context, where special interrogatories are more common, the court may not enter a general verdict that is inconsistent with answers to a special interrogatory. Rule 49(b) of the Federal Rules of Civil Procedure provides in pertinent part:

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<sup>2</sup> A defendant’s right to have every element of the offense found by the jury beyond a reasonable doubt has arisen in cases where (a) the court fails to charge the jury to find a particular element, *see, e.g., Brunshstein*, 344 F.3d at 99 (holding that “a federal nexus is an element of [the crime charged] that must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt,” and that court “erred in refusing to submit this element to the jury”); *Baker*, 262 F.3d at 133 (holding that court erred in giving instruction that “allowed the jury to convict the defendants on the murder count, without finding that the defendants had murdered, or even killed, [the victim]”); (b) the court applies an enhanced penalty based on facts found by a lesser standard of proof, *see, e.g., Apprendi*, 530 U.S. at 489 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); and (c) the court instructs the jury to apply a presumption that relieves it of the obligation to find an element beyond a reasonable doubt, *see, e.g., Francis v. Franklin*, 471 U.S. 307, 313 (1985) (“[The Due Process Clause] prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.”).

When the general verdict and the answers [to interrogatories] are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

Fed. R. Civ. P. 49(b). “Rule 49(b) does not . . . authorize the court to enter judgment based on the general verdict despite answers to interrogatories that conflict with that verdict.” *Armstrong v. Brookdale Univ. Hosp. & Med. Ctr.*, 425 F.3d 126, 135 (2d Cir. 2004) (noting that in this circumstance, “the court had two options: (1) entering judgment in accordance with the interrogatories, or (2) seeking further clarification”). In *Armstrong*, the Second Circuit held that “the court’s entry of judgment on the general verdict in the face of an interrogatory answer that mandated a contrary result was error.” *Id.*

When a general verdict contradicts interrogatory answers, as it did here, a criminal defendant should be afforded no less protection than a civil litigant. *See Thomas v. Whitworth*, 136 F.3d 756, 761 (11th Cir. 1998) (noting that “the constitutional rights granted criminal defendants are more expansive than those ordinarily accorded civil litigants”); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (“A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant’s rights.”), *declined to follow on other grounds by Pashaian v. Eccelston Props.*, 88 F.3d 77, 83 (2d Cir. 1996); *cf. Doral Produce Corp. v. Paul Steinberg Assoc., Inc.*, 347 F.3d 36, 44 (2d Cir. 2003) (“If a judge must give notice and an opportunity to be heard before imposing a relatively trivial civil sanction, the imposition of the far greater penalty of criminal contempt, which gives the contemnor a criminal record and may result in imprisonment

for up to six months, should ordinarily require at least comparable levels of procedural safeguards.”). This is particularly so when important constitutional rights are at issue.

Although there are cases upholding inconsistent verdicts, those cases do not speak to an internally incoherent verdict such as this one. In *Harris v. Rivera*, 454 U.S. 339 (1981), the Supreme Court observed that it has upheld inconsistent verdicts “with respect to inconsistency between verdicts on separate charges against one defendant, . . . and also with respect to verdicts that treat codefendants in a joint trial inconsistently.” *Id.* at 345 (citing *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Dotterweich*, 320 U.S. 277 (1943)). Here, however, there is inconsistency not between counts or between defendants, but within each of the two counts on which the jury returned a guilty verdict. The jury found no specific intent to defraud, yet both counts, as discussed below, require this element for conviction. The verdict is therefore internally inconsistent and untenable. See *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988) (observing that “the government, unlike a defendant, may not rightfully seek the benefit of an irrational verdict”). Thus, since the jury found that no specific intent to defraud had been proved beyond a reasonable doubt, Mr. Lucarelli could not be convicted of any crime of which this intent is an element.

**B. The Substantive Securities Fraud Count Fails for Lack of Specific Intent to Defraud**

The jury’s finding that Mr. Lucarelli did not participate in the fraudulent scheme with the specific intent to defraud either the Bank of property or the depositors of money or property precludes a conviction for securities fraud. The securities fraud statute provides in pertinent part:

Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer . . . shall be fined under this title, or imprisoned not more than 25 years, or both.

18 U.S.C. § 1348(2). As the Court charged the jury, “[i]n order to convict the defendant on these counts, the government must prove beyond a reasonable doubt three elements,” the second of which is that “the defendant knowingly and willfully participated in that scheme or artifice, with knowledge of its fraudulent nature and *with the specific intent to defraud another of money or property*” (emphasis added). (Amorosa Aff. Exh. 2, at 50.) The Court instructed the jury that “[t]he instructions applicable to these elements are precisely the same ones as I previously gave to you in the mail fraud charge.” (*Id.*) In the mail fraud charge, the Court instructed that “[i]ntent to defraud’ means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another. . . . [T]he government must prove beyond a reasonable doubt that the defendant had a *specific intent to defraud* and that he contemplated or intended some harm to the property rights of another” (emphasis added). (*Id.* at 44.)

The Court’s charge requiring specific intent to defraud another of money or property comports with the legislative history of § 1348. Congress promulgated § 1348 in order to “supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to bank fraud and health care fraud statutes.” S. Rep. No. 107-146, at 14 (2002). “The intent requirements [of § 1348] are to be applied consistently with those found in 18 U.S.C. §§ 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], 1347 [healthcare fraud].” *Id.* at 20. These other fraud crimes also require specific intent to defraud. *See, e.g., United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (mail fraud); *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (wire fraud);

*United States v. Rodriguez*, 140 F.3d 163, 167 n.2, 168 (2d Cir. 1998) (bank fraud); *United States v. Singh*, 390 F.3d 168, 187 (2d Cir. 2004) (health care fraud).<sup>3</sup>

In its decision on the defendants' pretrial motions, this Court noted that "[t]he Government represented it 'does not have any intention of adding to the victims other than the[] two discrete groups of victims with the separate theories associated with them that [were briefed and argued],' and will be held to its representation." *United States v. Vought*, No. 3:05CR268, 2006 WL 1662882, at \*13 (D. Conn. Jun. 15, 2006). Indeed, the government attempted to show at trial, as noted in its closing, that "there was harm to the bank and there was harm to the depositors." (7/20/2006 Trial Tr. at 1528.)<sup>4</sup> Yet the special interrogatory answers make clear that the jury found Mr. Lucarelli did not act with a specific intent to defraud either the Bank or the depositors. Mr. Lucarelli therefore could not be convicted of securities fraud.

**C. The Securities Fraud Conviction Cannot Be Supported by a Theory of Aiding and Abetting Liability**

The securities fraud conviction also fails under a theory of aiding and abetting liability. The aiding and abetting statute 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." 18 U.S.C. § 2(a). Aiding and abetting is itself "a specific intent crime." *United States v. Samaria*, 239 F.3d 228, 235 (2d Cir. 2001); *see also United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006). "To support a conviction," the aiding and abetting statute "require[s] more

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<sup>3</sup> In *United States v. Mahaffy*, No. 05-CR-613, 2006 WL 2224518 (E.D.N.Y. Aug. 2, 2006), the court held with regard to subsection (1) of § 1348 that, "[t]hrough the text of the [securities fraud] statute does not explicitly require the intentional *mens rea*, precedent compels this [c]ourt to read into 18 U.S.C. § 1348 the well-established requirement of fraudulent intent, which is requisite to a conviction under the other federal fraud statutes." *Id.* at \*16. This Court charged the jury under subsection (2) of the statute and required specific intent to defraud for that subsection as well, consistent with analogous case law. *See, e.g., Rodriguez*, 140 F.3d at 167 n.2, 168.

<sup>4</sup> Transcript pages cited in this Memorandum are excerpted for the Court's reference in Exhibits 12 through 30 of the accompanying Affidavit of Dominic F. Amorosa in Support of Defendant's Motion.

than evidence of a general cognizance of criminal activity, suspicious circumstances, or mere association with others engaged in criminal activity.” *Samaria*, 239 F.3d at 233. The government must prove that “the defendant acted with the specific purpose of bringing about the underlying crime.”<sup>5</sup> *Id.* at 235 (quoting *United States v. Best*, 219 F.3d 192, 199 (2d Cir. 2000)).

“In order to associate oneself with the underlying crime, the defendant must have shared the principal’s criminal intent.” 1 L. Sand, *et al.*, *Modern Federal Jury Instructions—Criminal* (“Sand”), Instr. 11-2, cmt. at 11-11 (2006); *see also United States v. Gregg*, 612 F.2d 43, 51 (2d Cir. 1979) (finding correct an instruction charging that defendant “must not only know about the criminal nature of the other person’s acts but [must] share that evil purpose himself”). For example, “[i]f the principal is charged with possession with intent to distribute narcotics, proof that the defendant aided and abetted simple possession is not sufficient without further proof that defendant had the same intent to distribute as the principal.” Sand, Instr. 11-2, cmt. at 11-12. In *Samaria*, similarly, the Second Circuit held that the defendant could not be convicted of aiding and abetting credit card fraud when the government failed to prove that his “actions were motivated by an intent to further the receipt or possession of stolen goods.” 239 F.3d at 236.

In the case at hand, the jury found that Mr. Lucarelli did not participate in the fraudulent scheme with the specific intent to defraud either the Bank or the depositors. Like the defendant in *Samaria* who lacked intent to further the receipt of stolen goods, and like the defendant in

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<sup>5</sup> On this issue, the Court instructed the jury that it was “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. . . . An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.” (Amorosa Aff. Exh. 2, at 53.) To the extent that this charge could be read to require something less than specific intent to defraud, it was error and Mr. Lucarelli objected to it as such. (See 7/20/06 Trial Tr. at 1613-14, wherein Mr. Lucarelli’s counsel argued that “the jury needs to be told that for Lucarelli to be convicted of aiding and abetting, he must have the same mens rea as the underlying offense and not a different mens rea, and although the language is similar, I think your Honor should have told the jury it’s the same mens rea, the same mental state as if he had acted as a principal.”)

Judge Sand's example who lacked intent to distribute narcotics, Mr. Lucarelli cannot be convicted of aiding and abetting securities fraud because he did not act with an intent to defraud. *Cf. United States v. Frampton*, 382 F.3d 213, 223 (2d Cir. 2004) (holding that defendant could not be convicted of aiding and abetting commission of violent crime in aid of racketeering when government could not prove that defendant "knew that [his co-defendant] was seeking to increase his position in the 41 Ingalls enterprise and acted toward that end"). The jury's finding therefore precludes a conviction for securities fraud on this alternative theory as well.

**D. The Conspiracy Count Also Fails for Lack of Specific Intent to Defraud**

Although the special interrogatory did not reference the conspiracy count, the jury's answers to the interrogatory also preclude conviction on that count. The government charged Mr. Lucarelli with conspiracy to commit mail fraud and securities fraud. Both of these object crimes, as charged by the Court (Amorosa Aff. Exh. 2, at 43, 50), require specific intent to defraud another of money or property. *See United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (mail fraud); S. Rep. No. 107-146, at 20 (providing that "[t]he intent requirements [of § 1348] are to be applied consistently with those found in 18 U.S.C. §§ 1341, 1343, 1344, 1347"). Conviction for conspiracy requires proof of such specific intent as well.<sup>6</sup>

The conspiracy statute provides in pertinent part:

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. The Court charged that a conviction for conspiracy requires three elements:

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<sup>6</sup> Indeed, when Mr. Lucarelli's counsel requested during the charge conference that the special interrogatory also be asked for the conspiracy count, the Court observed that it was not necessary to do so because asking it for the substantive counts would sufficiently determine whether the jury found specific intent to defraud the Bank or the depositors. (7/19/2006 Trial Tr. at 92-93, wherein the Court asks, "Are you sure we don't get that on the mail fraud?")

First, that a conspiracy, agreement or understanding to commit fraud, as described in . . . the Indictment, was formed, reached, or entered into by two or more persons;

Second, that the defendant knowingly and willfully became a member of the conspiracy; and

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts specifically identified in the Indictment to further or advance the purpose of the conspiracy.

(Amorosa Aff. Exh. 2, at 59.)

With regard to the first element, the Court charged that “the government must prove beyond a reasonable doubt that the alleged co-conspirators entered into an agreement to knowingly and willfully accomplish at least one of the unlawful objectives charged in Count 1,” and that the jury “must unanimously find that the same unlawful objective was agreed upon by the alleged co-conspirators.” (*Id.* at 62.) On the second element, the Court instructed 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.” (*Id.* at 66.) The Court’s charge in the opening instructions was even clearer in this regard, as the Court defined the second element to require “that the defendant knowingly became a member of the conspiracy *with the specific intent to defraud another of money or property*” (emphasis added). (7/10/06 Trial Tr. at 31.)

These instructions comport with authorities holding that a conviction for conspiracy requires specific intent to commit the underlying substantive offense.<sup>7</sup> “Although the

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<sup>7</sup> To the extent that the Court’s conspiracy charge could be read to omit the requirement of specific intent to commit the underlying offense, such omission would have conflicted with the Court’s opening instruction (7/10/06 Trial Tr. at 31) and would have constituted error. *See United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001) (“To prove conspiracy, the government must show that the defendant agreed with another to commit the offense; that he knowingly engaged in the conspiracy *with the specific intent to commit the offenses that were the objects of the conspiracy*; and that an overt act in furtherance of the conspiracy was committed.”) (emphasis added) (quoting *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999)); *see also Pinckney*, 85 F.3d at 8 (“Conspiracy requires ( . . . continued)

government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that ‘the intended future conduct they . . . agreed upon include[s] all the elements of the substantive crime.’” *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (quoting *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978)). Where, as here, “the conspiracy involves a specific-intent crime, ‘the government [must] establish beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.’” *United States v. Ceballos*, 340 F.3d 115, 124 (2d Cir. 2003) (quoting *Samaria*, 239 F.3d at 234). A charge of conspiracy, like aiding and abetting, “require[s] the Government to prove, beyond a reasonable doubt, that the defendant knew the specific nature of the conspiracy or underlying crime.” *United States v. Friedman*, 300 F.3d 111, 126 (2d Cir. 2002) (noting that “[c]ircumstantial evidence of knowledge and specific intent sufficient to sustain a conviction must include some indicia of the specific elements of the underlying crime”) (citation omitted).

Because the jury found that Mr. Lucarelli did not participate in the fraudulent scheme with the specific intent to defraud either the Bank or the depositors, it could not conclude that “‘the intended future conduct they . . . agreed upon include[d] all the elements of the substantive crime.’” *Pinckney*, 85 F.3d at 8 (citation omitted). In *Samaria*, the Second Circuit reversed a conviction for conspiracy to receive or possess stolen goods and conspiracy to commit credit card fraud where the government failed to “meet its burden of offering evidence sufficient to demonstrate, beyond a reasonable doubt, that [defendant] knew that the boxes he helped to transport contained stolen goods and that [his] actions were motivated by an intent to further the

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proof of: (1) an agreement among the conspirators to commit an offense; (2) *specific intent to achieve the objective of the conspiracy*; and (3) usually, an overt act to effect the object of the conspiracy.”) (emphasis added).

receipt or possession of stolen goods.” 239 F.3d at 236. Here, similarly, the jury found that Mr. Lucarelli’s actions were not motivated by an intent to further a fraud upon the Bank or the depositors. He therefore lacked the intent to achieve the objects of the conspiracy set forth in the Indictment, namely, the commission of mail fraud or the commission of securities fraud.

This fundamental defect in the conspiracy conviction cannot be overcome by asserting that one of the other co-conspirators might have had the specific intent to defraud the Bank or the depositors, even if Mr. Lucarelli did not. First, such a view would be entirely speculative. Second, it would draw the deficiency in the verdict into even starker relief: if one of the co-conspirators held a specific intent to defraud the Bank or the depositors, but Mr. Lucarelli did not, then there could not have been “a mutual understanding . . . to cooperate with each other to accomplish the specific unlawful objectives alleged,” as the Court’s charge properly required. (Amorosa Aff. Exh. 2, at 60.) The “intended future conduct” would not have “include[d] all the elements of the substantive crime.” *Pinckney*, 85 F.3d at 8. Mr. Lucarelli’s lack of specific intent to defraud thus excludes him from a conspiracy to defraud. For these reasons, the jury’s answers to the special interrogatory preclude a conviction for conspiracy just as they preclude a conviction for the substantive offense of securities fraud.

**E. The Appropriate Relief in Light of the Jury’s Special Interrogatory Answers Is the Entry of a Judgment of Acquittal**

As expressed by Mr. Lucarelli’s trial counsel during the sidebar discussion of the verdict (7/28/06 Trial Tr. at 1716, 1721), the jury’s finding that Mr. Lucarelli did not act with specific intent to defraud is tantamount to a judgment of acquittal. The Second Circuit has held that an acquittal occurs when there is a “resolution in the defendant’s favor, correct or not, of some or all of the factual elements of the offense charged.” *Maula v. Freckleton*, 972 F.2d 27, 28 (2d Cir. 1992) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1976)); cf. *United*

*States v. Watts*, 519 U.S. 148, 155 (1997) (observing that an acquittal is “an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt”). The decision in *Maula* addressed the impact of a judge’s decision not to submit certain counts to the jury, *id.* at 28-29 (holding that nonsubmission is not an acquittal), but the principle has at least as much force in regard to a jury’s express finding on an element of the crimes charged. See *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (holding that jury’s verdict of not guilty has “the same effect” as reversal based on insufficiency of evidence, as in both cases double jeopardy bars retrial) (citing *Martin Linen*, 430 U.S. at 571); see also *Burks v. United States*, 437 U.S. 1, 16 (1978) (accordng same weight to acquittal whether by jury, in bench trial, or on appellate review). Here, the jury resolved the essential element of specific intent in Mr. Lucarelli’s favor. The result should then have been, and should now be, a judgment of acquittal.

The one case which suggests that the relief could be something less than an acquittal is inapplicable here. In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), a labor union and three of its officers were charged with conspiracy to violate a federal statute that made it unlawful for a union to contribute to a political campaign. *Id.* at 387 (citing 18 U.S.C. §§ 371, 610). For sentencing purposes, the court required a special finding of willfulness in order “to determine whether the substantive offense that petitioners were charged with conspiring to commit was a misdemeanor or a felony.” *Id.* at 401 n.11. The jury found the defendants guilty, but also “found specially that a willful violation of § 610 was not contemplated.” *Id.* at 396. On appeal, the defendants argued that “the special findings by the jury that a willful violation of § 610 was not contemplated amounted to an acquittal, since such willfulness was an essential element of the conspiracy under 18 U.S.C. § 371.” *Id.* at 401 n.11. The Supreme Court rejected the argument that this defect required an acquittal, stating that while

“the jury’s special finding may well have been inconsistent with its general verdict,” that “could require only reversal, not acquittal.” *Id.* The Court proceeded to reverse the verdict and grant a new trial based on an unrelated defect in the jury instructions. *Id.* at 399-400.

As a threshold matter, the Supreme Court was troubled by the fact that the defendants in *Pipefitters* had “failed to move for acquittal on [this] ground . . . once the special finding was returned,” *id.* at 401 n.11, whereas Mr. Lucarelli sought acquittal immediately upon the return of the verdict and again in this motion. The Court also provided no reasoning in support of its view that a new trial was more appropriate than an acquittal, and it appears not to have considered the important constitutional implications of a guilty verdict entered after a finding that one of the essential elements of the crime was missing, considerations that have taken on great significance in the years since the decision in *Pipefitters*. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Mr. Lucarelli therefore respectfully submits that the Court should set aside the jury’s general verdict and enter a judgment of acquittal consistent with the special interrogatory answers.

In the alternative, if the Court decides in light of *Pipefitters* that an acquittal would be inappropriate, then the Court should order a new trial in the interest of justice. The Court has “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)); *see also* Fed. R. Crim. P. 33(a). Indeed, a district court “may grant [a] new trial in the interest of justice even if it does not find that a specific legal error occurred at trial.” 3 Wright, King & Klein, *Federal Practice & Procedure: Criminal 3d* § 551 n.1 (pocket part) (citing *United States v. Scroggins*, 379 F.3d 233 (5th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005)). *Pipefitters* itself indicates that

a new trial is the appropriate outcome when a jury's special finding is inconsistent with its general verdict.<sup>8</sup> 407 U.S. at 401 n.11. The jury found that Mr. Lucarelli did not act with a specific intent to defraud, yet specific intent to defraud is an essential element of both the securities fraud and conspiracy counts. The entry of the incoherent guilty verdict represents a manifest injustice requiring at least a new trial.

**II. The Court Should Also Enter a Judgment of Acquittal on the Ground that There Was Insufficient Evidence of Specific Intent to Defraud or of Knowledge that the Stock Transactions Were Fraudulent**

The special interrogatory answers demonstrate that this jury found no specific intent to defraud, and therefore require an acquittal (or at least a new trial) on their own force, but they also stand as a stark indication that no rational jury would find specific intent to defraud based on the evidence submitted at trial. Moreover, the evidence was insufficient to establish that Mr. Lucarelli knew the stock transactions were improper. Mr. Lucarelli thus renews his motion for judgment of acquittal based on insufficiency of the evidence.

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<sup>8</sup> Although the Supreme Court stated in *Pipefitters* that the petitioners would “be entitled *at best* to a new trial,” 407 U.S. at 401 n.11 (emphasis added), it is unclear what other, lesser form of relief could be available for this defect. Our research has identified only two cases discussing this aspect of the *Pipefitters* decision, both in dictum. In *Crawford v. Fenton*, 646 F.2d 810 (3d Cir. 1981), the jury initially found the defendant guilty of conspiring to distribute a controlled substance, but in response to a special interrogatory “answered ‘No’ to the question of whether the drug was heroin, and ‘No’ to the question of whether the drug was cocaine.” *Id.* at 813. The trial court then instructed the jury to return to its deliberations, and subsequent confusion led the judge to declare a mistrial. *Id.* at 813-15. In his habeas petition, the defendant argued that the trial judge abused his discretion in ordering a mistrial, and that double jeopardy precluded a new trial on the same counts. *Id.* at 811. In rejecting this argument, the Third Circuit stated in dictum that “if the jury verdict had been accepted, Crawford would have been entitled, at most, to a new trial.” *Id.* at 817 n.8 (citing *Pipefitters*, 407 U.S. at 401 n.11).

In *United States v. Hoffer*, 626 F. Supp. 786 (N.D. Ill. 1985), the district court held that a defendant convicted of murder, voluntary manslaughter, and involuntary manslaughter could be retried even though “the verdict was legally and logically inconsistent” in that “the jury found all three mental states in the petitioner.” *Id.* at 788 n.2. The defendant argued that he could not be retried for the greater offense because “by convicting him of involuntary manslaughter . . . the jury impliedly acquitted him of the greater charges.” *Id.* at 789. The court rejected this argument, holding that “because petitioner was expressly convicted of the greater offenses, the jury’s verdict can be considered as either no verdict or multiple convictions,” but “[t]he verdict cannot be considered an acquittal.” *Id.* at 790 (citing *Pipefitters* in support of the view that “the Court was at least implying that no double jeopardy difficulties would arise in retrying the defendants”).

Although a defendant “bears a ‘heavy burden’ in challenging his conviction on the ground of insufficiency of the evidence,” *United States v. D’Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994), “a conviction based on speculation and surmise alone cannot stand.” *Id.* “In particular, the government must introduce sufficient evidence to allow the jury to reasonably infer that each essential element of the crime charged has been proven beyond a reasonable doubt. Therefore, the government must do more than introduce evidence at least as consistent with innocence as with guilt.” *Id.* (internal citations omitted); *see also United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (holding court “must be satisfied that after drawing all permissible inferences in favor of the government, a rational trier of fact could find that every element of the crime was established beyond a reasonable doubt”).

Two aspects of the Court’s jury charge on Mr. Lucarelli’s defenses bear upon these issues. First, the Court instructed the jury that “[a]n honest belief that a representation, even if false, would not deceive the persons to whom it was directed, is . . . a good defense.” (Amorosa Aff. Exh. 2, at 46.) Second, the Court instructed that, if the jury finds “the defendant actually believed that the transactions in question were not fraudulent, he may not be found guilty.” (*Id.* at 44.) “[G]ood faith on the part of the defendant is a complete defense to a charge of mail fraud.” (*Id.* at 46.) The government had to prove at least that “the defendant was aware of the high probability that false or fraudulent representations would be used in the scheme to obtain the Bank stock, and that he acted with deliberate disregard of how the stock would be obtained.” (*Id.* at 43-44.) On both of these issues, as the Court instructed the jury, “[t]he burden of establishing lack of good faith and criminal intent rests upon the government.” (*Id.* at 46.) The

government offered insufficient evidence to establish either that Mr. Lucarelli intended for depositors or the Bank to be injured or that he knew the transactions were improper.<sup>9</sup>

**A. The Potential Existence of Depositors Who Could Be Harmed Was Entirely Speculative**

As the jury's special interrogatory answers demonstrate, the government offered insufficient evidence to establish that Mr. Lucarelli acted with a specific intent to defraud depositors. The only evidence offered to establish that depositors were deprived of money or property was the testimony of Alan Jean of Crowe Chizek & Company, the consulting firm that assisted the Bank in managing data for the offering. Mr. Jean testified that the offering was oversubscribed and that "it was determined that the oversubscription occurred within that priority one category" (Jean Trial Tr. at 1281), but he did not testify that such oversubscription necessarily resulted from the alleged co-conspirators' actions. The oversubscription could only be identified and calculated after all of the orders had been submitted and the results analyzed. And only after running a complex, "iterative" allocation analysis, involving four or more passes through the final subscription numbers, could Mr. Jean determine that 2,154 depositors received less than they requested. (*Id.* at 1283-86.) In order to determine how many of those depositors would have received additional shares without the seven orders at issue here, Mr. Jean had to re-run this complex, iterative process without those seven orders.<sup>10</sup> (*Id.* at 1287-89, 1302-03.)

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<sup>9</sup> If the Court does not find that the insufficiency of evidence requires acquittal under Rule 29, Mr. Lucarelli respectfully requests that the Court exercise its discretion under Rule 33 to grant a new trial where "the verdict is against the weight of the evidence." 3 Wright, King & Klein, *Federal Practice & Procedure: Criminal 3d* § 553. Under that rule, the Court "may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." *Id.*

<sup>10</sup> Mr. Jean also told the Court, outside the presence of the jury, that there had been five manual overrides of qualifying deposit amounts, three of which were first-tier subscription orders that could affect the allocation in the first tier. (7/18/06 Trial Tr. at 1316, 1323.) One of those three, an order by the Bank's profit-sharing plan, was a very large order involving 378,000 shares which then "weren't available to anyone else." (*Id.* at 1324.)  
( . . . continued)

Under these circumstances, there is no basis whatsoever to conclude that Mr. Lucarelli knew or intended that other depositors would be deprived of money or property. Unlike Mr. Jean, he did not have the benefit of hindsight, and he could not examine or quantify the variables involved in determining the subscription rate and allocation, variables which include the number of orders, the size and validity of each order, the tier from which each order derives, the relative impact of the seven orders at issue here, and any manual exceptions to the qualifying deposit amounts. In light of all these variables, it is fanciful speculation to assume that Mr. Lucarelli could have known, let alone intended, that the seven orders at issue here would deprive other depositors of shares they requested.

As demonstrated by its closing argument (7/20/06 Trial Tr. at 1529), the government can cite only two pieces of evidence in response, neither of which establishes that Mr. Lucarelli acted with a specific intent to defraud depositors. First, the government cites the testimony of the younger Mr. Querker and Ms. Morant indicating that Mr. Lucarelli asked them what balances

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In determining to exclude this evidence, the Court asked Mr. Jean if the profit-sharing plan was “a constant in both” his “analysis of the tier one depositors who didn’t get all that they requested and the tier one depositors minus the seven accounts in dispute,” and Mr. Jean answered that it was. (*Id.* at 1325.) The relevant question, however, is whether the overall allocation of shares—with or without the seven orders at issue here—would have changed if the manual exceptions had not been made. In other words, the manual exceptions may have affected the oversubscription and the overall allocation of shares. In fact, Mr. Jean stated that “the qualifying deposit amounts themselves are the basis for the calculation to determine how many shares each order will receive” (*id.* at 1332), and that the exception for the Bank’s profit-sharing plan “guaranteed that the order was filled for 378,000 shares” (*id.* at 1330). The same may also have been true for the two other exceptions, both of which were individual orders for 70,000 shares. (*Id.* at 1327-28.)

This testimony reveals that the manual overrides were yet another variable affecting the overall subscription rate, and yet another step in the chain of speculation necessary to determine if other depositors might get fewer shares than they requested. It therefore speaks directly to the question of whether the defendant could have had an intent to deprive other depositors of shares. As Mr. Lucarelli’s counsel argued during trial, “the jury right now, based on the direct examination [of Mr. Jean], could very well have the impression that there were a finite number of shares and those finite number of shares were taken and distributed to depositors based exclusively on this formula, and that’s not so.” (*Id.* at 1334.) Mr. Lucarelli therefore respectfully submits that it was error to preclude cross-examination of Mr. Jean on this issue.

they had on deposit at the Bank.<sup>11</sup> (*See* Querker I Trial Tr. at 78-79, 107; Morant Trial Tr. at 1092.) Even if one infers from this testimony that Mr. Lucarelli hoped Mr. Querker and Ms. Morant would obtain as many shares as possible, it does not in any way establish that Mr. Lucarelli intended this transaction to deprive other depositors of shares. *Cf. United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987) (finding error in charge on specific intent to the extent it “permit[ted] the jury to find an intent to defraud based solely on the defendants’ appropriation of a benefit to themselves”).

Second, the government cites the New Haven Advocate article of February 26, 2004, which includes the following statement: “[I]t cheats other New Haven Savings Bank depositors. Lots of outsiders look to make deals like this when banks go public. They pour millions in—which means the stock offering can become oversubscribed. That limits how much stock the legitimate depositors can buy.” (*Amorosa Aff. Exh. 7*, at 3; *see also* 7/20/06 Trial Tr. at 1529.) Even assuming that Mr. Lucarelli was aware of this statement in the article, it establishes only that he may have known it was possible the offering would be oversubscribed and other depositors might be deprived of shares, not that he intended for that to happen.<sup>12</sup> The Second Circuit has made clear that it is not enough for a defendant merely to “recognize that the scheme

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<sup>11</sup> In fact, the younger Mr. Querker testified that he ultimately sent the account information only to Ross. (*Querker I Trial Tr.* at 108-10.) The government also argued that Mr. Lucarelli asked Landino “about the accounts and his balances” (7/20/06 Trial Tr. at 1529), but Landino testified only that Mr. Lucarelli asked him “[a]bout the passbooks, you know, that I needed passbooks in order to consummate this,” and that “I believe that for a passbook, you were entitled to 70,000 shares” (*Landino Trial Tr.* at 542). Two other witnesses had no such discussions with Mr. Lucarelli—Mr. Accettullo testified that the younger Mr. Querker asked him about his accounts (*Accettullo Trial Tr.* at 154), and the elder Mr. Querker testified that Ross raised this issue with him (*Querker II Trial Tr.* at 213-15).

<sup>12</sup> Ross and Kundrat testified that they thought the offering might be oversubscribed, and Ross testified that this could be a “natural effect,” but he did not testify that oversubscription was a necessary outcome, and he also testified that he “certainly wasn’t intending to hurt anybody,” “hadn’t considered the other depositors,” and never discussed with anyone “[t]he issue of whether getting shares will leave others who wish to subscribe for shares with fewer shares.” (*Ross Trial Tr.* at 831-33, 1023; *Kundrat Trial Tr.* at 1234.) Similarly, Mr. Henrie of the FDIC testified that “conversion offerings are very desirable given their nature and they’re often oversubscribed for,” but he did not testify that oversubscription was a necessary outcome. (*Henrie Trial Tr.* at 471.)

had the capacity to cause harm,” but rather he must also intend the harm actually to occur.

*United States v. Gabriel*, 125 F.3d 89, 97 (2d Cir. 1997) (internal punctuation omitted),  
*overruled in part on other grounds as noted in United States v. Quattrone*, 441 F.3d 153, 176 (2d  
Cir. 2006).<sup>13</sup>

Moreover, this is not a case where intent to harm may be inferred because “the scheme has such effect as a necessary result of carrying it out.” *Starr*, 816 F.2d at 101 (quoting *United States v. London*, 753 F.2d 202, 206 (2d Cir. 1985)). The variables and contingencies discussed above determined whether the offering would be oversubscribed, and it was fully possible that the seven transactions at issue here would not deprive other depositors of shares. “Where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant’s fraudulent intent.” *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (vacating mail fraud conviction where there was insufficient evidence that defendant intended to harm corporation that had retained him). The government produced no such independent evidence of fraudulent intent with regard to the depositors.

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<sup>13</sup> In *Gabriel*, the Second Circuit found error in an instruction that allowed the jury to find specific intent if the defendants merely “recognized that the scheme had the capacity to cause harm.” *Id.* It declined to order a new trial on this basis, which had not been preserved below, only because the jury’s other findings made clear that it must have concluded the defendants intended to cause harm, and there was therefore no prejudice to the defendants. *Id.* The issue has been preserved here, however, and in any event the jury expressly found that Mr. Lucarelli did not act with specific intent to defraud.

**B. There Also Was Insufficient Evidence that Mr. Lucarelli Intended to Defraud the Bank**

With regard to the other potential victim, the evidence was insufficient to establish that Mr. Lucarelli believed the Bank would be defrauded by these transactions.<sup>14</sup> As the Court stated in its charge, the jury may consider “the alleged co-conspirators’ understandings or beliefs regarding whether the Bank knew such activity was going on when determining whether any of these persons—including the defendant—had the requisite intent to defraud the Bank.” (Amorosa Aff. Exh. 2, at 70.) The central factor is “what the alleged co-conspirators believed the bank knew or intended.”<sup>15</sup> (*Id.*)

The evidence establishes that Ross, the source of Mr. Lucarelli’s understanding of conversion offerings, believed that these transactions were “a common practice that went on with these bank conversions,” and that he told this to others. (Ross Trial Tr. at 855-56.) While he claimed during trial not to know specifically what the New Haven Savings Bank knew at the time, he testified that this was “fairly common knowledge,” and that “people in the banking and conversion industry and certainly their underwriters knew.” (*Id.* at 856-59.) The younger Mr. Querker testified that Ross told him he was making full disclosure to the Bank with respect to these transactions, that the Bank knew professional investors were doing these kind of deals, and that this was in the newspaper articles. (Querker I Trial Tr. at 123-25, 143.)

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<sup>14</sup> In its pretrial ruling, the Court held that, “as the Government agreed [at oral argument], if the Bank was not deceived, the Government’s fraud theory fails.” *Vought*, 2006 WL 1662882, at \*17. During the charge conference, after Mr. Lucarelli had defended the case based on the pretrial ruling, the Court advised that it “had some reconsideration of that” and “no longer [thought] that’s true,” concluding instead that “the bank’s knowledge isn’t relevant, that what is relevant is the conspirators’ intent to deceive them.” (7/19/06 Trial Tr. at 26-29.)

<sup>15</sup> In its trial memorandum, the government similarly acknowledged that “a defendant may properly seek to establish . . . that he, personally, knew or believed . . . that the bank was accepting fraudulent applications without concern for the fraud.” (*See* United States’ Trial Mem., dated Jun. 19, 2006, at 3.) This statement miscasts the burden of proof—as noted above, “[t]he burden of establishing lack of good faith and criminal intent rests upon the government” (Amorosa Aff. Exh. 2, at 46)—but it acknowledges the central premise that the defendant cannot have had a specific intent to defraud the Bank if he believed the Bank would not be defrauded.

This understanding was reinforced by the Bank's subsequent conduct. The Bank never questioned Mr. Landino's \$1.4 million stock order, even though he had less than \$10,000 on deposit and the Bank held mortgages on his property. (Landino Trial Tr. at 593.) The Bank also never contacted the Querkers about their orders, even though it had their phone numbers on the stock order forms. (Querker I Trial Tr. at 133; Querker II Trial Tr. at 272.) The Bank did not even question the transaction when the Querkers showed up shortly after they received their stock certificates to obtain signatures necessary to transfer them. (Querker II Trial Tr. at 281.)

This lack of any investigation in the face of large orders by small accountholders was endemic. There was a mechanism in place at the Bank to determine how much money the depositors placing stock orders had on account. (Blanksteen Trial Tr. at 373-75.) Even during trial, Mr. Jean of the Bank's consulting firm was easily able to generate a printout of all those depositors who sought 70,000 shares, including their names, addresses, and the amounts they had on deposit on the record date. (Jean Trial Tr. at 1304-07.) In one such example, a depositor named Burner ordered 70,000 shares, or \$700,000 worth of stock, despite having only \$8,270 on deposit on the record date. (*Id.* at 1306.) These incongruities were all the more noticeable for the fact that depositors had to provide full payment at the time of their orders. (*See id.* at 1307.) As in the transactions at issue in this case, some of those payments came in the form of large checks submitted by third parties. (Ross Trial Tr. at 734-36.) Yet, in the words of the Bank's Chief Financial Officer, "[w]e didn't ask that question because we didn't feel that it was our responsibility." (Blanksteen Trial Tr. at 374.) "It was not our business" where depositors obtained their funds, "[t]hat was not our concern." (*Id.* at 401.)

Although the government introduced evidence that the Bank took several steps to cover itself against the regulatory risks presented by improper stock orders (Blanksteen Trial Tr. at

338-45), the sincerity of those efforts was belied by the lack of any meaningful effort to identify and turn back improper stock orders. Moreover, the steps taken by the Bank were unknown to Mr. Lucarelli and therefore could not have impacted his belief that the Bank would not be deceived by the transactions. (*See, e.g.*, Blanksteen Trial Tr. at 338, describing how the Bank sent a letter to the state banking authority.) Thus, there was insufficient evidence to conclude that Mr. Lucarelli believed the Bank would be defrauded by the transactions or that he had specific intent to defraud the Bank.

**C. The Evidence Also Was Insufficient to Establish that Mr. Lucarelli Knew the Stock Transactions Were Fraudulent**

The government also offered no sound basis to conclude that Mr. Lucarelli knew the stock transactions were improper in the first instance. At most, the government established that he understood the terms of the deal Ross had with the depositors, not that he understood the deal to be fraudulent or to involve a fraudulent misrepresentation.

In this regard, the government emphasized the one-page agreement entered into between Bob Ross and Linda Morant.<sup>16</sup> (7/20/06 Trial Tr. at 1511-12; Amorosa Aff. Exh. 9.) Although this agreement may set forth the terms of the deal between Ross and Ms. Morant, it provides no indication that those terms were improper. It makes no reference to the offering's requirement that depositors not enter into agreements to transfer their shares, or to the certification on the stock order form whereby a depositor represents that he or she has not entered into such an agreement, which are the only things that make the arrangement improper. (Blanksteen Trial Tr. at 369-70.) The prohibition and the stock order form were not discussed during the meeting at

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<sup>16</sup> It may not be a coincidence then that the sole substantive count on which the jury convicted Mr. Lucarelli was the securities fraud count pertaining to the Morant transaction. (Amorosa Aff. Exh. 10, at 19.) For the reasons that follow, however, this agreement cannot sustain the conviction.

which this agreement was signed. (Morant Trial Tr. at 1093-1102; James Trial Tr. at 868-72; Ross Trial Tr. at 760-67.) Indeed, the fact that Mr. Lucarelli signed this document as a witness suggests that he saw nothing wrong with the arrangement it described.

The government offered no sufficient basis to conclude that Mr. Lucarelli knew or had reason to know that the transaction would be a fraudulent circumvention of the Bank's transfer prohibition. First, Mr. Lucarelli's academic and professional training does not establish that he knew or should have known the transaction was improper, as there was no evidence that he had any experience with a bank conversion like this one or its prohibition on agreements to transfer shares. (*See, e.g.*, Querker I Trial Tr. at 77-78, wherein the younger Mr. Querker testified that "it didn't seem to be John's field;" Darcey Trial Tr. at 413, wherein Ms. Darcey of Ryan Beck testified that "IPOs that are not conversion offerings have no special strictures on who must receive the opportunity to purchase shares;" *see also* Blanksteen Trial Tr. at 378, wherein Mr. Blanksteen of the Bank testified that "[i]t's a mutual conversion issue" that has nothing to do with general IPOs.)

Second, the government offered no proof that Mr. Lucarelli ever read the prospectus and other offering documents. (*See* Querker I Trial Tr. at 84, wherein the younger Mr. Querker testified that he gave a copy of the prospectus and associated documents to Ross, but not that he ever gave one to Mr. Lucarelli; *see also* Darcey Trial Tr. at 418-19, wherein Ms. Darcey testified that the prospectus was only mailed to depositors.) Moreover, the prospectus gave poor notice of the prohibition on agreements to transfer shares, as the explanation of this aspect of the transaction appears more than 250 pages into the prospectus, and the summary section and question-and-answer pamphlet mention only "nontransferable rights to buy shares" and do not

explain that depositors could not enter into agreements to transfer shares after buying them.

(Blanksteen Trial Tr. at 387-91, 403-04; Darcey Trial Tr. at 447-48; Amorosa Aff. Exhs. 3, 4, 5.)

Third, the government introduced no proof that Mr. Lucarelli ever read one of the stock order forms containing the certification. (Amorosa Aff. Exh. 6.) The elder Mr. Querker testified that he faxed his form only to Ross so that Ross could advise his family how to complete it. (Querker II Trial Tr. at 232, 237.) The depositors testified that Ross never told them about the certification. (Querker I Trial Tr. at 129-30; Querker II Trial Tr. at 273; Landino Trial Tr. at 550.) Ross testified only that he told Mr. Lucarelli “there were some regulatory restrictions that were anticipated to be in the documentation limiting the depositors’ ability to sell their subscription rights, transfer their stock certificates,” but he told him that “historically these provisions don’t seem to have received much attention and shouldn’t be a problem.” (Ross Trial Tr. at 681-82.)

Fourth, the SEC *Salzhauer* case identified by Mr. Accettullo through his online research also does not establish that Mr. Lucarelli knew or should have known that the transactions were improper. Accettullo testified that he showed Mr. Lucarelli the case but did not give it to him. (Accettullo Trial Tr. at 166-67.) Although he testified that Mr. Lucarelli said he was “familiar with” the case (*id.* at 167, 170), the testimony only establishes that Mr. Lucarelli heard about the case from the younger Mr. Querker, not that he ever read it. (Querker I Trial Tr. at 103-04.) Moreover, Accettullo testified that he still wanted to do the deal despite the SEC case because Ross repeatedly told him he could do it legally. (Accettullo Trial Tr. at 173-74.)

Fifth, the government could not establish that Mr. Lucarelli knew or should have known the transactions were improper by relying on the two newspaper articles from February and March 2004. (Amorosa Aff. Exhs. 7, 8.) Both articles included equivocal statements on the

legality of certain kinds of transactions, and there was insufficient evidence in any event that Mr. Lucarelli was even aware of those statements. The younger Mr. Querker testified that he read the February 2004 article and discussed it with Accettullo and his father at Geppi's restaurant before Ross and Mr. Lucarelli arrived. (Querker I Trial Tr. at 89, 93-94.) Both Querkers testified that they only faxed a copy of the March 2004 article to Ross. (Querker I Trial Tr. at 110-11, 115; Querker II Trial Tr. at 217.) Although the younger Mr. Querker testified that he discussed articles with Mr. Lucarelli generally, he did not recall discussing the March 2004 article with him.<sup>17</sup> (Querker I Trial Tr. at 112, 115.)

Finally, the government's effort to place Mr. Lucarelli at meetings in which he might possibly have learned that the transactions were improper was unavailing. Mr. Lucarelli was not present for the Querkers' first and last meetings with Ross or at Mr. Landino's meeting with Ross. (Querker I Trial Tr. at 80, 116; Querker II Trial Tr. at 211-14, 233, 246; Landino Trial Tr. at 574.) Although Mr. Lucarelli was present for the weekend meeting at Geppi's restaurant with Ross, the Querkers, and Accettullo, the younger Mr. Querker testified that he was "more or less catching up with [his] friend, John," while the others discussed the investment, and Mr. Lucarelli did not go downstairs with Ross and Accettullo when the two of them had a private conversation in Accettullo's office. (Querker I Trial Tr. at 97; Querker II Trial Tr. at 231, 284; Accettullo Trial Tr. at 192-93.) The discussion which did occur during this meeting, and which prompted Ross to expound upon the risks of "walking on the grass"—a conversation which took place mostly in private in Accettullo's downstairs office and out of Mr. Lucarelli's presence (Ross

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<sup>17</sup> The government questioned Agent Cuff about a prior statement Mr. Querker made indicating that Mr. Lucarelli had in fact seen the article (Cuff Trial Tr. at 1443), but the Court specifically instructed the jury that this statement could only be used for the limited purpose of assessing credibility (*id.* at 1442). As the Court later charged the jury, "[e]vidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the defendant's guilt." (Amorosa Aff. Exh. 2, at 24.)

Trial Tr. at 723-24)—did not concern the legality of the transaction itself. Accettullo admitted that his concern was that he did not want to “roll” the \$700,000 “through [his] restaurant,” the accounts for which were overdrawn. (Accettullo Trial Tr. at 160-61, 177; Ross Trial Tr. at 722.) He testified that “[t]he meeting ended that we were going to find out if I had some personal accounts, because I guess my main concerns were mainly with putting the money through the business account.” (Accettullo Trial Tr. at 162.)

In all of these meetings, the overall tenor was one of constant reassurance by Ross. Although Ross testified that he “indicated” to Mr. Lucarelli and others “that there were some regulatory restrictions applicable to the depositors, including the transfer restriction” (Ross Trial Tr. at 1024; *see also id.* at 844-47), he did not tell them about the certification requirement or explain that the transaction would be a fraudulent circumvention of the restriction. (*Id.* at 846-47.) Rather, Ross assured everyone that he knew how to conduct these transactions notwithstanding the “regulatory restrictions.” (*Id.* at 692, 885.) Ross told the Querkers that this transaction was legal, that he knew how to structure it to avoid problems, that they should trust him because he is a securities lawyer and a tax specialist, that he had a lot of experience in IPOs, and that he was making full disclosure to the Bank with respect to the transactions. (Querker I Trial Tr. at 122-25; Querker II Trial Tr. at 269-70; Ross Trial Tr. at 850-54.) The elder Mr. Querker testified that Ross “was constantly reassuring us that this is the way he’s done business before,” and that he believed the transaction was a “legitimate loan.” (Querker II Trial Tr. at 214, 271.) Mr. Accettullo testified that Ross told him he knew how to do the transaction legally (Accettullo Trial Tr. at 173); Mr. Landino testified that he thought it was “absolutely” a legitimate transaction (Landino Trial Tr. at 581); and Mr. James testified that Ross “assured us

that everything was legal.”<sup>18</sup> (James Trial Tr. at 867.) The depositors’ meetings and discussions with Ross only served to reinforce these beliefs, and the government’s evidence is insufficient to establish that Mr. Lucarelli learned any contrary lesson from them. Thus, the government offered insufficient evidence to establish that Mr. Lucarelli either knew or intended that others would be defrauded. The verdict must therefore be set aside.

### **III. The Court’s Instructions Confused the Jury and May Have Permitted a Conviction Based on Insufficient Evidence of Specific Intent to Defraud**

In the context of a Rule 33 motion, an erroneous jury instruction is one that “misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.” *United States v. Kim*, 303 F. Supp. 2d 150, 157 (D. Conn. 2004) (quoting *United States v. Dinome*, 86 F.3d 277, 282 (2d Cir. 1996)). A court will deem such error “harmless” only if it is “convinced that the error did not influence the jury’s verdict.” *United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir. 1996); *see also United States v. Scotti*, 47 F.3d 1237, 1242 (2d Cir. 1995) (affirming grant of new trial under Rule 33 based on erroneous jury instruction where court concluded that instruction “may have misled the jury”).

During its deliberations in this case, the jury asked the Court the following question: “Is the act of disregarding SEC Regulations (‘Regulatory Restrictions’) the same thing as disregarding ‘the law’ as ‘the law’ relates to paragraph 2 on page 43 of our jury instructions?” (Amorosa Aff. Exh. 11, at 1; 7/24/06 Trial Tr. at 1622-23.) The referenced paragraph of the jury charge, which concerns the intent requirement, provides that “[t]o act knowingly and willfully means to act voluntarily, deliberately, and intentionally, and with the intent to do something with

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<sup>18</sup> At the same time, it was clear that Ross was the expert and driving force. Ms. Morant and Mr. James testified that Ross told them Mr. Lucarelli was getting “an education” from him. (James Trial Tr. at 876; Morant Trial Tr. at 1108; *see also* Querker I Trial Tr. at 130.) Also, Accettullo told Agent Cuff that Mr. Lucarelli was merely a “messenger” for Ross. (Accettullo Trial Tr. at 188.)

a bad purpose either to disobey or disregard the law.” (Amorosa Aff. Exh. 2, at 43.) Thus, the jury asked whether “disregarding SEC Regulations” can establish that the defendant acted knowingly and willfully.

As a threshold matter, the Court should have instructed the jury that it could not consider “disregarding SEC Regulations” because there were no regulations governing Mr. Lucarelli’s conduct. (See 7/24/06 Trial Tr. at 1622-23.) Even if there were relevant regulations to consider, however, the Court’s response to this question may have caused the jury to confuse the standard for finding that the defendant knowingly and willfully participated in a scheme to defraud with the standard for finding that the defendant acted with a specific intent to defraud. The Court instructed the jury as follows:

Your note refers to the act of disregarding the SEC regulations. Now, remember that page 71 of your instructions clarifies that the defendant is not charged in this case with a violation of any governmental regulation, that what he is charged with is committing mail and securities fraud and conspiracy to commit those two.

So your inquiry on page 43, which your note refers to, relates to whether—your consideration of 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 are to consider whether the defendant’s participation was with the intent to do something with bad purpose either to disregard or disobey the law, including any agency rules and regulations, keeping in mind my clarification from page 71 that he is not charged in this case with violation of any regulations or agency rules.

(7/24/06 Trial Tr. at 1650.) The jury asked the Court to repeat this instruction, and the Court went on to state that the inquiry “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.” (*Id.* at 1651.)

While the Court may have intended only to instruct the jury on the requirement of knowing and willful participation, its contemporaneous mention of “specific intent to defraud” and use of the word “intent” conflated that requirement with specific intent to defraud. The result of this confusion is manifest in the jury’s verdict. The jury convicted Mr. Lucarelli on one count of securities fraud and one count of conspiracy, but also found that he did not specifically intend to defraud either the Bank or the depositors, an essential element of both crimes. It may be that the jury believed a finding that he disregarded regulations could serve as a substitute for finding that he acted with specific intent to defraud. Thus, the Court’s instruction “misled the jury on the correct legal standard” for finding specific intent. *Kim*, 30 F. Supp. 2d at 157 (quoting *Dinone*, 86 F.3d at 282). The jury’s confusion on this point provides an additional basis for granting Mr. Lucarelli at least a new trial.

**IV. In Addition to the Foregoing Issues, Mr. Lucarelli Respectfully Preserves Other Trial Errors as Grounds for Appeal**

In addition to the foregoing grounds for acquittal or new trial, Mr. Lucarelli also respectfully maintains and preserves for appeal all objections and errors made throughout the pretrial proceedings and trial.

**CONCLUSION**

For the foregoing reasons, pursuant to Federal Rules of Criminal Procedure 29 and 33, defendant John M. Lucarelli respectfully requests 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.

Dated: New York, New York  
October 11, 2006

DAVIS POLK & WARDWELL

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2006, a copy of the foregoing Memorandum in 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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