F.#2002RO1364

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

02 CR 767 (S-2) (ADS)

BARRY DRAYER and
STEPHEN BARKER,

Defendants.

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GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RULE 29 AND RULE 33 MOTIONS

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in opposition to the post-trial motions of defendants Barry Drayer and Stephen Barker, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, in which both defendants move for a judgment of acquittal on the basis that the evidence presented at trial was insufficient to support conviction. Specifically, Barry Drayer contends that there was insufficient evidence establishing his criminal intent to commit bank fraud, conspiracy to commit bank fraud and wire fraud, and conspiracy to commit money laundering. Stephen Barker similarly contends that the evidence adduced at trial was insufficient to prove his knowledge and intent to enter into a conspiracy to commit bank fraud and wire fraud, and a conspiracy to commit money laundering.

In the alternative, the defendants also move, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial arguing that the verdict was a manifest injustice and against the weight of the evidence.

For the reasons set forth below, the defendants' motions should be denied in all respects.

STATEMENT OF FACTS

INTRODUCTION

The defendants Barry Drayer and Stephen Barker were charged in a superseding indictment with conspiracy to commit bank fraud and wire fraud, in violation of 18 U.S.C. §§ 371, 1343 and 1344; and conspiracy to launder money, in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1)(A)(I) and 1956(a)(1)(B)(I). The defendant Barry Drayer was also charged in five counts of bank fraud, in violation of 18 U.S.C. § 1344.

The government's theory of the case, as charged in the indictment and proven at trial, was that Drayer was the leader of a complex fraud scheme based in Long Island and Massachusetts, through a company he controlled, RW Professional Leasing Services, Inc. ("PLS"). The scheme operated from 1991 until mid-2002. In brief, PLS provided financing to medical professionals who wished to purchase new medical equipment or otherwise obtain funding in connection with a medical practice. PLS was not a self-funded institution. Rather, PLS had relationships with a variety of other companies which either had the necessary capital to lend, or else were in a position to obtain funding from federally-insured banks.

Under the agreements between PLS and the various funding institutions, if an individual borrower, such as a doctor, prepaid the loan (i.e., paid the balance of the loan

early, so as to take advantage of a discount), PLS was required to remit those proceeds to the funding institution. As a part of the fraudulent scheme, under Drayer's direction, PLS often pocketed the prepayments remitted by borrowers. To hide this malfeasance, PLS would make monthly payments on the loan to the funding institution in the place of the borrower. To further fool the funding institution, PLS would divert mail such as bills from the funding institution addressed to the borrower, into a private mail-drop account that PLS had secretly opened in the borrower's name. This mail-drop scheme operated in the late 1990s. Subsequently, however, Drayer learned that if PLS "paid ahead" – that is to say, sent in a monthly payment prior to the due date, then no invoice would be generated or mailed to the borrower. Therefore, the mail-drop scheme was replaced with the "pay ahead" scheme.

To further hide the fraud, under Drayer's direction, PLS created phony checks in the name of the borrower, made payable to PLS, to make it look as though the borrower had made a monthly payment to PLS. PLS then provided a copy of the phony check to the lender along with PLS' own original check paying in place of the borrower. This enabled PLS to use the full proceeds prepaid by the borrower, while only paying the lender in small increments over the life of the loan.

Another fraudulent device used by PLS was to generate phony invoices through a sham company called Riteway Health Services ("Riteway"). Each false invoice made it appear that Riteway had sold new medical equipment to the borrower, which PLS was being asked to finance. In fact, Drayer had directed his underlings to create Riteway as a shell company that had no assets or equipment and never did any business whatsoever. Drayer instructed his underlings at PLS to create the false invoices from Riteway to PLS and to write checks from PLS to Riteway purporting to pay those invoices. Drayer would then instruct his underlings to send the lending institution a copy of the Riteway invoice and a copy of the PLS check paying the invoice. Once that was done, PLS would, without fail, cancel the PLS check to Riteway and no funds would be remitted to Riteway. At Drayer's direction, PLS engaged in this kind of fraud over 1,000 times.

Another fraudulent device used by PLS was multiple lending. In this regard, PLS would take a legitimate application of a borrower and then fraudulently submit that same application to multiple lenders without the borrower's consent. Upon receiving the multiple loan proceeds from the lenders, PLS would remit only one set of loan proceeds to the borrower, and would pocket the rest.

Barker's role was principally that he ran two companies in California known as Medpro Equipment Co. ("Medpro") and Carefree Financial Services (""Carefree"), which remitted loan applications to PLS for submission to the lending institutions. To ensure that inappropriate applications would be approved, Barker included in the package a fraudulent invoice from Medpro to PLS, making it appear as though Medpro had sold valuable medical equipment to the doctors, which Medpro was asking PLS to finance. In fact, Medpro was a sham corporation with no assets or business function, and the invoices were entirely devoid of substance.

Drayer and Barker each made millions of dollars in commissions from the scheme, and the lending institutions lost tens of millions of dollars. The scheme proceeded until its ultimate collapse in 2002 when Drayer and others were arrested; Barker was arrested on a later date.

THE TRIAL

The government presented an enormous amount of evidence at the three-week trial, which easily proved both defendants' guilt beyond a reasonable doubt. In this section, the government provides a summary of each witness's testimony. In the next section (beginning on page 94), we will explain how this proof supports the verdict notwithstanding the defendants' motions.

I. COOPERATING WITNESSES

A. Roger Drayer

1. Background

Roger Drayer, Barry Drayer's brother (Tr. 1364), testified pursuant to a cooperation agreement, having pled guilty to conspiracy to commit bank fraud. (1366; GX 90).[1] Roger Drayer began working at PLS part time in 1990 or 1991. (1368). He began working there full time in 1997, and was still working there at the time of trial. (1369 & 1370). Ultimately, he was responsible for sales and marketing in the New York office. (1369). Rochelle Besser ran the New York office on a day to day basis; Barry Drayer ran the Massachusetts office on a day to day basis and the company as a whole. (1370-71). Barry Drayer approved all significant decisions for the company. (1371).

Most of the sales were generated by the Massachusetts office. (1371). The Massachusetts office also handled collections, credit, customer service, and all dealings with lenders and funding sources. (1372). The New York office handled most clerical and administrative functions and maintained the company's bank accounts. (1372). Eventually, Barry Drayer gave Roger Drayer the title of Vice President of Marketing and Operations. (1373). Barry Drayer approved all sales at the

[1] "Tr." refers to the transcript of the trial. Numbers in parentheses without other references refer to pages of the trial transcript. "GX" refers to the government's trial exhibits.

company, except that for a period of time, Susan Cottrell had some limited authority to approve sales under Barry Drayer's supervision. (1374-75).

2. Types of Loans; Funding Sources

PLS offered equipment leasing transactions, in which the doctor would typically choose medical equipment and have the vendor bill PLS; PLS would buy the equipment and lease it to the doctor. (1375). PLS also engaged in sale-leaseback transactions, in which the doctor would "sell" his or her existing equipment to PLS, which would lease the equipment back to the doctor as a way of raising funds for the doctor. (1375). PLS also made working capital loans, in which money was lent to the doctor without any specific collateral, other than a blanket lien against the practice. (1376). First Sierra had specific requirements for such a loan, including that the doctor had been in practice for at least two years, and the amount of the loan could not exceed $50,000. (1377). This financial cap did not apply to equipment leasing or equipment financing, which could involve several hundred thousand dollars. (1377).

PLS did not have its own money to lend. Its funding sources were community banks, through a broker known as Crawford & Sons (primary lender from mid-2001 forward), and non-bank lenders such as AT&T Capital (primary lender from early 1990s through 1995) and First Sierra (primary lender from 1996 to mid-

2001). (1377-78). The community banks engaged in portfolio lending, in which the bank would lend money to PLS based on a portfolio, or group, of leases. (1382).

In approximately 1997, Barry Drayer told Roger Drayer that, in the course of pending litigation with AT&T, AT&T had accused PLS of disguising sale leasebacks and working capital loans as other, more acceptable kinds of financings. (1379-80).

3. Servicing of Loans; Collections

First Sierra and AT&T serviced their own loans; PLS typically serviced the community bank loans. (1380-81). First Sierra and AT&T used a "lock-box," in which invoices under the PLS name were sent to the doctors, and the doctors wrote checks payable to PLS and forwarded the checks to a mailbox under the lender's control. (1381). If a doctor's payment was late, PLS had the obligation to collect money from the doctor (even if PLS was not servicing the loan). (1382).

Upon default, PLS was responsible to pay the full amount of the loan to the lender. (1384). If a doctor went bankrupt, PLS was supposed to notify the lender and pay the loan in full or "substitute" it (i.e., PLS would finance another loan with its own money and then assign the stream of payments to the lender). (1384). Barry Drayer had authority to provide discounted "prepayment" figures to the doctors. (1384).

4. Discussions with Barry Drayer about the Drain on PLS' Bank Accounts and Lack of Reserves

In 1997, while conducting a reconciliation of PLS's bank accounts, Roger Drayer noticed that PLS was paying between $140,000 and $160,000 per month directly to AT&T as payments for lessees. (1385-86). PLS was not supposed to make payments to AT&T on behalf of lessees. (1386). Roger Drayer brought this to Barry Drayer's attention; Barry Drayer was already aware of it and was directing it. (1386). Roger Drayer monitored this issue over time, and saw that the amount of money being paid directly to lenders increased to $200,000 per month for AT&T plus $200,000 for First Sierra, and an unknown amount for the community banks. (1387-88). Roger Drayer kept his brother informed, and told him it was a "big drain," but Barry Drayer replied that PLS could "overcome the drain by bringing in new business." (1388).

PLS was not allowed to just take over the payment schedule for a defaulted borrower rather than paying off the loan in full. (1389). PLS had no cash reserves. (1389). In 1999, which was a good year for PLS, during a walk on the beach at Cape Cod, Roger Drayer suggested to Barry Drayer that he create a reserve account for "deals going bad." (1390). However, Barry Drayer refused to do so. (1390).

5. Use of Phony Checks, Telechecks and Western Union Money Grams to Hide the Fraud

First Sierra accepted payments from PLS on behalf of borrowers from time to time, but required proof that a doctor had actually paid PLS before accepting a check written by PLS. (1391-92). To circumvent this requirement, PLS created altered or forged checks. (1392-93). Roger Drayer and other employees of PLS did this at the direction of Barry Drayer. According to Roger Drayer: "Barry had called me one day and asked me to go to Frank [Zambaras] and ask Frank if we could take a check that was already there, and alter the date or the check number or the amount on it. Not for the purpose of cashing it, but for the purpose of sending it as proof to request a payment that was made." (1392-93). At Roger Drayer's request, Frank Zambaras scanned and altered checks by computer. (1393).

PLS also created phony telechecks (proof of payment by phone) for the same purpose. At Barry Drayer's direction, Roger Drayer instructed employees of the New York office, including Roger Drayer's daughter Jennifer Tarantino, to create these phony instruments. (1394-95). Barry Drayer would fax lists of accounts requiring phony telechecks to be created. (1395). PLS generated between 1,000 and 1,500 phony telechecks for this purpose. Additionally, at Barry Drayer's request, the scheme was diversified to include phony Western Union money grams, for the same purpose of fooling First Sierra into hiding defaults by

doctors. (1395-96). Principally, Adam Drayer (Roger Drayer's son) created the phony Western Union money grams as proof of payment. (1396).

6. Mailboxes Etc. Scheme

At Barry Drayer's direction, PLS kept accounts at Mailboxes Etc. from late 1996 through 1999. (1397). These accounts were opened to divert invoices from First Sierra and AT&T to PLS borrowers who had gone bankrupt or prepaid. (1397-98 & 1400). In the case of bankruptcy, the lender was not allowed to continue billing the doctor. Since PLS had hidden the bankruptcy, the lender did not know to stop billing the doctor, and therefore PLS diverted the mail. (1397). In the case of prepayments, PLS had kept the prepayment money rather than forwarding it to the lender, and so PLS did not want the borrower to receive additional bills from the lender. (1397-98). PLS would provide a change of address form to First Sierra or AT&T redirecting the borrower's mail to a Mailboxes Etc. maildrop account in the same geographic area as the borrower. (1398-99). Jennifer Tarantino managed the Mailboxes Etc. accounts. (1399). Barry Drayer would provide oral or written instructions to Roger Drayer to open these accounts. (1399).

There were approximately 200 Mailbox Etc. accounts. (1399). The mail was forwarded from those accounts to PLS, where it remained. PLS did not get the consent of the doctors to

change their addresses with the lenders. (1400).

Eventually, PLS closed the Mailboxes Etc. accounts because Barry Drayer learned that if an account was paid ahead, then First Sierra would not generate an invoice, because no balance was due. By this time also, PLS had stopped doing business with AT&T.

7. Riteway and GHT

Riteway was a company created to make invoices "for the purpose of funding leases." (1407-08). Roger Drayer created Riteway at Barry Drayer's direction. (1048). Riteway was used to get funding where the doctor already owned the equipment, "to make it appear as if it was new equipment." (1408). PLS created invoices under Riteway's name, and then submitted the invoices to the funding sources to get money. Other than Jennifer Tarantino, whose name was put into the company's records, Riteway had no employees, and it had no equipment or money. (1409). The invoices were created in Massachusetts. (1409). PLS created checks from PLS to Riteway to make it appear than the invoices had been paid. (1410). Copies of these checks were then sent to First Sierra or AT&T, as proof of payment. (1411). Then PLS simply voided the checks. (1411).

GHT was a company formed in Jennifer Tarantino's name to reduce PLS' tax liability by buying PLS losses or bad receivables at a discount. (1412). This was Roger Drayer's idea;

he discussed it with Barry Drayer. (1413). GHT did not spend any money to "buy" PLS' losses and bad receivables; however, PLS' financial statements falsely reflected that it had done so. (1413).

8. Carefree and Medpro

Carefree was a broker for PLS, and was controlled by Barker. (1415). Medpro, also through Barker, sent invoices to PLS. (1415). All of the Carefree deals included a Medpro invoice, unless the deal was specifically designated as a working capital loan. (1416). Roger Drayer never saw a Medpro invoice in a borrower file that had *not* been brokered by Carefree. (1416).

9. First Sierra Audit; Dr. Quitman

In June or July 2001, First Sierra conducted an audit of certain PLS accounts. Prior to the audit, Barry Drayer directed Roger Drayer to "cleanse the files" of "anything that was illegal . . . ." (1416). In addition, Barry Drayer told Roger Drayer to create a duplicate set of computer files to help fool First Sierra. The duplicate files would falsely reflect payment and make the accounts look appropriate. (1417). It took the office workers two to three weeks to cleanse the files. (1417-18). During the audit itself, First Sierra unexpectedly discovered a delinquent account, and demanded that PLS pay it back. (1421). After the audit, First Sierra asked for a list of problematic accounts. At Barry Drayer's direction, Roger Drayer

left off the list loans where the borrower had canceled and PLS kept the money. (1421).

In addition, Roger Drayer took off the list, at Barry Drayer's direction, certain borrowers' names, including Dr. Jeffrey Quitman. (1422). Dr. Quitman and the other borrowers in this category had applied for loans that had been funded to PLS, and PLS had failed to remit the proceeds to the borrower. (1423). Dr. Quitman had applied for a loan to help him buy a practice in California, where he intended to move. (1423). However, Dr. Quitman had a serious accident and could not work as a result of the accident. (1424). Roger Drayer conveyed this information to Barry Drayer. (1425). Sometime later, Roger Drayer learned that PLS had not sent the funds back to the funding source, or to Dr. Quitman, and that the originating salesman, Frank Zambaras, was "nervous about this." (1425). Barry Drayer responded that Roger Drayer should offer Zambaras a commission on the deal to "settle Frank down and make him feel better about it . . . ." (1425).

The total dollar amount of problematic loans on the list to First Sierra was between $10 and $11 million. (1426-27 & 1429; GX 40G). First Sierra stopped doing business with PLS as a result. (1426). Roger Drayer told Barry Drayer that PLS would not be able to fund future deals in the pipeline. Barry Drayer responded that Crawford had enough banks to "pick up all the

slack." (1426).

10. Corporate Credit Card; Financial Motive

Rochelle Besser told Roger Drayer that she was disturbed by the amount of charges on Barry Drayer's corporate credit card, because he was using it "for every little thing." (1428). Barry Drayer built house during the course of the conspiracy for approximately $900,000. (1428). Barry Drayer had a boat, took ski vacations, and belonged to a country club. (1429).

11. Corroboration

During his testimony, Roger Drayer authenticated a series of documents corroborating his testimony. These documents included payment instructions from Barry Drayer, indicating which delinquent loans to pay down on directly, and instructions to generate fraudulent checks ("send backup"). (1433-1442; GX 47, 58, 58B & 68). In addition, Roger Drayer authenticated fraudulent checks generated at Barry Drayer's direction. (1433-1452; GX 69, 71 & 72). Significantly, Roger Drayer authenticated a document he had sent to Barry Drayer, listing delinquent fraudulent accounts, and including annotations as to whether the account had an unauthorized Mailboxes Etc. account, or whether the account had been improperly "paid ahead" by PLS. (1452-56; GX 76). This document – a status report of the fraud – corroborated large portions of Roger Drayer's testimony.

12. Rochelle Besser's Fear of Jail

Finally, Roger Drayer recounted a conversation in early 2002, when Rochelle Besser said that she was "very concerned that she was going to end up going to jail as a result of what my brother was doing . . . ." (1457). Roger Drayer told Barry Drayer about the conversation. (1457-58). According to Roger Drayer, Barry Drayer responded, "If anything were to happen or there was a criminal problem, he would take the blame for it and we would be out of it." (1458).

B. Rochelle Besser

1. Background

Rochelle Besser, Barry Drayer's sister, testified pursuant to a cooperation agreement, having pled guilty to one count of conspiracy to commit bank fraud and one count of money laundering. (491-92; GX 88-A). Besser also entered a plea on behalf of PLS. (496 & 500-01; GX 88).

Besser ran the New York office on a day to day basis and handled, among other things, PLS' accounts at the Bank of New York. (502). Barry Drayer managed the Massachusetts office of PLS on a day-to-day basis and made decisions for the company as a whole. (503). Credit review and approval was handled in Massachusetts, as were the vendor and lender relationships. (504-05). Barry Drayer decided which loans to fund. (506). When funds arrived in PLS' account at the Bank of New York, Besser

would notify Barry Drayer for instructions. (507).

In the beginning, PLS operated as a broker and had no direct dealings with lenders. (474). Subsequently, PLS established direct dealings with lenders. The primary lenders over time were AT&T, First Sierra, and FDIC banks brokered through Crawford & Sons. (475-79).

First Sierra and AT&T serviced their own loans; PLS serviced the FDIC banks. (507). PLS was required to wire funds monthly to the FDIC banks based on a portfolio of leases. (508). The FDIC banks would fund in increments of $250,000 or $500,000, based on a group of loans. (509). If a borrower decided to prepay, PLS was supposed to forward the proceeds to the bank or else substitute that lease for another lease of equal value that PLS funded itself. (512-15). If prepayment funds came in, Besser would notify Barry Drayer and ask for instructions. Sometimes, he would instruct her to hold onto the funds rather than remitting them to the bank; this occurred more frequently in later years. (517). PLS retained almost all prepayments during the last year of PLS' operations. (518). PLS used these proceeds for operating expenses and for making payments on defaulted loans. (518).

If the doctor went bankrupt, PLS was required to either pay the bank or substitute another transaction. (518). Barry Drayer made this decision. (519). During the last year or so of

PLS' operations, PLS almost never made good on a bankrupt loan. (520). In total, PLS failed to make good on several hundred bankrupt loans. (520).

Crawford & Sons' pension and profit sharing plan invested in certain PLS loans. (485). In some cases, the pension plan would provide a bridge loan until particular leases could be funded through an FDIC bank, and in other cases, the pension fund directly invested or lent money to fund such leases. (485). In March 2002, Al Crawford called Besser about one of the loans funded by the pension fund; Besser relayed this conversation to Barry Drayer. Crawford was angry and screamed to Besser that PLS had received a prepayment of over $300,000 on the Dr. Ojeager loan and had failed to remit the proceeds to the Crawford pension fund. (486-87). Barry Drayer had no explanation for this. (487).

PLS provided lease agreements for the purchase of new equipment and promissory notes for working capital loans. (488). It was more difficult for PLS to obtain funding on a working capital loan. (490). The lender typically would not lend more than $50,000 for working capital, whereas equipment leases could be for as much as $300,000, depending on the price of the equipment. (490).

2. HSMT

At first, Besser thought HSMT was a group of doctors. (644). However, she learned through an insurance check that it was actually a hotel. (644). She reported this to Barry Drayer, who said he would check into it; he never got back to her. (645). Besser authenticated a series of memoranda from March 2001 to October 2001 regarding loans in connection with HSMT. (640-43; GX 64-67). The documents corroborated her testimony. One of them, from Besser to Barry Drayer, showed that PLS had received $2.1 million from lenders in connection with HSMT, but had only paid out $650,000. (646-660; GX 67). Besser stated that Drayer controlled whether to pay out loan proceeds, and he never instructed her to pay out the $1.6 million balance. Besser understood that PLS had kept that money in house to pay expenses and to make monthly payments on defaulted loans. (662).

3. Particular Loans

Besser authenticated computerized PLS records showing pay histories on certain accounts. (710; GX 123). The pay history for Dr. Raymond Nikodem showed that it was a "dead deal," which meant the deal did not go through; however, PLS received and kept approximately $34,475 in loan proceeds from the lender. (710-11). The pay history for Dr. Eric Pantaleon showed that the transaction was canceled; however, PLS received and kept approximately $50,000 in loan proceeds from the lender. (711-12).

The pay history for Dr. Eve James-Wilson showed that PLS received and kept $71,000 in loan proceeds from the lender. (712-13). The pay history for Dr. Rosalva Garcia showed that PLS made payments in place of Dr. Garcia. (713-14). The pay history for Dr. Anita Srinvasa showed that the borrower canceled the loan in March 2002; PLS took over the payment schedule with the lender. (714). The pay history for Dr. David Goren showed that it was refinanced and PLS kept the original loan proceeds. (715-16). Finally, the pay history for Dr. Tim Silegy showed that the borrower paid in full and PLS kept the proceeds rather than remitting them to the lender. (716-17).

Besser prepared and authenticated a summary chart (GX 122) of bank loan files (GX 8-33) and related PLS pay histories (GX 122-A). (717-19). The summary showed that the loan files included fourteen bankruptcies, twenty-eight prepayments, thirty-nine Riteway invoices, five Medpro invoices, and thirty-two loans where the bank funded PLS but PLS kept the money rather than forwarding it to the borrower or, in the case of canceled loans, sending it back to the lender. (728). The summary included entries showing that the Jewel Daniels loan went bankrupt, and PLS replaced it with the Scott Jackson loan, which was actually a prepayment. (723-24). The summary also included an entry for the Wayne Williams loan, showing the borrower went bankrupt. (725). Finally, the summary included an entry for Dr. Jeffrey Quitman,

showing that his loan included a Riteway invoice, and that he did not receive his loan proceeds. (727).

4. Other Exhibits

Other exhibits offered through Besser's testimony included (1) a picture of a house Drayer built while working at PLS (674; GX 107); (2) PLS commission expense report for Barry Drayer for 1998 to 2002 (678; GX 59); (3) PLS loan receivable account for Barry Drayer for 1997 through 1999 (680; GX 61); (4) PLS records of payments to American Express for a credit card account for 2000 to 2002 (681; GX 61-A); (5) PLS vendor check history showing payments from PLS to Medpro for 1996-1998 (695-96; GX 77); (6) from PLS loan files, a stack of Riteway invoices with corresponding Schedule As (697; GX 111); (7) from PLS loan files, a stack of Medpro invoices (701-02) (GX 110); (8) various loan files of PLS, including the Wayne Williams file, which contained a Medpro invoice even though the purpose of the loan was debt consolidation (704-06; GX 118 & 118-G).

None of the Riteway invoices were true (702).

5. Funds Flow; Money Laundering

When an FDIC bank funded a loan, the bank wired the proceeds into a PLS account known as the "063" account (for the last three digits of the account number. (689-90). PLS regularly transferred those funds into an account known as the "E" account, for the purpose of commingling the funds so that they could be

used for expenses and other matters. (690-92). The FDIC banks required that PLS maintain escrow accounts at the Bank of New York for the collection of payments from borrowers to be forwarded to the banks. (692). Besser signed a number of escrow agreements requiring these accounts to be opened, but did not open those accounts. (693; GX NW-4). PLS did not always have the funds to segregate into escrow accounts and pay its obligations, so PLS commingled the funds into one account instead. (693). Besser discussed the lack of escrow accounts with Barry Drayer. (694). The FDIC bank would receive an original executed escrow agreement as a part of the loan packet. (695).

C. Jennifer Tarantino

Jennifer Tarantino, the defendant Barry Drayer's niece, testified as follows. Tarantino began working at PLS part time in November 1993, and worked there from 1994 until the company stopped doing business. (1076-77). Rochelle Besser ran the Island Park office on a day to day basis. (1079). Barry Drayer ran the Massachusetts office on a day to day basis. Barry Drayer was in charge of the company as a whole. (1079). Rochelle Besser reported to Barry Drayer. (1082).

Tarantino pled guilty to conspiracy to commit bank fraud. (GX 91). This was based on her conduct maintaining a collection of fraudulent maildrop accounts at Mailboxes Etc., and in helping create fraudulent telechecks. (1084). With respect to

the telechecks, pursuant to Barry Drayer's written instructions, Tarantino and other employees in New York would create unauthorized telechecks to make it look like doctors had paid their monthly bill to PLS on outstanding loans, when in fact they had not. (1088-89). These fraudulent telechecks were used to represent to the banks that doctors had paid when in fact they had not paid. (1989). Tarantino participated in this fraudulent conduct daily for a period of time and for a total period of two years. (1090-91). Tarantino's brother, Adam Drayer, and employee Frank Zambaras also helped create phony Western Union receipts for the same purpose, per Barry Drayer's instructions. (1093-94).

Riteway Health Services was a company in Tarantino's name, which she allowed at her father Roger Drayer and her uncle Barry Drayer's request. (1095). Tarantino was the president of Riteway. (1102). Invoices were written under Riteway's name, showing equipment and how much the equipment cost. (1096-97). However, Riteway did not have any employees, equipment, warehouses, or office addresses. (1097). The invoices were sent to the banks. Checks were written to pay the invoices, and then the checks were voided. (1098; GX 46).

GHT was another company opened in Tarantino's name, at Roger Drayer and Barry Drayer's request. (1103). She did not recall what GHT was to be used for. (1103).

Tarantino opened mailboxes at Mailboxes Etc. to "receive invoices that were sent from the bank to the doctor." (1104). The mailboxes were opened "all over the country." (1105). The mail sent to the mailboxes was forwarded to PLS. (1106). Roger Drayer told her that "bankrupt doctors can't be invoiced." (1107). Tarantino's duties were to find a mailbox close to the doctor's office, open and maintain the account, and make sure it was paid for. (1108). There were more than 100 accounts; at some point, this task took up 25 percent of Tarantino's time. (1109; GX 34). An employee from Massachusetts, Wendy Cutillo, would typically send instructions from Barry Drayer with the information necessary to change the doctor's address and open a mailbox account. (1109). This occurred several times per month. (1109). The lenders whose mail to doctors was intercepted were First Sierra and AT&T. (1113). The summary chart of the Mailbox Etc. accounts included an entry for Murphy Animal and Bird Hospital. (1120; GX 34). Other exhibits introduced through Tarantino included faxes between Roger Drayer and Barry Drayer concerning setting up the Mailboxes Etc. accounts. (GX 35A, 36A & 37A).

First Sierra came to the New York office of PLS at some point. Before the First Sierra representatives arrived, employees of PLS went through the files and took out some of the checks. (1152). It took more than two days to do this. (1153).

D. Susan Cottrell

1. Background

Susan Cottrell, a former employee of PLS, testified pursuant to a cooperation agreement and pled guilty to conspiracy to commit bank fraud. (2320-21; GX 89). Cottrell testified that she worked under Barry Drayer in the Massachusetts office of PLS for a little under sixteen years beginning in 1989. (2313-14). Cottrell's job consisted of running credit for new doctors' applications and typing up documents for the loan contracts. (2314). Cottrell testified that the primary lenders from which PLS obtained funding for its loans were First Sierra and Crawford & Sons, which represented community banks. (2315). Cottrell testified that Barry Drayer ran the Massachusetts office of PLS, made all of the big decisions regarding how the company operated, dealt with all of the funding sources, approved new loan applications, and established the company's relationships with brokers. (2317-18). While the New York office handled the bank accounts and made payments, they would only do so after receiving a check request that was signed by Barry Drayer. (2320).

2. Approval of New Loans

Cottrell testified that when a new loan application came in she would be responsible for running the credit check, which involved using a software package connected to the three major credit bureaus. For the first 10 years she worked at PLS,

Cottrell would simply run the credit and bring the results to Barr Drayer for approval. (2322-23). After Drayer decided to approve a loan, Cottrell or one of the other girls in the office would prepare the loan contracts according to Barry Drayer's instructions. At some point around 1998, Cottrell received the authority to accept or decline loans on behalf of PLS, but Barry Drayer always reviewed the loan documents before sending them to the lenders and the loan documents were prepared according to his instructions. (2324-25, 2328-29). Even after the loan was accepted on behalf of PLS, the loan application materials and contract documents still had to be sent to the funding sources, who had ultimate authority to accept or reject each loan. (2325-26). Cottrell accepted or declined loans based on a criteria provided to her by Barry Drayer. This criteria took into account the credit score but per Barry Drayer's instructions, the type of loan applied for did not matter. Barry Drayer instructed Cottrell to use the same approval procedure regardless of whether the loan involved working capital, new equipment financing or was a sales lease back involving existing equipment. (2327-28). When the loan packages were sent to the lenders, the package always included a cover letter from Barry Drayer explaining the terms of the loan. The cover letter never indicated that the equipment involved in the loan was old or existing equipment, never indicated that the loan was for the purpose of consolidation, and

never indicated that a loan was a sales leaseback involving old equipment. (2331).

3. Loan Documents

Cottrell authenticated a number of different documents she prepared for PLS at Barry Drayer's direction. Cottrell prepared equipment finance agreements (GX 84), the terms of which were supplied by Barry Drayer. (2337) Drayer instructed Cottrell to use the equipment finance agreement on sale leaseback deals (2338).

Another document Cottrell prepared was a Schedule A listing equipment on a loan. Cottrell would receive from the doctor a list of "existing equipment that the doctor had in his office." (2342). She would give the equipment list to Barry Drayer for his review and then type the equipment onto a Schedule A. (2343; GX AB-3A). The Schedule A's were on a template located in the PLS computer system. Cottrell and other PLS employees were involved in putting the Schedule A and other documents onto the computer system at Barry Drayer's direction. (2343-44). The template listed the equipment as "new equipment." (2344). Barry Drayer instructed Cottrell to take the equipment from the doctors' equipment list and put it onto the Schedule A. Drayer never told Cottrell to change the template to remove "new equipment" depending upon what was involved in the loan. (2345). The finished Schedule A was sent out for signature by the doctors

and then forwarded to the banks to obtain funding. (2345). All documents were reviewed by Barry Drayer before being sent to the banks. (2346-348). Cottrell knew the Schedule A's were not a truthful representation because the equipment they listed as new equipment "wasn't new equipment." (2346, 2348). Cottrell included the Schedule As with documents sent to First Sierra and other funding sources because she was told to do so by Barry Drayer. (2346-348).

4. Riteway

Cottrell typed up invoices for Riteway Health Services purporting to show that equipment was sold from Riteway to PLS and shipped to doctors. (2340; GX AB-3C). According to Cottrell, she was not an employee of Riteway, nor was anyone else in her office. Cottrell never met any employees of Riteway. Riteway did not have any physical location that Cottrell was aware of nor did Riteway conduct any business. To Cottrell's knowledge, Riteway did not even exist except on paper, and Riteway did not sell any equipment to PLS that she was aware of. (2340-41). Cottrell never believed that Riteway was a real vendor. (2341).

Cottrell prepared Riteway invoices by taking the list of equipment off the Schedule A. Riteway invoices were located on the PLS computer system in a folder containing PLS business documents. (2350). The template already contained the Riteway header with the phone number and address, and the "Bill to" box

was completed with PLS's address. (2350; GX 82). Cottrell filled in the "ship to" box with the doctors' address. Cottrell never arranged for any equipment to be shipped and to her knowledge, noone at PLS arranged for any equipment to be shipped from PLS or Riteway to any doctors. (2351). Barry Drayer provided Cottrell with the value to put on the Riteway invoice and the total amount always equaled the amount of the loan. (2351). Barry Drayer instructed Cottrell how to prepare Riteway invoices and informed her which deals needed to have Riteway invoices prepared. (2352). Riteway invoices were never sent to doctors. Barry Drayer told Cottrell not to send Riteway invoices to doctors. (2353). To Cottrell's knowledge, noone at PLS ever mentioned Riteway to doctors and none of the documents sent to doctors for their signature mentioned Riteway. (2353). Riteway invoices were not truthful representations because the deals involved existing equipment not new equipment. Cottrell knew it was wrong to send the Riteway invoices to the funding sources but did so because Barry Drayer instructed her to. (2354, 2356).

5. Carefree and MedPro

Carefree was a broker that sent applications to PLS for financing. Carefree was the only broker that prepared their own loan documents. (2357). Carefree used the same types of documents as PLS and Cottrell sent those PLS documents to Stephen Barker. (2357). After the documents were executed, Carefree

would send the executed documents to PLS. When the documents arrived at PLS they would include an invoice from MedPro. (2358; GX AB-1D). Carefree was one of the largest volume brokers PLS used. Cottrell dealt with Stephen Barker at Carefree and had daily conversations with him. Barker told Cottrell he owned Carefree. Cottrell also dealt with Barker's father, two brothers, and wife, who all worked at Carefree, and his secretary, Tallie Jo Bassett. (2358-360).

All of Carefree deals had MedPro as a vendor. Cottrell never saw an invoice from another vendor. Occasionally there were errors in MedPro invoices. Cottrell would contact Stephen Barker to correct such errors. (2361-362; GX AB-1D). Barker appeared to be making the decisions on what to put on MedPro invoices. She would usually receive a new invoice within minutes after contacting Barker. The new invoices were faxed to Cottrell and the header on the fax was from Carefree. There was never a second header and Cottrell saw no indication that the invoice was faxed from MedPro to Carefree and then to PLS. (2363-64). MedPro invoices never came directly from MedPro. According to Cottrell 98 or 99% of Carefree deals included MedPro invoices. MedPro invoices came only from Carefree, and Cottrell never saw a MedPro invoice in the files of any other broker used by PLS. (2364-65). The only other vendor used as much as MedPro was Riteway. (2365-66). Cottrell never saw any indication that MedPro was anything

other than a name. MedPro invoices were treated the same as Riteway invoices – they were never sent to the doctors. (2366).

The inclusion of a vendor invoice in a loan package indicated that the loan involved new equipment being sold to a customer from Riteway or MedPro. (2367). Although MedPro invoices purported to show equipment being purchased by PLS from MedPro ans shipped to doctors, to Cottrell's knowledge, PLS never purchased any equipment from MedPro. After receiving the finalized documents from Carefree, Cottrell would review them and forward them to Crawford & Sons, who would forward them to the community banks. On First Sierra deals, Cottrell would send the documents to the PLS New York office, which would then forward them to First Sierra. (2368-69). MedPro invoices were not truthful representations because the equipment involved was not new. Cottrell understood it was wrong to send these invoices to the banks but did so because Barry Drayer instructed her to. (2369-70). Cottrell never sent out any documents without Barry Drayer's final approval. (2370).

Occasionally the documents Cottrell received from Carefree included a bill of sale. Cottrell did not receive many bills of sale. The bills of sale were never sent to the funding sources. Barry Drayer told Cottrell to put them in the back of the file and not to send them to the banks. (2370-72).

6. Carefree Loan Files

Cottrell authenticated several documents from the files of Carefree loans she handled. First she authenticated two memos in the loan file of Dr. Rosalva Garcia. (2373; GX 50-B). The first memo from Bryn Barker to Barry Drayer dated December 10, 1998 explains that Dr. Garcia "has now purchased a forth practice. The practice is paid for and the equipment is free and clear." (GX 50-B). The memo further stated that Dr. Garcia was looking for $100,000 as a "sale leaseback on the equipment." (GX 50-B). Cottrell verified that a MedPro invoice was included in Dr. Garcia's loan file indicating that equipment was sold to PLS by MedPro and shipped to the doctor. This invoice was not a truthful representation to the banks because the deal was a sale leaseback, "which means the equipment was existing and not new." (2374). The memo from Bryn Barker also stated that Carefree "funded a $100K deal in 7/97 for this doctor. She used the money to purchase her third practice." (Gx 50-B). Cottrell verified that a MedPro invoice was included in Dr. Garcia's 1997 loan file, indicating that new equipment was being sold to PLS from MedPro and shipped to Dr. Garcia. (2376-377). Cottrell knew it was wrong to send this invoice to the bank because the equipment was not new and the doctor used the money to purchase a practice not to finance new medical equipment. (2376-378). Cottrell stated that whenever she received memos from Stephen Barker or

anyone else from Carefree she would put them in the file and give them to Barry Drayer for his review. (2378).

Cottrell also authenticated a memo from Stephen Barker to Barry Drayer dated January 11, 2001, regarding the loan of Dr. Huy Nguyen. (2378-379; GX 85). The memo stated that the "total purchase price on the practice was $50,000" and suggested that "we use $35K as the equipment cost." (GX 85).

7. Conversations With Barker Regarding Banks

Cottrell spoke with Stephen Barker "just about every day" regarding Carefree loans. (2381). She met Barker in 1991 or 1992 when he was working at Centaur Financial, another broker PLS used. Barker had a relationship with PLS for "a good 13 years." (2382-383). In the 15 years Cottrell worked for PLS, PLS funded no more than 12 of its own deals of minimal size. On all the other thousands of loans, PLS received money from outside sources like First Sierra and Crawford & Sons. PLS never funded a single Carefree loan with its own money. (2385). Cottrell had "quite a few discussions" with Stephen Barker about the fact that money for Carefree deals was coming from outside banks and would often "fax him or give him a call and let him know that the banks were requesting additional information." (2386). Cottrell may not have specified which particular bank, but told Stephen Barker that she was submitting the credit applications for Carefree loans to a bank. If one of the community banks requested

additional credit information, Cottrell would let Barker know that the bank had asked for. Cottrell advised Barker that she was submitting this information to the requesting bank. (2387-88). When a Carefree deal was approved by one of the community banks, Cottrell would fax a note over to Barker letting him know that the bank had approved the loan. (2389).

Cottrell testified that Barker would sometimes receive commissions before a loan was funded by the bank, but Barker had to get permission directly from Barry Drayer for any such request. (2389-90). The subject of banks also came up when Barker called asking about a delay in funding. Cottrell would advise Barker that the bank had not funded Professional leasing yet so PLS could not send the money to Carefree. (2390). In the course of her daily conversations with Barker, Cottrell used the word "bank" hundreds of times. Barker never seemed confused by the discussion of banks and never asked why banks were involved in the funding of his loans. Cottrell never attempted to hide from Barker the fact that Carefree loans were being funded by Crawford banks. (2391).

Hundreds of Carefree deals were funded by First Sierra. Cottrell specifically mentioned to Stephen Barker that loans were funded by First Sierra on hundreds of occasions. (2391-92). Barker himself specifically mentioned First Sierra 50 to 75 times in the context of asking whether First Sierra had funded a

particular deal. (2392-393). Cottrell never hid from Barker the fact that First Sierra was funding Carefree deals and barker never seemed confused by the mention of First Sierra. (2394-95). Cottrell also testified that she specifically mentioned AT&T to Stephen Barker as being a funding source for Carefree loans. (2395-96).

8. Wire Transfers to MedPro

PLS paid out loans by sending a wire transfer to a MedPro bank account. Commissions were paid to Carefree by a separate check. Stephen Barker provided the wire instructions for the MedPro account. (2396-397). Barry Drayer authorized the wire transfers to MedPro. Cottrell authenticated a check request form signed by Barry Drayer, which directed a wire transfer to MedPro and the payment of commission to Carefree for a deal involving Dr. Garcia. (2398-399; GX 50-A). The check request stated in bold letters across the top: "Barry's signature only." (GX 50-A). Only Barry Drayer could authorize check requests and wire transfers. (2399-400). Stephen Barker and Barry Drayer arranged for commissions to be paid by a separate check to Carefree. (2401).

9. Verbal Audits

Cottrell conducted verbal audits for PLS by calling the doctors. The ostensible purpose of the verbal audit was to make sure the doctor "understood the agreement, and that he received

his equipment." (2401). Cottrell would fill out and sign a telephone verbal audit sheet at the completion of the audit. (GX-NW-15). The audit sheets recorded answers to, among other things, whether the doctor had "received the equipment," whether the doctor was "satisfied with the equipment" and whether PLS would release payment. (2402-403; GX NW-15). On Riteway deals Cottrell did not ask any questions about the equipment because she knew the doctors already had the equipment in their offices. (2403). Cottrell never mentioned the name Riteway during these calls. The verbal audit sheets were sent to the banks as part of the loan application for the purpose of conveying to the banks that "doctors had received their equipment, and they were satisfied with it." (2403). These were not truthful representations on deals involving Riteway invoices because the doctors had not received any new equipment. (2404). Barry Drayer told Cottrell that on Riteway deals she did not need to ask the questions regarding equipment because she already knew the doctors had the equipment. (2405).

Cottrell also conducted verbal audits on MedPro deals using the same type of verbal audit sheet (GX 118-E). On these verbal audits, Stephen Barker would call the doctor and arrange for a three-way call. (2406-407). As with Riteway deals, Cottrell did not ask any of the questions regarding equipment because she knew the doctors already had the equipment and it was

not new equipment. The purpose of sending the verbal audit sheets to the banks was to convey to the banks that doctors had received their equipment from the vendor (i.e. MedPro) and were satisfied with the equipment. Cottrell knew the verbal audits were not truthful representations on MedPro deals but sent them to the banks anyway because she was instructed to do so by Barry Drayer. (2407-408). Cottrell conducted hundreds of verbal audits with Stephen Barker on MedPro deals. In those hundreds of verbal audits neither Cottrell nor Barker ever mentioned the name MedPro. (2408-409).

10. Delivery & Acceptance Receipts

As part of her job at PLS, Cottrell prepared delivery & acceptance receipts for loan packages. The delivery & acceptance receipts purported to certify that equipment involved in a particular loan had been "delivered, inspected, installed, is in good working condition, and accepted by the undersigned [doctor] as satisfactory." (2411; GX Ab-5C). Delivery & acceptance receipts were included in both Riteway and MedPro deals. Cottrell prepared the delivery & acceptance receipts on Riteway deals. Carefree prepared the delivery and acceptance receipts on MedPro deals. (2410-411). As per Barry Drayer's request, delivery & acceptance receipts were included in the package of documents sent to the funding sources on Riteway and MedPro deals. Cottrell did not believe the delivery & acceptance

receipts were truthful representations because on Riteway and MedPro deals the equipment was not new and thus had not been delivered, inspected and accepted by the doctors. (2411-412). Barry Drayer instructed Cottrell how to prepare delivery & acceptance receipts and directed her to include them among the documents sent to the funding sources. (2412).

11. Checks to Riteway and MedPro

Cottrell testified that First Sierra required proof of payment to the vendor such as a copy of the check from PLS to the vendor. PLS would write checks purporting to pay Riteway but the checks would not be negotiated. To Cottrell's knowledge, First Sierra was never informed that the checks were not negotiated. (2417-418). PLS also wrote checks purporting to pay MedPro for the same purpose - "to show the bank that Professional Leasing was cutting a check to the vendor." (2418).

12. Complaints From Doctors

Cottrell testified that she received complaints from doctors that their loan had been paid off and the doctors were still being invoiced or that the doctors never received their money. She passed these complaints on to Barry Drayer, informing him of the substance of the complaints. Prior to 2000, the complaints were few and far between but by the end of 2001, Cottrell was receiving complaints every day. Barry Drayer and PLS continued to apply to funding sources for money on new deals

even after Cottrell began giving these complaints to Barry Drayer. (2418-2420).

13. Dr. Wayne Williams

Cottrell authenticated several documents from the loan file of Dr. Wayne Williams, an account she handled. Cottrell explained that the loan was supposed to be a debt consolidation and Dr. Williams was using the proceeds to pay off his accumulated debts. A memo in the file from Alison from the PLS New York office was a tally of Dr. Williams' debts that he wanted to consolidate. (2420-421; GX 118D). Cottrell also prepared a list of Dr. Williams' creditors and how much was owed (2421-22; GX 118D). Cottrell authenticated a number of check requests in the Williams file that bore Barry Drayer's signature and authorized transfers from PLS to various creditors including MBNA, AMA Insurance Agency, Ford Credit and Home Depot. (2422-423; GX 118A). Cottrell testified that the Williams file also contained a MedPro invoice (GX 188G), which she received from Carefree and sent to the bank at Barry Drayer's direction. The MedPro invoice was not a truthful representation because the doctor was applying for a debt consolidation loan not a new equipment financing. (2423-424). Cottrell also conducted a telephone verbal audit with Stephen Barker and Dr. Williams during which the name MedPro was never mentioned. (2424-425; GX 118E).

14. HSMT

Cottrell was familiar with HSMT because it had multiple loans with PLS that were approved by Barry Drayer. Cottrell authenticated a number of agreements and Riteway invoices she prepared for HSMT loans, several of which were signed by Barry Drayer. (2426-428; GX PB2, AB-3A - AB-3C, PB3, NW14). Barry Drayer instructed her to prepare Riteway invoices for these loans. (2428).

Cottrell's original understanding, as conveyed to her by Barry Drayer, was that HSMT was a medical clinic in Tennessee. (2429). Cottrell authenticated a memo she typed up from Barry Drayer to Dan Ciocca at First Sierra, which concerned an HSMT loan with First Sierra. (2430-31; GX 81) The memo stated that the purpose of the doctors forming HSMT "is to take advantage of the need for a clinic in the area." (GX 81). Cottrell later discovered that HSMT was a hotel not a medical clinic. The company Cottrell arranged to verify the equipment informed her that the location was a hotel and the company could not get in to all of the rooms to check the equipment because they were occupied. (2431). Cottrell advised Barry Drayer of this information and he responded that he would take care of it. Barry Drayer gave final approval for the HSMT loans even after Cottrell informed him that HSMT was a hotel. (2432). Cottrell sent Riteway invoices to the banks on HSMT loans both before and

after finding out that HSMT was a hotel. The invoices were not true because they represented that the deal involved new equipment for a medical clinic. PLS did not sell any medical equipment to the hotel. (2333-34). To her knowledge, Barry Drayer never informed First Sierra that HSMT was a hotel and not a medical clinic. (2434-435). Cottrell was not aware of any other occasion in which PLS arranged financing for a hotel. (2435).

Cottrell also testified concerning two memos she discussed with Barry Drayer regarding HSMT. The first memo (GX 67) was received by Cottrell from the PLS New York office and listed a recap of HSMT accounts. According to the first memo, HSMT had 17 loans with PLS in the total amount of $2,343,140.15. As of the date of that memo, PLS had received the $2.3 million from the banks but had paid out only $650,000 to HSMT. (2435-439). The second memo (GX 65) was a memo that Cottrell typed up from Barry Drayer to Rochelle Besser dated April 2, 2001. Cottrell confirmed that as of that date, PLS had paid out only $650,000 to HSMT. Cottrell was concerned that HSMT had not received all of its money despite the fact that PLS had been funded by the banks, but Barry Drayer told her he would take care of it. (2440). Drayer never got back to Cottrell regarding this issue and to Cottrell's knowledge, PLS never paid out any additional money to HSMT. (2439-441).

E. Lynn Walker

Lynn Walker, a former PLS employee, testified pursuant to a nonprosecution agreement. (GX 92). Walker was responsible for customer service and collections at PLS. (2185). As part of her collections duties Walker would contact delinquent doctors and would personally receive payment checks. Walker was able to view payments received by dialing into the First Sierra database through PLS's computer system. (2190-191). Walker was supposed to record any payments that came in on the First Sierra database as well as on a handwritten daily check list. However, Barry Drayer instructed Walker that whenever she received a large check Walker was *not* to record the payment on the First Sierra computer. Drayer instructed Walker to send those checks to the PLS New York office and have Rochelle Besser call him regarding the check. (2192-193). When doctors called to prepay loans, Drayer instructed Walker to have the doctor send the payoff check to the PLS Massachusetts office rather than the bank. Drayer also instructed Walker not to record the payoff checks on the First Sierra computer system. (2194-195). Walker followed Drayer's instructions for approximately 100 payoff checks. When a doctor prepaid a loan, PLS was supposed to send the money to the bank or First Sierra. (2196-197). Walker could see from records in the PLS computer system that PLS did not always send the money to the funding source when doctors prepaid. Instead,

PLS would keep the money in-house. (2197-201). When PLS did keep the money on prepaid loans, PLS would make monthly payments to the funding source on those accounts. (2198).

Walker was also responsible for contacting delinquent doctors when their loan payments were past due. (2201). She sometimes received notification that doctors had gone bankrupt. From reviewing PLS files on these bankrupt accounts, Walker observed that PLS continued making monthly payments on some bankrupt accounts and did not always notify the banks that the doctor had gone into bankruptcy. (2202-203).

One of Walker's customer service responsibilities was to handle complaints from doctors. In the first few years Walker worked at PLS she received very few complaints. She received less than 50 complaints from approximately 1996 to 2000. From 2001 to early 2002 complaints began coming in every day. (2203-204). Walker received complaints from doctors that they were getting collection calls and overdue invoices on leases that the doctors had already paid off. She passed these complaints on to Barry Drayer along with the loan paperwork from the doctors' file. (2204-205). During the last two and a half years Walker worked at PLS she forwarded to Barry Drayer a number of complaints from doctors who had cancelled loans or never received the proceeds on loans but were being invoices. PLS continued to apply to funding sources for new financing even after Walker

began giving these complaints to Drayer. (2206-207). From reviewing the file, Walker could tell that the doctors had not received their money. (2207).

Over the last two to three years at PLS, Walker also informed Drayer of over 75 complaints from doctors who had prepaid their loans but continued to be invoiced from banks. On many of these deals Walker had herself personally received the prepayment checks but knew from PLS records that PLS had kept the money in-house and did not send the prepayment to the bank. (2210-212). Walker would refer these complaints to Barry Drayer and provide him with a copy of the doctor's payoff check. (2212-213).

Walker testified that Susan Cottrell created invoices for Riteway Health Services. Walker called the phone number listed on Riteway invoices and heard Roger Drayer's voice. According to Walker, Barry Drayer instructed her not to send Riteway invoices to doctors. On one occasion Walker sent an invoice by mistake. Drayer and Cottrell told her never to do that again. (2214-215).

In June of 2002 Walker contacted the FBI and provided them with a deal number for an account where a doctor had paid off the lease but PLS kept the money. (2217-218).

Walker testified that PLS maintained accounts at Mailboxes etc., which were managed by Roger Drayer. Walker

further testified that she was responsible for sending address change information to AT&T by fax and input address changes into First Sierra's computer database. Roger Drayer asked her to input address changes for doctors who had paid off their leases. The addresses were changed to post office boxes. (2222). Walker changed approximately 100 addresses – all for accounts that had been paid off by the doctors. (2223-224). Barry Drayer told Walker that Roger Drayer "was going to be faxing over address changes and to just do them." (2224). Roger Drayer sent her lists of addresses to change and instructed her to only change a few at a time. (2225). Walker understood that the purpose of changing the doctors' addresses to mailbox accounts was to prevent the doctors from being invoiced. The addresses were changed without the doctors' knowledge. (2225).

Walker also testified concerning Dr. Forest Roach, a doctor who leased medical equipment from PLS. (2225). Dr. Roach prepaid his loan in 2001 and sent the check to Walker. Six months after Dr. Roach paid off the loan Walker received a call from Dr. Roach's family. Walker informed Barry Drayer that Dr. Roach had paid off the loan and had since died. Walker informed Barry Drayer that Dr. Roach's widow was receiving invoices on the loan from the bank. (2226-227). Although Walker showed Drayer a copy of Dr. Roach's prepayment check, Drayer informed the doctor's widow that PLS needed her to send a copy of the payoff

check before the lease would be closed. At the time Barry Drayer made this call, a copy of Dr. Roach's payoff check was already in front of him. (2227-228).

F. Frank Zambaras

Frank Zambaras, a former employee of PLS, testified pursuant to a non-prosecution agreement. Zambaras testified that he began working part-time at PLS as a consultant providing computer assistance in 1992 and worked at PLS for 10 years in the New York office. (180-81). Over the course of his employment Zambaras began to take on greater responsibilities in sales. (182-83). Rochelle Besser managed day-to-day operations in the New York office. Barry Drayer was the de facto president of PLS and made all the real decisions. Barry Drayer was responsible for negotiating relationships with banks and placing loan transactions with the appropriate lenders. Drayer also ran the Massachusetts office of PLS, decided whether to approve or decline loans, dealt with the funding sources, and made the ultimate decisions on how the company operated. (188-89). Rochelle Besser and Roger Drayer would not make any decisions without first consulting with Barry Drayer. (189).

Zambaras worked in sales for approximately five years and brokered new loans for a commission. Barry Drayer approved doctors for new financing. (205). PLS did not fund the loans themselves, but obtained funding from outside lenders such as

First Sierra and AT&T Capital. (206). PLS offered equipment leases, working capital loans and sale lease back loans. A sale lease back involved a physician selling their existing equipment to PLS and then paying a monthly fee to maintain control over the equipment. Working capital loans where there was no specific itemized collateral were harder to obtain financing for. (207-09).

During the time Zambaras worked for PLS Roger Drayer asked him to alter payment checks from doctors to PLS. Zambaras would alter the amount on the checks, the dates on the checks and check numbers by scanning the checks into a computer and using digital imaging editing software to make the alterations. Roger Drayer would supply Zambaras with the checks to be altered with a note affixed to them as to what modifications he wanted on the checks. (211-212). Roger Drayer told Zambaras that there was nothing wrong with the alterations because the checks were not being presented for payment. (213-14). Zambaras stopped altering checks and told Roger Drayer that he didn't want to be part of check fraud. Roger Drayer was not happy and told Zambaras he would talk to Barry Drayer about it. Approximately a month after this conversation, Roger Drayer pleaded with Zambaras to alter some mor checks and stated that it would be a "personal favor to Barry." (214-15). Zambaras agreed to alter the additional checks. A month later, Roger Drayer asked Zambaras if he was not

willing to alter any additional checks would he be willing to share with Roger Drayer the procedure for doing so. Zambaras explained to Roger Drayer that he should scan the checks and could modify them on the computer using Corel Photo Paint. (216).

In July of 2001, Zambaras was present during a meeting with representatives from First Sierra at the New York offices of PLS in which First Sierra was to conduct a review of the accounts at PLS. Prior to the meeting, Zambaras was given instructions by Roger Drayer. Drayer explained to Zambaras that PLS had prepared "an additional set of records for this visit for audit." Zambaras was told that if he was "asked to pull up any physicians lease accounts, rather than going into the normal screens," Zambaras should "go into a duplicate set of records and present what I assume was altered information." (217-18). Zambaras examined the duplicated database and found that it varied from the company's actual records in that the duplicated records contained payments that had not been made and gave the impression that delinquent accounts were in fact current. (218-19). When Zambaras was asked to show First Sierra representatives account records for specific doctors, Zambaras ignored the instructions of Roger Drayer and provided the original, unmodified information. (220). After being shown this information, one of the First Sierra representatives accused Barry Drayer of misappropriating their money and using the proceeds of these

loans as his personal checkbook. Roger Drayer was "very irate" with Zambaras for failing to follow his instructions in presenting the altered information to First Sierra. (221). Shortly after the audit, First Sierra stopped their relationship with PLS and PLS appeared to have a difficult time funding new loans. (222-23).

While working at PLS, Zambaras heard the name Riteway Health Services and believed it was owned by some of the same people operating PLS and held out as an equipment vendor selling tangible equipment to physicians. (224). Zambaras was asked by Roger Drayer to record a telephone answering greeting for Riteway but was not an employee of Riteway and never met any employees of Riteway. (225). After Zambaras recorded the greeting he said something to the effect of "I hope this isn't one of your bogus companies," to Roger Drayer, who subsequently informed Zambaras that a bank had called the Riteway number and heard Zambaras's comment at the tail end of the greeting. (225). Zambaras called the Riteway number sometime after that and discovered that his message had been replaced by a new message with Roger Drayer's voice. (226).

Zambaras began looking into loan files and found invoices from Riteway in folders where no equipment transaction should have been such as working capital loans. (226-27). The invoices purported to show equipment being sold from Riteway to

the doctors and PLS being invoiced for the equipment. Zambaras found such invoices in files he had closed which were working capital loans, meaning that PLS "was misrepresenting the character of the transaction with their funding source." (231-32). He also found a set of folders labeled mailboxes etc. (227, 232). By looking at these files, Zambaras found that PLS had leased mailboxes in cities near some of the medical practices that had taken out financing with PLS. Physicians' addresses had also been modified in the computer system so that any bank that was looking to send mail to the physician was instead sending it to these mailbox addresses. (232-33).

Approximately two months prior to ending his with relationship with PLS, Zambaras contacted the FBI. (236). Zambaras provided the FBI with certain documents he had taken from PLS including copies of altered checks and some of the mailbox etc. files. (239). According to Zambaras, "one of the straws that broke the camel's back" and prompted his decision to contact the FBI was the loan of Dr. Jeffrey Quitman. (247). Dr. Quitman applied for a $450,000 loan in order to relocate and purchase the practice of another physician. (240). After Dr. Quitman had executed the loan documents and returned them to PLS, Zambaras received a call from Dr. Quitman's relative prompting him to cancel the loan. Zambaras explained to Roger Drayer that Dr. Quitman was involved in a serious car accident and was unable

to complete the transaction. (243-44). Zambaras later discovered that PLS had not cancelled Dr. Quitman's loan when he received a call from the Dr. expressing surprise that he had been billed for the loan. Zambaras looked at PLS records and found that PLS had funded the loans instead of cancelling them. None of the money was ever provided to Dr. Quitman, but rather, it went into PLS's bank account. (245). Zambaras communicated this information to Roger Drayer who offered Zambaras a commission for the loan and said he would discuss the situation with Barry Drayer. (246). Zambaras was "appalled" by PLS's response.

G. Tallie Jo Allen

Tallie Jo Allen testified that she worked at Carefree Financial Services from June of 1999 through April of 2002.[2] She was interviewed for the job by Stephen Barker. (1026). Prior to working at Carefree, Allen had no experience in the financial industry. (1027). Carefree was operated out of a small office next door to Stephen Barker's home in San Juan Capistrano, California. Stephen Barker's father, Tony Barker, performed various office duties at Carefree. Stephen Barker's brothers Bryn Barker and Evan Barker processed loans at Carefree. (1027-28). Allen answered the phones, and typed up loan paperwork at Carefree, reporting directly to Stephen Barker. According to

[2] Allen was recently married. While she was employed at Carefree, she was known by her maiden name Tallie Jo Bassett. (1025).

Allen, Stephen Barker owned and operated Carefree, and controlled the bank accounts for the company. Only Stephen Barker had check signing authority. (1029).

Approximately 100 percent of Carefree's business was done with PLS. Allen could not remember a single loan with another company during her tenure at Carefree. (1029-30). Allen dealt primarily with Susan Cottrell at PLS and communicated with her daily by telephone and fax. During the course of her conversations with Cottrell, the subject of banks would come up, usually when PLS was waiting on a bank before it could fund loans to Carefree. (1030-31). Based on these conversations, Allen was aware that banks were involved in Carefree loans with PLS. (1031).

Allen would prepare loan documents and send them to doctors for execution. At Stephen barker's instruction, Allen sent a cover letter along with the documents which instructed the doctors not to date the documents. (1031-34; GX CC-5). Allen prepared lease agreements according to the direction of Stephen Barker. She would receive the information from Stephen, Evan or Bryn Barker and type the information into the contract. (1035). She would also prepare Schedule As by using a list of equipment provided by the doctor. The equipment from the list would go on the Schedule A, which was a template contained on the Carefree computer. (1036). Stephen Barker instructed Allen how to prepare

the Schedule As. Allen did not know whether the equipment list provided by the doctor listed new equipment or equipment already owned by the doctor, but all of the Schedule As listed the equipment under the heading "new equipment description." (1036-37; GX AB-1A). Allen was never instructed to change the template because the equipment involved in the deal was not new equipment. Allen would send out blank Schedule As for the doctors' signatures if Carefree had not received an equipment list from the doctor. In those cases, the equipment would be filled onto the Schedule A after the doctor had signed the blank document and sent it back to Carefree. (1038).

Stephen Barker directed Allen to prepare invoices for a company called MedPro Equipment Company. Allen was not an employee of MedPro and never met any employees of MedPro. (1038-39; GX CB-2). Stephen Barker instructed Allen how to prepare the MedPro invoices. The MedPro invoice was created by inserting the equipment from the Schedule A into a computer template. The MedPro invoices were located in a computer folder which contained Carefree business documents. (1039-40). Allen created approximately 200 MedPro invoices, which were sent to PLS along with the rest of the loan paperwork. (1040-41). Every deal involving equipment needed to have a MedPro invoice. If there were mistakes in an invoice, Allen would correct it and send a new invoice to PLS. She did not need to contact anyone from

MedPro to make changes on an invoice. If she ever had any questions regarding MedPro, Allen would talk to Stephen Barker. (1041). Allen never received a call from a doctor asking about MedPro and never mentioned the name MedPro to any doctors. (1041-42). MedPro invoices were not signed by doctors and were never sent to the doctors. (1042-43).

Allen also created documents known as bills of sale, but did not send those documents to PLS. According to Allen, she had a conversation with someone at Carefree about not sending bills of sale to PLS. (1044).

Allen was not aware of any address for MedPro other than the P.O. Box listed on the invoice. (1044; GX CB-2). She was not aware of any building where MedPro was located, or any physical location. (1045). When she filled in the customer order number on the invoice she simply used the next number in sequence. She never took any customer orders for equipment and was not aware of anyone else in the office taking equipment orders from customers for MedPro. (1045). MedPro invoices were always billed to PLS. (1045-46). Allen added the doctor's address in the "ship to" box on the MedPro invoices, but never arranged for any equipment to be shipped from MedPro to the doctor, nor was she aware of any equipment being shipped. The equipment description on the invoice was provided by the doctor not MedPro. (1046; GX CB-2). Sometimes Allen would receive

invoices from other vendors showing that the doctors had purchased equipment from another vendor and not MedPro. This equipment was still put on MedPro invoices. (1046).

The notation for "salesperson number 32" on MedPro invoices was part of the template Allen was instructed to use. (1047; GX CB-2). Carefree did not have 32 salespeople. The total amount for the invoice was provided to Allen by Stephen, Evan or Bryn Barker. The value on the invoice always equaled the amount of the loan. (1047-48; GX CB-2). Allen was provided only with the total. To calculate the subtotal and sales tax she would take the percentage of the sales tax and back it out of the total to arrive at the subtotal. (1048). To fill out the "quantity shipped" and "quantity ordered" columns of the MedPro invoice, Allen used the same number as the equipment list provided by the doctor. (1048; GX CB-2). Stephen Barker instructed Allen to use the same numbers for both columns. Allen did not have to check to make sure the same quantity of items were shipped and in the hundreds of MedPro invoices she prepared, the quantity shipped always equaled the quantity ordered. (1048-49).

Stephen Barker directed Allen to answer a phone line for MedPro. The phone was located at her desk in the Carefree office but was a separate line. Barker instructed Allen to answer that phone line "Good afternoon, MedPro." (1049-50).

Allen received calls on the MedPro line from people asking for various medical equipment approximately once a week. She was instructed by Stephen Barker to "say that we didn't have the equipment." (1050). Allen never had to check to see if MedPro had the particular equipment the caller was seeking. She was never aware of any equipment actually owned by MedPro. Allen never saw a list of equipment that MedPro sold or an inventory of the type of equipment MedPro supplied. There was never any equipment stored in the office and Allen never saw any reason to believe that MedPro had a warehouse where equipment was kept. In the two-and-a-half years Allen answered the MedPro phone line, there was not a single occasion where MedPro could supply the equipment being asked for. (1051).

From this testimony, the jury was entitled to infer that although Stephen Barker attempted to hold MedPro out as a medical equipment vendor (the invoices, the phone line, etc.), it did not in fact sell any medical equipment and was nothing more than a sham company with no employees, no equipment, and no purpose other than to pump out false invoices.

II. BORROWERS

A. Dr. Joseph Carbone

Dr. Joseph Carbone, a dentist, testified that he moved from Rhode Island to Sarasota, Florida in May 2000. (Tr. 1/19/06 at 142-43). In May 2001, he purchased a dental practice in

Sarasota. (144 & 153). Dr. Carbone contacted Carefree for financing in the amount of $65,000 to purchase the Sarasota practice, plus $10,000 in working capital to maintain his Rhode Island practice until it could be sold. (144-45 & 148). According to Dr. Carbone, the $65,000 was to purchase "number one, goodwill, which is the patients and the records; number two, three laboratories of existing equipment and supplies, obviously the waiting room, administrative office, back office furniture and what not." (145). Dr. Carbone explained this purpose to Carefree. (146-47).

Dr. Carbone received and filled out an application packet from PLS; however, he did not read the documents before signing them. (147 & 154-55). Among the documents he signed were a Schedule A listing and falsely describing as "new" the equipment already in existence at the Sarasota practice, and a delivery and acceptance receipt which falsely verified that the equipment had been delivered, inspected, installed, and was in good working condition. (GX JC-5 & JC-7; 155-57). As Dr. Carbone stated, these documents were false because "[a]ll the equipment was preexisting." (157). The loan file for Dr. Carbone contained a Medpro invoice (GX JC-9) listing the very same equipment, but Dr. Carbone had never seen it before. Nor had he ever purchased equipment from Medpro, or authorized anyone to generate an invoice representing that he had done so. (157-58).

From this testimony, the jury was entitled to infer that the lender had been falsely led to believe that the purpose of Dr. Carbone's loan was to purchase new medical equipment from Medpro, when in fact he intended to buy an existing dental practice.

B. Dr. Keith Collins

Dr. Keith Collins testified that, while he was a dentist in Arizona, he obtained several loans from PLS beginning in 1995. (1677-78). In 2000, Dr. Collins refinanced his PLS loans through a separate lender. (1682). The new lender paid off Dr. Collins' loans to PLS. (1683). Sometime later, Dr. Collins received a billing inquiry from a lender on one of the PLS loans that had been paid off. (1683-84). Dr. Collins told the lender that his loan had been paid off, and the lender stopped billing him. (1684).

When showed a Riteway invoice (GX AB-5D) from the Alliance Bank loan that Dr. Collins had received through PLS, Dr. Collins said that he had not received this invoice in connection with his loan. He further stated that the invoice, dated in 1998, listed equipment that was already in his office at the time of the loan, including a laser machine that he had purchased in 1993 or 1994. (1685-86).

C. Dr. Kodihalli Channabasappa

Dr. Kodihalla Channabasappa testified that he was a cardiologist in Tennessee, and a partner in Hospitality Services of Middle Tennessee ("HSMT"). (1695-96). HSMT owned a hotel in Tennessee. (1696). HSMT was not in the medical business, and was not authorized to operate a medical practice. (1699). HSMT did not borrow money from PLS. (1699). When shown loan documents purporting to show that HSMT had borrowed money from PLS (GX AB-3A; GX AB-3B), he stated that his signature and his brother's signature (another partner in HSMT) had been forged. (1701-02). When shown a Riteway invoice from the loan file (GX AB-3C), purporting to show that medical equipment had been shipped to HSMT, Dr. Channabasappa testified that the hotel did not have any medical equipment or medical facility. (1703-04).

In addition, Dr. Channabasappa was shown a series of Riteway invoices found in the files of a variety of lenders on HSMT loans. Dr. Channabasappa confirmed that there were duplicate invoices in different lenders files. (1705-1712).

In early 2002, Dr. Channabasappa and his partners in HSMT received mail from banks regarding these unauthorized loans. (1712). The witness called the attorney for the bank, who referred the witness to Barry Drayer. (1712-13). Dr. Channabasappa called and told Barry Drayer that HSMT had not received any medical equipment, and asked Drayer to send the

paperwork to Dr. Channabasappa. (1714). Drayer gave no explanation, and did not forward any documents to the witness. (1714-15).

D. Prabhakar Pallapothu

Prabhakar Pallapothu, an accountant for the state of Tennessee, testified that he was an investor in HSMT. (1772-73). HSMT developed a hotel (1773), and did not operate a medical practice. (1775). Nor was HSMT authorized to borrow money from HSMT. (1775-76). When shown loan documents between HSMT and PLS, Pallapothu stated that his signature and his cousin's signature (another partner in HSMT) had been forged. (1778-80; GX AB-3B). When shown a Riteway invoice from the loan file (GX AB-3C), Pallapothu stated that HSMT did not order medical equipment from Riteway and had no reason to do so. (1784-85).

E. Dr. Eve Ann James-Wilson

Dr. Eve Ann James-Wilson, a dentist, testified that she applied for financing in 2001, seeking a "consolidation loan" to consolidate credit card debts and other loans she had amassed from the purchase of an existing dental practice and dental equipment. (383). Although she applied initially to a company called Bankers Healthcare, the loan contracts and other paperwork was with PLS. Dr. James-Wilson executed loan documents for two $50,000 loans with PLS. (287-90; GX EJW-2 - EJW-8). Dr. James Wilson was instructed by PLS not to sign the documents. (391-92).

The equipment listed on the loan documents was existing equipment Dr. James-Wilson already owned; she did not purchase any new equipment as part of her deal with PLS. (398-99). Dr. James-Wilson executed all of the documents for the two loans but did not receive any of the $100,000. (400). She contacted PLS and was able to speak with Barry Drayer, who said there was a technical difficulty but that her money should be deposited in her account within the next week. (401). Dr. James-Wilson stated that she called PLS and left messages for Barry Drayer five or six times in February and March of 2002 before she managed to speak with Drayer. (401-02).

Although she never received any money from PLS, Dr. James-Wilson was billed for the two loans by Alliance Bank and Bank of Taney County. (402-405; GX EJW-10, EJW-11). Dr. James-Wilson attempted to contact Barry Drayer seven or eight times regarding the fact that she was being billed for loans that she never received, but despite leaving detailed messages, Drayer never called her back. (406-07). Dr. James-Wilson eventually received two letters from PLS, signed by Barry Drayer, stating that PLS was "solely responsible for all obligations" for both of her loans. (408-410; GX EJW-12). Dr. James-Wilson subsequently received two additional letters from PLS to Bank of Taney County and Alliance Bank, stating that Dr. James-Wilson's loans "have

not been funded" and further stating that PLS remained liable for the outstanding obligations. (410-13; GX EJW-13).

From this testimony, the jury was entitled to infer that PLS had obtained funding from two lenders for Dr. James-Wilson's loans but never paid the proceeds out to Dr. James-Wilson.

F. Dr. Tim Silegy

Doctor Tim Silegy, an oral and maxillofacial surgeon, testified that he applied for financing from Carefree Financial in 2000. Dr. Silegy explained that he was seeking working capital because he had just started a new office in Long Beach, California and needed reserve cash. (1178-79). Dr. Silegy dealt with Bryn Barker from Carefree and set up two loans - a $50,000 working capital loan and an additional $25,000 loan. After receiving the proceeds for the loans, Dr. Silegy canceled the $25,000 loan and sent a check for $25,000 back to PLS. (1186, 1188-91). Sometime later, Dr. Silegy received a billing inquiry from Alliance Bank requesting payment on the cancelled loan. (1191-92, 1194-95). At the time, Dr. Silegy was confused and believed Alliance was asking for payment on the $50,000 working capital loan he had received. He told the lender that he was already making payments on the loan to American Express. (1193-94).

When showed a MedPro invoice (GX AB-1D) from the Alliance Bank loan that Dr. Silegy was billed for but had never received, Dr. Silegy stated that he had not received this invoice in connection with his loan. He further stated that the invoice listed equipment that was already in his office at the time of the loan, including equipment he had brought from an earlier practice in Colorado, and it was never purchased from MedPro as part of the loan deal. (1181-84).

From this testimony, the jury was entitled to infer that the lender had been falsely led to believe that the purpose of Dr. Silegy's loan was to purchase new medical equipment from Medpro, when in fact the equipment listed on the invoice was old equipment the doctor already owned. The jury was also entitled to infer that PLS had obtained funding from the lender for Dr. Silegy's $25,000 loan and never refunded the money to the lender even after Dr. Silegy cancelled the loan and sent the proceeds back to PLS.

G. Dr. Anita Srinivasa

Dr. Anita Srinivasa, an internist, testified that she applied for financing from Carefree Financial in 2001 to purchase an existing medical practice in Thousand Oaks California. (1265-66). Dr. Srinivasa dealt with Stephen Barker at Carefree and arranged for two loans: a $50,000 working capital loan and a $55,000 equipment loan. (1266). According to Dr. Srinivasa, the

$105,000 was to purchase an existing medical practice and old equipment that was already present in the office of the practice. Dr. Srinivasa received and filled out an application packet from PLS. Dr. Srinivasa was instructed by Stephen Barker not to date any of the loan documents. (1267).

Dr. Srinivasa testified that she received the $50,000 for the working capital loan, but never received the proceeds for the $55,000 equipment loan. Despite never receiving the proceeds from the loan, Dr. Srinivasa received invoices from Crown Bank Leasing seeking payment on the equipment loan. (1275). She contacted Crown Bank Leasing and informed them that she had never received the loan and was able to resolve the issue after five or six months. (1276-77). During that time, Dr. Srinivasa was unable to get in contact with anyone from Carefree or PLS to resolve the problem. (1277).

When showed a MedPro invoice (GX CB-2A) from the Crown Bank loan that Dr. Srinivasa was billed for but had never received, Dr. Srinivasa stated that she had not received this invoice in connection with her loan. She testified that the invoice was false because she did not purchase any new equipment from MedPro as part of the deal, and the equipment listed on the invoice was existing equipment in the office that she was purchasing not new medical equipment. (1268-71).

From this testimony, the jury was entitled to infer that the lender had been falsely led to believe that the purpose of Dr. Srinivasa's loan was to purchase new medical equipment from Medpro, when in fact she intended to buy an existing medical practice. The jury was also entitled to infer that PLS had obtained funding from the lender for Dr. Srinivasa's $55,000 loan and never sent the proceeds to Dr. Srinivasa.

H. Dr. Carey Chronis

Dr. Carey Chronis, a pediatrician, testified that he applied for financing from Carefree Financial in 2001 to start a new medical practice. (1289). Chronis dealt with Bryn Barker at Carefree, which he had heard about through an ad in the back of a medical journal. Chronis set up a loan of $150,000, of which $50,000 was for working capital money that Chronis could use to survive on until his practice started to pick up, $50,000 was for the construction and build-out of Chronis's new office space, and $50,000 was for the purchase of equipment to furnish the practice. (1289-90). Chronis received and filled out three separate applications for the loans. Among the documents he signed were blank Schedule As (GX CC-15), which Dr. Chronis signed without any equipment listed on them. (1293). When shown Schedule A's from his loan file listing equipment, (CC-2) Dr. Chronis testified that he purchased the equipment from various vendors but none of the equipment was purchased from MedPro.

(1294-95). Dr. Chronis was show a MedPro invoice (GX 116) and stated that he never received the invoice and did not purchase any of the equipment listed on the invoice from MedPro. (1296).

Dr. Chronis testified that Bryn Barker explained that because the financing was coming from a bank that would rather deal in lot sizes of millions of dollars, his loan would be packaged together with other loans from other physicians. (1301).

I. Dr. Rosalva Garcia

Dr. Rosalva Garcia, a dentist, testified that in July of 1997 she applied for financing from Carefree Financial in order to purchase a dental practice in Pomona. (1214-15). Dr. Garcia applied for $100,000 and dealt with Stephen Barker at Carefree. (1215). The $100,000 was to be used to purchase an existing practice, including old equipment already in the office. (1217). When showed a MedPro invoice (GX 129) for that loan, Dr. Garcia stated that she had not received this invoice in connection with her loan. She further stated that the invoice listed equipment that was already in the office at the time of the loan, and that she had never purchased any new equipment from MedPro. (1218-20).

Dr. Garcia further testified that in December of 1998 she applied for additional financing from Carefree Financial in order to purchase a computer system for her four dental offices. (1221). Dr. Garcia applied for $100,000 and dealt with Stephen

Barker at Carefree. (1221-22). The $100,000 was to be used to install a specialized computer system designed by a computer engineer that makes software specifically for dentists. When showed a MedPro invoice (GX 127) for that loan, Dr. Garcia stated that she had not received this invoice in connection with her loan. She further stated that the invoice was false because she did not purchase the equipment from MedPro. (1223-24).

Dr. Garcia initially testified that did not apply for a loan from Carefree or PLS in 2002. (1225-32). She subsequently testified that she did apply for a loan from Carefree in 2002 but cancelled the loan and never received the proceeds. (1258). After the loan was cancelled, Dr. Garcia received a bill from Crown Bank Leasing seeking payment on the loan. (1258-59).

J. Kathleen Boyer

Kathleen Boyer, a business manager and partner in the dental practice of Dr. David Goren and Village Dental Center, testified that she applied for financing from PLS on several occasions. She dealt directly with Barry Drayer at PLS. (1324-25). In 1998, Boyer obtained financing from PLS for the purchase of telephone equipment for Dr. Goren. (1325-26). Subsequently, in 1999, Boyer arranged a new lease with PLS that was supposed to merge with the balance of the old lease. According to Boyer, the original lease from 1998 was supposed to be voided, as the balance was added on to the new 1999 lease. (1327-29). When PLS

attempted to bill Boyer for the original lease in September of 2001, Boyer had a conversation with Barry Drayer, who informed her that the bill was a mistake and that he would take care of it. (1330-33). In April 2002, however, Boyer received an invoice from FirstBank and Trust seeking payment on the original lease that should have been voided. (1333-34; GX DG-21). Boyer attempted to contact Barry Drayer but was unable to do so. (1337-38).

Boyer also testified that in 2000, she applied for equipment financing from PLS on behalf of Dr. Goren. After executing the paperwork for the lease, however, the equipment order was changed and Boyer negotiated a new lease several months later. The original lease was voided and should never have funded. (1339-41). Nevertheless, in March of 2002, Boyer received a letter from Alliance Bank seeking payment on the voided lease. (1343-44; DG-18). Boyer attempted to contact Barry Drayer but was unable to do so. Boyer contacted the lender and faxed over documentation regarding the lease that was actually funded. (1345-46).

From this testimony the jury was also entitled to infer that PLS had obtained funding from the lender on Boyer's 1998 equipment loan but failed to return the proceeds of that loan to the lender when that loan was cancelled and merged into a new loan. Similarly, the jury was entitled to infer that PLS had

obtained funding on Boyer's 2000 loan but failed to return the proceeds of that loan to the lender when the loan was cancelled.

K. Dr. Eric Pantaleon

Dr. Eric Pantaleon, a pediatrician, testified that he applied for financing in 2001 in order to expand his practice and move into a bigger office. (1649). Dr. Pantaleon received and completed applications from PLS for two separate loans: a $40,000 loan and a $45,000 loan. (1651-54). Although he received the proceeds for the $45,000 loan, Dr. Pantaleon did not receive the proceeds for the $40,000 loan. (1655-56). Dr. Pantaleon contacted PLS about the missing loan funds but did not receive any specific response about when the money would be paid. (1657-58). In March of 2005, Dr. Pantaleon received a letter from Alliance bank demanding payment on the $40,000 loan. (1658-59; GX EP-15). Dr. Pantaleon informed Alliance Bank that he had never received the proceeds for that loan from PLS. (1659). Dr. Pantaleon subsequently received a letter from PLS, signed by Barry Drayer, stating that PLS was "solely responsible for all obligations" for the $40,000 loan Dr. Pantaleon never received. (1660-61; GX EP-18).

From this testimony, the jury was entitled to infer that PLS had obtained funding from the lender for Dr. Pantaleon's $40,000 loan but never paid the proceeds out to Dr. Pantaleon.

III. LENDERS

A. Keith Shurtleff (Alliance Bank)

Keith Shurtleff, senior vice president of Alliance Bank, testified that Alliance Bank is an FDIC-insured bank primarily serving the local community of approximately 15,000 people. (2061 & 2063). Beginning in 1998, Alliance Bank did business with PLS through a broker, Crawford & Sons. (2064). Alliance Bank agreed to lend money to PLS with equipment leases serving as collateral for the loans. (2066). It was the bank's understanding that the equipment was new equipment being purchased by the doctors from equipment vendors. (2067). PLS agreed to make the payments to the bank on a portfolio of contracts. If the doctor did not make his or her payment, PLS would pay the bank in place of the doctor. (2069). If the doctor was 90 days past due, then PLS had an obligation to notify Alliance Bank and to replace that lease with another lease that PLS had already funded itself. (2069-70). PLS was to make payments into an escrow account at the Bank of New York. This was important to the bank, to take the money out of PLS's hands and have it handled instead by the Bank of New York, an old institution with an outstanding reputation in the banking industry. (2070-71).

The bank obtained approval from its board of directors to enter into this relationship, because the bank is conservative

and this was a new form of lending for the bank. (2068-69 & 2972). The loan committee of the board of director also approved the loan, because the proposed amount was $500,000, which was considered to be large. (2072-73). Alliance Bank then received a bundle of leases for a block loan of $250,000. (2073). In the first or second bundle of leases, Alliance Bank rejected two leases because they were working capital loans rather than equipment loans. Shurtleff stated: "We were not interested in working capital situations. We wanted them to be purchase[s] of equipment." (2075). He explained:

> Even for doctors, *working capital loans are a riskier proposition than the purchase of new equipment*. Every business requires that it has cash in the business to operate. If a company is sound and is going well, it has plenty of cash and it can afford to make the payment on new equipment so they can go out and buy new equipment.
>
> And we don't mind lending money on that, but working capital, if a company gets short of cash and they have to go out and they have to borrow working capital, that's a sign that there is some stress on their cash position, and *unlike expansion in new equipment, there tends to be more risk*.
>
> It is not necessarily a bad thing every thing that a company [has] to borrow working capital, but it is certainly something *we look at much more closely* when we try to do business. And in this particular arrangement, *we just weren't interested in tak[ing] on any extra risk*."

(2076-77) (emphasis added). Similarly, the bank was not interested in working capital loans secured by the doctor's existing equipment. (2076).

Alliance Bank lent the full $500,000, and then obtained approval to go to a million dollars, and then two millions dollars (total) in loans to PLS. (2077-78). The escrow arrangement was a factor both for the loan committee and to regulators examining the bank. (2078). Payments came to Alliance Bank from the Bank of New York by wire transfer, monthly. (2078-79).

Alliance Bank did not contemplate that a doctor might cancel the lease, because by the time it lent money to PLS, an initial payment had already been made. (2080). If the doctor did cancel, however, PLS should have refunded the money to Alliance Bank or else substituted the lease with another funded lease. (2082). PLS was not allowed to take over payments on the lease if a doctor canceled or prepaid. Moreover, PLS was supposed to confer with the bank before agreeing to the terms of any prepayment. (2082).

Shurtleff reviewed the loan file for Tim Silegy, and stated that it appeared, from the documents, to be a new equipment lease, with the equipment having been purchased from Medpro. (2083-84). In this regard, Shurtleff relied on the Medpro invoice, the delivery and acceptance receipt, and the

Schedule A describing the equipment as "new." (2084-85). There was no bill of sale showing the doctor selling the same equipment to the vendor. (2085). A bill of sale would have shown that the doctor was not buying new equipment, but was using existing equipment for a working capital loan. (2085-86). Alliance Bank would not have funded such a loan. (2086).

Similarly, documents in the loan files for Dr. Eric Pantaleon and Dr. Eve James-Wilson represented those to be new equipment leases. (2162-63).

Alliance Bank also funded certain HSMT leases. (2087). The files contained Riteway invoices and related documents that made these appear to be new equipment leases. (2087-88). Alliance Bank would not have funded the loan had it known that the purpose of the loan was to develop a hotel. (2088).

Shurtleff stated that Alliance Bank primarily looked to PLS for repayment, then to the collateral, and then to the doctors. (2089).

The promissory note between Alliance Bank and PLS stated that it was an event of default if PLS failed or refused to substitute a "defaulted or prepaid lease." (2090-91; GX AB-3D). The security agreement between the parties included a representation from PLS that the "description of the equipment is true and complete, and the equipment has been duly delivered to and accepted by the lessee." (2091-92; GX AB-3A).

Alliance Bank also funded the Dr. Keith Collins transaction. (2093). The loan documents represented that this was a new equipment lease. (2093-94). The file included a Riteway invoice. (2094).

Alliance Bank lent PLS a total of $2 million. (2083 & 2095-99; GX AB-5A through 5H). The bank lost half of that money. (2112). In October 2001, payment was late. PLS paid October through February 2002 by check, having been told that the events of September 11, 2001 had impeded the Bank of New York's wire-transfer abilities. (2107). Alliance Bank did not receive the March 2002 payment, and took over servicing of the portfolio. (2109).

B. Dan Ciocca (First Sierra)

Dan Ciocca testified that he previously managed the Private Label Program ("PLP") at First Sierra Financial, which had a business relationship with PLS since approximately 1996. (1854, 1859). PLS would originate the transaction, prepare the documentation, and then sell them to First Sierra. (1854). PLS was responsible for making sure payments were made in a timely fashion and collecting the debt if the leases were past due, but payments were supposed to be remitted to a lockbox – an independent third party that would collect the payments. (1856). PLS was responsible if a particular loan defaulted. (1856). PLS had a portfolio of approximately $100 million with First Sierra

when Ciocca took over as manager of the Private Label Program, making it one of the larger PLP clients. (1860).

Ciocca authenticated a written master agreement that governed the terms of the relationship between First Sierra and PLS. (GX 112). Under the master agreement, First Sierra had the right to evaluate and reject any loans PLS offered to First Sierra. (1861-862). For any loans PLS sold to First Sierra, PLS assigned all of its rights under the loans to First Sierra. (1862). The agreement required PLS to make representations and warranties guaranteeing that each loan it offered to First Sierra "was accurate, that it was truthful, basically that all relevant information that a reasonable person would want to know about this transaction had been told, and had been correct at time of submittal." (1863). Under the master agreement, PLS was responsible for buying back from First Sierra any loans that became more than 150 days past due. First Sierra would send PLS a notification when accounts became 90 days past due. (1865).

First Sierra would fund working capital loans but only up to a limit of $50,000. The limit on equipment leases was considerably higher. (1866). Working capital loans were considered riskier loans. (1866-867). Ciocca testified that First Sierra required accurate information about the type of loan being applied for because "it was crucial to assessing the risk of a transaction." (1967). First Sierra always took the type of

loans into account when balancing the risk for the entire PLS portfolio. Certain loans, such as working capital loans, had higher default rates than equipment loans. (1867-868). Ciocca explained that sale leasebacks, where "the doctor is in essence refinancing equipment he already owns," also had a higher default rate than new equipment financing:

> And the reason that we found this is because when a doctor goes out and purchases equipment, it is because he is growing. That is usually a good thing. He needs more equipment. But when a doctor is looking to generate cash by going into debt to refinance something he already owns free and clear, there is usually an underlying reason for that, that you may or may not be aware of, but usually those reasons aren't good. (1868).

Ciocca testified that if First Sierra was not provided with accurate information about the intended use of loan proceeds it could end up with a portfolio that carried more risk than the company planned for. (1869). While First Sierra could take steps to minimize its overall risks on portfolios carrying riskier loans such as working capital loans, it would need to have accurate information about the underlying loans. (1869-870). Ciocca further testified that sale leaseback loans involving the doctor refinancing existing equipment were more difficult to obtain financing for. "As a general rule we didn't do them, and when we did it was an exception. And the reason being is because they have historically shown a higher likelihood of defaulting." (1872).

Ciocca testified that First Sierra also required accurate information about the type of business involved in a loan because certain industries were considered riskier. (1876-877). Ciocca authenticated a memo to him from Barry Drayer regarding a loan with HSMT. (GX 81). The memo informed First Sierra that it was seeking funding for a medical clinic in Tennessee. (1878-879). Ciocca testified that if First Sierra had known that HSMT was a hotel and not a medical clinic First Sierra would likely not have made the loan. (1879). Ciocca was shown an equipment finance agreement, Riteway invoice and Schedule A from a loan transaction with HSMT. (1881-883; GX 20). Ciocca testified that based on these documents submitted by PLS, First Sierra would have treated this loan as an equipment finance loan. (1882-883).

Under the master agreement, PLS was not allowed to make payments on behalf of doctors. (1885). If a doctor prepaid on a loan, PLS was obligated to remit those funds to First Sierra. (1885-887).

First Sierra generated daily delinquency reports showing which PLS accounts were delinquent and how many days they were delinquent. The delinquency reports listed accounts in order of the number of days they were past due. (1887-1891; GX 43). First Sierra treated the delinquency reports very seriously and the percentage of loans in the portfolio that were delinquent

was probably the single most important factor in evaluating PLS's overall performance. (1891).

After Ciocca became manager of the Private Label Program in late 2000, he began noticing a number of problems in the PLS portfolio. Ciocca noticed several accounts being paid current when they were just about to go over 150 overdue (at which point PLS would be responsible for buying them back). This was referred to as an account being "resurrected." (1892-893). Ciocca observed that the check sequences on payment checks from PLS accounts were changing. (1897-898). Ciocca also noticed that PLS was making a large number of direct payments to First Sierra instead of the payments being made through the lockbox. (1897-899). Although it was occasionally acceptable for PLS to send a payment directly to First Sierra when, for instance, a customer inadvertently sent a payment in to PLS instead of the lockbox, Ciocca noted that PLS was making these payments more frequently. (1899, 1902).

Ciocca testified that under the master agreement it was not acceptable for PLS to make payments on behalf of borrowers who had not made payments to PLS. It would not have been acceptable for PLS to make payment on behalf of borrowers who had gone bankrupt or had canceled their leases. (1900). If a doctor cancelled a loan the proceeds should have been immediately returned to First Sierra. (1901). If a doctor prepaid a loan

that money should have been promptly sent to First Sierra. (1901). If First Sierra did accept a payment from PLS it would require a photocopy of the underlying payment check from the borrower to ensure that the borrower had actually made the payment. (1901).

After discovering the problems in the PLS portfolio, Ciocca began investigating the portfolio more closely and eventually First Sierra audited the Massachusetts office of PLS in April 2001. Ciocca and the other auditors met with Barry Drayer at PLS. (1904-905). Drayer admitted that he was making payments on behalf of several accounts that had defaulted, but indicated that he felt justified doing so because First Sierra maintained a reserve of approximately $4 to $5 million of PLS's money to guard against defaults. (1913-916).

First Sierra subsequently conducted an audit of the PLS New York office in the summer of 2001. Ciocca and the other auditors met primarily with Barry Drayer in the New York office. (1922-923). Prior to the audit, First Sierra officers notified PLS of approximately 100 specific loan files they wished to review. The records were not ready when the auditors arrived. (1923-924). During the audit Ciocca reviewed a record which indicated that a borrower had paid off an account but instead of forwarding the money to First Sierra, PLS had kept making monthly payments on the account for over a year. (1925-926). Ciocca was

able to determine that the borrower had refinanced the loan with another company, but PLS had never sent the money to First Sierra. (1927-929).

Ciocca was able to determine that PLS hid the fact that it was making monthly payments on behalf of borrowers by submitting the payments in advance. Ciocca explained that when payments were made prior to the due date, First Sierra would not generate an invoice and therefore the borrowers would not know that their accounts had not been terminated. (1929-930). The auditors also found that PLS had been able to hide delinquencies through the use of a company called GHT. GHT was actually run by family members of Drayer's, but on paper it appeared that GHT was buying PLS's bad debts. By using GHT, PLS was able to make it look like it was continuing to get payments on accounts that it no longer was actually receiving payments on. Because of this, First Sierra could not trust PLS's books regarding the number of defaulted accounts. (1930-32). As a result of the audit, First Sierra concluded that PLS was keeping prepayments and hiding defaulted accounts. (1932).

After the audit, First Sierra terminated its relationship with PLS. (1933). On July 17, 2001, First Sierra sent a notice of default outlining all of the provisions of the master agreement PLS was in default of. (1933-934; GX 40B). The default letter specifically cited the following violations: PLS's

failure to notify First Sierra of defaulted accounts; making payments on behalf of delinquent accounts; and failing to deliver payments to First Sierra on accounts that were paid off. (1939-940; GX 40B). First Sierra took over servicing of PLS's accounts and discovered additional problems such as bankrupt accounts that PLS had failed to notify First Sierra about. (1944-947). Ciocca had several conversations with Barry Drayer in the months following the audit. During those conversations, Drayer admitted that he had been keeping prepayments and forwarded Ciocca a list of accounts where PLS had received funds from the doctors but had not remitted those funds to First Sierra. The list detailed over $6 million in prepayments that PLS had received but had not remitted to First Sierra. (1948-950; GX 40G). Drayer also provided information about $5 million in loans that had defaulted but PLS had made monthly payments on instead of buying them back from First Sierra as required under the master agreement. (1950-951).

C. William Redig (Northwest Bank)

Redig understood that doctors would send payments directly to an escrow account at the Bank of New York, which would wire transfer those funds to Northwest. If there was any shortfall, PLS was required to make up the shortfall in the account prior to the transfer. (2705). If a doctor missed three payments and therefore defaulted, PLS was required to substitute

that lease. (2705-06). If PLS received a prepayment, PLS was supposed to remit those funds to the bank. (2707-08). PLS did not have the right to take over the payment schedule of a prepaid or defaulted doctor. (2708). If PLS failed to substitute a new lease for a defaulted or prepaid lease, that was an event of default under the promissory note between PLS and Northwest Bank (2709-10; GX 135).

Northwest funded the Nikodem lease. (2710-11). The bank believed, based on the loan documents, that Nikodem was purchasing new equipment from Riteway. (2711-12). The purpose of the transaction was a factor in the bank's decision to fund that lease. (2712). The security agreement between PLS and the bank included a representation by PLS that the "description of the equipment is true and complete and the equipment has been duly delivered to and accepted by the lessees." (2713; GX NW-3).

Northwest also funded a lease in the name of Dr. Prusannakumar. (2714; GX NW-14). The loan documents presented this deal to be an equipment lease involving new equipment from Riteway. (2715). Northwest relied on the Riteway invoice in approving the loan. (2715). It would have made a difference if Northwest knew the money was going to be used to fund the development of a hotel. (2715).

Northwest funded a lease to Dr. Joseph Carbone. (2716; GX 87). The loan documents made this appear to be a new

equipment lease involving Medpro. (2716-17). No bill of sale was included in the loan documents to Northwest. (2718). If Redig had seen a bill of sale, it would have been confusing. (2719). He would have wondered why Dr. Carbone was selling equipment to Medpro when it appeared he was purchasing equipment from Medpro. (2719). This would have led Redig to ask questions. (2719). Redig would have expected to see the bill of sale if it were a part of this transaction. (2720).

From May to August 2001, Northwest received timely wire transfers from the Bank of New York "E" account on behalf of PLS. (2722-23 & 2724). The September payment came by check to due the Bank of New York's inability to send wire transfers immediately after September 11, 2001. (2723). The payments for October through December were each a few days late; the January 2002 payment may have been on time. (2723-24). The February payment was late. (2726). Redig obtained Barry Drayer's telephone number from Al Crawford. Drayer stated that the company was having cash flow problems and would pay shortly. (2727). PLS did send the February payment shortly after that. (2727). Northwest never received the March 2002 payment. Redig called Barry Drayer and Rochelle Besser, but neither of them returned his calls. (2728).

On April 15, 2002, Redig received a letter form Barry Drayer on PLS letterhead stating that Nikodem's loan had never been funded and he was therefore not responsible for payment.

(2732-33; GX NW-7). On April 29, 2002, Redig sent a letter to Dr. Kumar stating that Dr. Prasannakumar had taken the position that his signature had been forged. (2734; GX NW-13).

In April or May 2002, Redig attempted to verify Riteway's existence by calling the phone number on the invoice and conducting searches on the internet, to no avail. (2738). He did the same for Medpro, with the same result. (2738).

The total amount lent by Northwest was $500,000. (2730 & 2737). The total loss for Northwest Bank was approximately $115,000._

D. Scott Weaver (People's Bank)

Scott Weaver, senior vice president of People's Bank, testified as follows. People's Bank is a community bank with approximately $450 million in assets. (2809-10). The bank's deposits are insured by the FDIC. (2810).

Beginning in late 1999 or early 2000, People's Bank began doing business with PLS, through Crawford & Son. (2811-12). After a period of due diligence, and with the approval of the senior loan officers committee, People's Bank decided to lend $500,000. (2813-14). The bank kept the amount low because this was a new customer and the lending was outside of the bank's usual community. (2815). In approving a credit application, the bank considers the "five c's": character, cash flow, credit, collateral and conditions, meaning economic conditions. (2815-

16). In approving PLS' credit application, the bank considered PLS' cash flow, the credit history of the underlying contracts, the escrow arrangement, and other factors. (2816-17).

People's Bank understood that Crawford would forward as proposed collateral new medical equipment leasing transactions, refinancing of existing debt, and working capital loans. (2818). The bank was willing to lend with respect to all three kinds of transactions. (2818).

Eventually, the bank increased its funding to PLS to $2 million. (2824). PLS made its payment by wire transfer from the Bank of New York. (2825). Among the deals People's Funded was two in the name of HSMT MD, LLC. (2825; GX PB-2 and PB-3). The deal documents made these appear to be financing of new equipment from Riteway. (2826-29). Weaver would have wanted to know if the true purpose of these deals was to finance a hotel. (2830-31). He would also have wanted to know if the equipment was actually existing equipment rather than having been newly purchased from Riteway, as that would have affected the value of the collateral. (2831).

The first late payment from PLS to People's Bank, to Weaver's knowledge, was March 2002. (2836-37). Weaver left messages for Barry Drayer, but never called back. (2838-39). People's Bank took over servicing of the portfolio. (2841). In so doing, the bank discovered that borrowers had repaid $300,000,

which PLS had failed to forward to the bank. (2841). The total loss to People's Banks was $1.4 million, out of $1.9 million lent. (2841).

IV. LAW ENFORCEMENT WITNESSES

A. Brad Howard

Special Agent Brad Howard of the Federal Bureau of Investigation testified regarding two interviews he conducted of the defendant Stephen Barker. (2898).

Special Agent Howard first interviewed Barker on June 12, 2003 at a Denny's restaurant. During that interview, Barker stated that he had owned Carefree Financial Services since 1994 and ran the business from his residences and later an office. (2900-901). According to Barker, Carefree assisted doctors and dentists in securing loans for their practices and offered office construction loans, medical equipment loans and working capital loans. (2901). Barker stated that Carefree had a business relationship with PLS from 1996 through 2002 and conducted ninety percent of its business with PLS. (2903). Barker dealt with Barry Drayer, whom he had met in the early 1990's when Barker was working at Centaur Finance, and other employees including Susan Cottrell. (2902-903).

During the interview, Barker further stated that he started MedPro in approximately 1996 or 1997 and ran the company. Barker stated that MedPro was originally set up to remarket used

medical equipment. (2904). According to Barker, PLS would fund his loans by sending money to a bank account Barker set up on behalf of MedPro. Barker initially stated that it was an escrow account and estimated that as much as $2 million may have passed through the MedPro bank account. (2904-905). Barker told Agent Howard that he was paid a commission for his services to PLS and that the commission was deposited into a separate bank account for Carefree. (2906).

During the interview Special Agent Howard asked Barker about the creation of MedPro invoices and showed Barker such an invoice. (2906-907; GX 87). When shown the invoice, Barker stated that it looked like a MedPro invoice, and the address, telephone number and fax number appeared to be correct. Barker also stated that he recognized the name of the Doctor on the invoice as being Dr. Carbone, a dentist that Barker had done business with. (2906-907). Barker told Agent Howard that he directed others, including Tallie Jo Bassett, to prepare MedPro invoices. (2907-908). When asked about the "salesman number 32" listed on the invoice, Barker stated that he did not know what salesman number 32 was and that he "never had 32 salesmen." (2909; GX 87). According to Barker, MedPro did not actually own the equipment on the invoices, and never actually sold any equipment to PLS. (2909). Barker indicated to Agent Howard that he received his personal mail at P.O. Box 3297 Mission Viejo,

California – the same post office address listed on the MedPro invoice. (2909).

Special Agent Howard testified that he conducted a second interview of Stephen Barker on February 10, 2004 in the FBI office in Santa Ana. (2909-910). During this interview, Barker stated that he had been running Carefree for ten years. He further stated that he did not have records for Carefree for 1997 to 1999 because he kept records only for two years to make sure that the doctors did not default. (2911). Barker informed Agent Howard that he had twelve years experience in the financing business and had previously worked at Centaur Finance. (2911-912). When questioned about his business dealings with PLS, Barker told Agent Howard that 99.9 percent of Carefree's business was with PLS. Barker could remember only a single deal with another company. (2912-913).

Special Agent Howard testified that he questioned Stephen Barker about MedPro again in the second interview. During that interview, Barker stated that MedPro was not incorporated, did not have a physical location and did not have a separate telephone number. (2913). Barker further stated that MedPro had no employees and that he did not keep any payroll records for MedPro. Barker further indicated that he did not file corporate or state tax returns on behalf of MedPro. (2913). During this interview, Barker told Agent Howard that he created

MedPro in 1997 for the purpose of repossessing used equipment for deals gone bad. Barker explained to Agent Howard that his idea was to set up a warehouse to sell the repossessed equipment. Barker admitted that no warehouse was ever set up for MedPro. Barker stated that MedPro was used to purchase existing equipment from doctors. (2914). Barker was unable to provide a list of equipment suppliers and indicated that MedPro was not in the business of dealing with manufacturers or suppliers of medical equipment. (2914-915).

During the interview, Barker stated that he sometimes paid doctors by writing out checks to cash or cashiers checks. When questioned as to whether this was the best method of payment, Barker responded that he had a philosophy of making it easy for the doctors to get funded. Barker further stated that he paid preexisting debts of doctors by writing checks from MedPro and Carefree accounts. Barker admitted that he paid sellers and medical providers by writing a check and then using that check to initiate a wire transfer instead of making direct wire transfers because "he felt it was easier" this way. (2916).

Agent Howard also questioned Barker about the MedPro Bank account during the second interview. Barker initially stated that it was an escrow account, but when pressed, admitted that it was not a real escrow account. (2917). Barker was also questioned regarding the amount of money passing through the

MedPro account. He first stated that the $2 million figure he provided to Agent Howard in the first interview was for a different account. Barker maintained that $10 million to $12 million went into the MedPro account, but when pressed, conceded that as much as $25 million could have been sent to the MedPro account. (2919). During the interview, Barker stated that upon receiving money into the MedPro account, he would immediately transfer that money to a Carefree bank account. (2920). Finally, when asked about where the money was coming from to fund his loans, Barker specifically mentioned two outside financial institutions – AT&T and Copelico. (2921).

B. Matthew Galioto

Special Agent Matthew Galioto of the Federal Bureau of Investigation verified and introduced summary charts of voluminous bank records for the period of 1996 to 2002, pursuant to Rule 1006 of the Federal Rules of Evidence. (2965-2983). One of the charts summarized incoming wire transfers into PLS' Bank of New York account, going in to the "063" account (referring to the last three digits of the account number. This chart showed approximately $92.6 million coming into the account, and approximately $92.9 million, being transferred to the "E" account (a second PLS account). (GX 100; 2973 & 2977-78). The agent testified that the funds were typically transferred within a day. (2973).

A second chart showed approximately $24 million in total wire transfers from PLS' "E" account at the Bank of New York to Medpro's account at the Bank of America for 1997 through 2001. (2975 & 2978-79; GX 102).

A third chart showed approximately $23.9 million in transfers from the Medpro account to the Carefree account for the same time period. (2975-76; GX 103).

While Agent Galioto was on the stand, the government also introduced a self-authenticating document which showed that Stephen Barker opened Medpro's account at the Bank of America, as sole proprietor. (2980-81; GX 130). Similarly, the government introduced the articles of incorporation for Carefree, showing Barker as the incorporator on December 3, 1996, having signed as president, secretary, director and shareholder. (2982-83; GX 113).

C. Christopher King

Special Agent Christopher King of the Internal Revenue Service, one of the case agents, testified that a search of the IRS database disclosed no income tax returns for Riteway or Medpro. (2998-99; GX TR-15A and 15B). Agent King further authenticated summary charts of documents in evidence. One of these was a summary of American Express records for PLS from August 1996 through June 2002. (GX 100; 3004). This chart showed that Barry Drayer, his wife and children, incurred $1.6 million

in charges on the PLS American Express card during these years; Rochelle Besser incurred approximately $198,600, for a total difference of approximately $1.44 million more spent by Barry Drayer. (3012-13).

Another chart was a summary of commissions paid to Carefree by PLS. (GX 104; 3007). This chart showed that PLS paid approximately $4.3 million in commissions to Carefree. (3026). A third chart was a summary of amounts reflected on Medpro invoices in evidence. (GX 110; 3026). This chart showed a grand total of approximately $12.4 million in total reflected on the invoices. (3029).

V. MISCELLANEOUS WITNESSES AND EVIDENCE

A. Lucile Delva

Lucile Delva, a supervising tax coordinator for the state of California Board of Equalization, testified that Barker had applied for a sale tax permit in late 1996, for Medpro Equipment Company, a d/b/a, and canceled the permit on May 19, 1997 because the company "did not operate." (1828-38; GX 114 & 114A). Delva tallied up the amount of sale tax reflected on the Medpro invoices in evidence (as GX 110), and determined that approximately $735,845 in total sales tax was reflected; approximately seventy percent of those invoices showed sales in the state of California. (1839-1843). Finally, Delva stated that California had not received any of those sale taxes. (1843).

B. Excerpts of Barry Drayer's Deposition

The government read into the record excerpts from the prior deposition testimony of defendant Barry Drayer in related civil litigation between PLS and AT&T, given in March 1998 and April 2000. Those excerpts are summarized below.

Rochelle Besser ran the New York office. (2889). She was president, director and shareholder of the company. (2890). Barry Drayer was vice-president and director. (2890). Drayer stated that in the "technical sense," he reported to Besser, but in many instances Drayer had the final word. (2891-92). He further acknowledged that he would "probably qualif[y]" as the chief executive officer of PLS. (2892).

Drayer acknowledged that he sometimes sent in checks to AT&T on defaulted loans, without notifying AT&T. (2894). He did so to avoid having to repurchase the account. (2894). In addition, Drayer failed to tell AT&T that PLS had been paid off early on the Murphy Animal and Bird Account. (2894). To hide the prepayment, Drayer sent in a change of address form to AT&T on that account. (2894-95). Finally, Drayer admitted that it was a common practice at PLS that after a loan became delinquent, PLS would take over the payments rather than repurchase the loan as required. (2895).

C. Stipulation Concerning Income Tax Return Information

The government introduced a stipulation on income tax return evidence (ST-4; 2995-98), which stated that Barry Drayer's returns for 1998 and 1999 reported income from PLS, and that he indicated on his Schedule C that he had materially participated in the operation of the business. The stipulation also stated that Stephen Barker's returns for 1996 through 2000 showed income from Carefree and did not include any income from Medpro; Barker's returns similarly stated on Schedule C that he had materially participated in the operation of Carefree. (2996-98).

ARGUMENT

POINT ONE

THE LEGAL STANDARD UNDER RULE 29

Defendants have moved for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure on the basis that the evidence produced at trial was insufficient to support their convictions. Specifically, the defendants contend that there was insufficient evidence establishing their intent to commit the charged crimes.

In evaluating the sufficiency of the evidence of the defendants' intent, the court must employ the familiar test articulated in Jackson v. Virginia, which asks whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" on the evidence adduced. 443

U.S. 307, 319, 99 S.Ct. 2781 (1979) (emphasis in original). If the answer is yes, the jury verdict of guilty cannot be set aside. See id. This standard of review draws no distinction between direct and circumstantial evidence. Indeed, the law recognizes that a guilty verdict can be based entirely on circumstantial evidence, see United States v. MacPherson, 424 F.3d 183 (2d Cir. 2005); United States v. Morgan, 385 F.3d 196, 204 (2d Cir. 2004), and that elements going to the operation of a defendant's mind, such as intent, can often be proved only through circumstantial evidence, see United States v. Salameh, 152 F.3d 88, 143 (2d Cir. 1998); United States v. Nersesian, 824 F.2d 1294, 1314 (2d Cir. 1987); see also United States v. Crowley, 318 F.3d 401, 409 (2d Cir. 2003) (recognizing *mens rea* issues as "especially suited for resolution by a trial jury"). The evidence is also to be viewed "not in isolation but in conjunction." United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) (citation omitted).

Moreover, the court must examine the evidence in the light most favorable to the government and credit every reasonable inference that the jury could have drawn in its favor. See, e.g., United States v. Walker, 191 F.3d 326, 333 (2d Cir. 1999); United States v. Rodriguez, 702 F.2d 38, 41 (2d Cir. 1983) ("[a]ll reasonable inferences are to be resolved in favor of the prosecution and the trial court is required to view the evidence

in the light most favorable to the Government with respect to each element of the offense"). The fact that inferences favorable to the defense could also be drawn from the evidence is of no import because "the task of choosing among competing inferences is for the jury, not a reviewing court." United States v. Salmonese, 352 F.3d 608, 618 (2d Cir. 2003) (internal quotation marks omitted); see United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003) (noting that court may not substitute its own judgment for that of the jury in evaluating the weight of the evidence and the reasonable inferences to be drawn therefrom). In fact, when "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible[, a reviewing court] must let the jury decide the matter." United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000); accord United States v. MacPherson, 424 F.3d at 190 (quoting Autuori); United States v. Morgan, 385 F.3d at 204 (same); United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004) (same).

Similarly, the credibility of witnesses and the weight of the evidence is a matter to be argued to the jury by counsel, and not grounds for reversal. See United States v. Giraldo, 80 F.3d 667, 673 (2d Cir. 1996); United States v. Rea, 958 F.2d 1206, 1221-22 (2d Cir. 1992) (in considering a challenge to the sufficiency of the evidence, "[m]atters of choice between competing inferences, the credibility of the witnesses, and the

weight of the evidence are within the province of the jury, and [the court is] not entitled to second-guess the jury's assessments."). The reason for these "strict rules" is to "avoid judicial usurpation of the jury function," which occurs when the trial court rules based on its own view of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn. Id.; see also United States v. Maniego, 710 F.2d 24 (2d Cir. 1983) ("Appellants forget that issues of credibility are the exclusive province of the jury . . . .").

Accordingly, a defendant challenging the sufficiency of the evidence under Rule 29 bears a "very heavy burden." United States v. Brewer, 36 F.3d 266, 268 (2d Cir. 1994); see also United States v. Finley, 245 F.3d 199, 202 (2d Cir. 2001); United States v. Khan, 787 F.2d 28, 33 (2d Cir. 1986). To enter a judgment of acquittal, a court must conclude that the evidence, viewed as a whole and in the light most favorable to the government "is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999) (internal quotation marks omitted).

POINT TWO

THE DEFENDANTS' MOTIONS FOR A JUDGMENT OF ACQUITTAL UNDER RULE 29 ARE WITHOUT MERIT

A. The Evidence Was Sufficient to Convict Both Defendants of Conspiracy to Commit Bank Fraud and Wire Fraud

1. Legal Standard for Conspiracy

In weighing the sufficiency of the evidence, "courts must be careful to avoid usurping the role of the jury." United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003). It is the task of the jury, not the Court, to choose among competing inferences that can be drawn from the evidence. United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995). Where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter. United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000).

Deference to a jury's verdict "is especially important" in cases of conspiracy "because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992) (citation and internal quotation marks omitted); see also United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir. 1997).

"To prove conspiracy, the government must show that the defendant agreed with another to commit the offense" and "that he knowingly engaged in the conspiracy with the specific intent to commit the offenses that were objects of the conspiracy . . ." United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999) (citation and internal quotation marks omitted).

Conspiracy is a specific intent crime. "[I]f direct evidence is absent, circumstantial evidence of knowledge and specific intent to sustain a conviction must include some indicia of the underlying crime." United States v. Morgan, 385 F.3d 196, 206 (2d Cir. 2004)(citation and internal quotation marks omitted). Thus, to prove a conspiracy, "there must be some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." United States v. Gaviria, 740 F.2d 174, 183 (2d Cir. 1984)(citing United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983)).

To prove a conspiracy, the government need not establish an "explicit agreement"; rather, "proof of a tacit understanding will suffice." United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1191 (2d Cir. 1989). Moreover, the co-conspirators "need not have agreed on the details of the conspiracy," as long as they have agreed on the "essential nature

of the plan." United States v. Rea, 958 F.2d 1206, 1214 (2d Cir. 1992). It is axiomatic that the defendant's knowledge, intent and participation in the conspiracy may be established through circumstantial evidence. Id. Further, because the jury is entitled to choose which inferences to draw, the government in presenting a case based on circumstantial evidence, "need not 'exclude every reasonable hypothesis other than that of guilt.'" Guadagna, 183 F.3d at 130 (quoting Holland v. United States, 348 U.S. 121, 139 (1954)); Autuori, 212 F.3d at 114 ("the government need not negate every theory of innocence").

In this case, the objects of the conspiracy were bank fraud against the FDIC-insured community banks, in violation of 18 U.S.C. § 1344,[3] and wire fraud against the non-FDIC-insured lenders such as First Sierra and AT&T, in violation of 18 U.S.C.

[3] Bank fraud is defined under 18 U.S.C. § 1344, which provides that

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1343.[4] In order to obtain a conviction for bank fraud, the government must prove that the defendant "(1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." United States v. Barrett, 178 F.3d 643, 647-48 (2d Cir. 1999); see also United States v. Chandler, 98 F.3d 711, 715-16 (2d Cir. 1996) (same); United States v. Ragosta, 970 F.2d 1085, 1089 (2d Cir. 1992) (same). "'The bank need not be the immediate victim of the fraudulent scheme'" and need not have suffered actual loss "'as long as a defendant acted with the requisite intent.'" United States v. Crisci, 273 F.3d 235, 239-40 (2d Cir. 2001) (quoting Barrett, 178 F.3d at 648).

To secure a conviction for wire fraud, the government must prove three elements: (I) a scheme to defraud victims, (ii)

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[4] Wire fraud is defined under 18 U.S.C. § 1343, which provides that

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

of money or property, (iii) through use of the interstate wires. See United States v. Walker, 191 F.3d 326, 334 (2d Cir. 1999).

An essential element of the "scheme to defraud" element of both bank fraud and wire fraud is proof of fraudulent intent, which requires proof of intent to deceive and proof that the defendant contemplated some actual or potential harm or injury to the victims. Id. at 335; Crisci, 273 F.3d at 239-40; Chandler, 98 F.3d at 715-16. Direct proof of defendant's fraudulent intent is not necessary. "Intent may be proven through circumstantial evidence, including by showing that defendant made misrepresentations to the victim(s) with knowledge that the statements were false." Guadagna, 183 F.3d at 129. Although the government must prove that the defendant contemplated or intended some harm to the victim, "[w]hen the 'necessary result' of the scheme is to injure others, fraudulent intent may be inferred from the scheme itself." Id. at 130 (quoting United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994).

The government proved beyond a reasonable doubt that the defendants conspired to execute a scheme to defraud and a scheme to obtain money and funds from a number of FDIC-insured community banks by means of false and fraudulent pretenses, representations and promises. The government also proved beyond a reasonable doubt that the defendants conspired to execute a scheme to defraud and obtain money and funds from a number of

other funding source through the use of interstate wire communications.

2. Proof of Intent in this Case

The government proved the defendants' intent in a variety of ways. First, they engaged in the scheme repeatedly. Drayer moved from lender to lender, and was warned repeatedly (by AT&T, First Sierra, and then Crawford) about the wrongfulness of his conduct. Yet he continued with the scheme. He told his brother Roger Drayer that he would take the fall if they were arrested, showing his consciousness of guilt. He directed the creation of false invoices for Riteway, phony checks, and the diversion of mail. These facts, and the others proven at trial, all point to his fraudulent intent.

Barker similarly engaged in the scheme over a number of years, and did not act by mere accident or mistake. Moreover, he too directed the creation of a sham company (Medpro) and the creation of phony invoices. He knew that all of this was designed to fool the lenders into parting with money they would not otherwise have lent. That proves his intent.

Testimony by each of the lenders that they lost money as a result of the scheme also helped prove the defendants' intent. Evidence of victim losses is admissible to prove a scheme to defraud and fraudulent intent in a mail or wire fraud case. United States v. Brocksmith, 991 F.2d 1363 (7th Cir. 1993)

("The amount of loss sustained by a victim is relevant and admissible evidence in a mail fraud prosecution."); United States v. Rasheed, 663 F.2d 843, 850 (9th Cir.1981) (evidence of victim loss is "relevant to show that a scheme to defraud [an element of fraud] existed"); Farrell v. United States, 321 F.2d 409, 419 (9th Cir.1963) (victim loss is relevant to prove intent to deceive). For this reason, the government may introduce any evidence "remotely bearing on the question of fraudulent intent." United States v. Foshee, 606 F.2d 111, 112 (5th Cir. 1979) (Evidence of defendant's failure to repay loans borrowed to cover kited checks was admissible to prove fraudulent intent with respect to the check-kiting scheme) (citing United States v. Brandt, 196 F.3d 653 (2d Cir. 1952). As a matter of common sense, fraudulent intent is supported by "proof that someone was actually victimized by the fraud." Foshee, 606 F.2d at 112 (quoting United States v. Foshee, 578 F.2d 629, 632 (5th 1978)).

"[S]tatements inadmissible to prove the truth of what they assert may be admitted if the fact of the assertion is in itself relevant irrespective of its truth." United States v. Press, 336 F.3d 1003, 1011 (2d Cir. 1964) (citing 6 Wigmore, Evidence § 1766 (1940 ed.)). The Second Circuit has expressly held that customer complaints which were called to the attention of the defendant are admissible on the issue of the defendant's fraudulent intent and bad faith. Press, 336 F.3d at 1011

(holding that letters from dissatisfied customers were admissible in a mail fraud conspiracy trial); see also United States v. AMREP Corp., 560 F.2d 539, 546 (2d Cir. 1977) (holding that "[e]vidence of customers' complaints called to defendants' attention was . . . relevant [and admissible in a fraud trial] on the issue of their bad faith and fraudulent intent"). As in Press, an inference might readily be drawn that since the defendants knew their customers were being defrauded, continuing in the same conduct "despite this knowledge showed the existence of a scheme to defraud." Press, 336 F.2d at 1011. Offered for this purpose, the complaints are not hearsay. See AMREP, 560 F.2d at 546, 547; Press, 336 F.2d at 1011.

The customer complaints received by the defendants also showed that the defendants had fraudulent intent. The Second Circuit has expressly held that customer complaints which were called to the attention of the defendant are admissible on the issue of the defendant's fraudulent intent and bad faith. Press, 336 F.3d at 1011 (holding that letters from dissatisfied customers were admissible in a mail fraud conspiracy trial); see also United States v. AMREP Corp., 560 F.2d 539, 546 (2d Cir. 1977) (holding that "[e]vidence of customers' complaints called to defendants' attention was . . . relevant [and admissible in a fraud trial] on the issue of their bad faith and fraudulent intent"). As in Press, an inference could readily be drawn that

since the defendants knew their customers were being defrauded, continuing in the same conduct "despite this knowledge showed the existence of a scheme to defraud." Press, 336 F.2d at 1011. Offered for this purpose, the complaints are not hearsay. See AMREP, 560 F.2d at 546, 547; Press, 336 F.2d at 1011.

Additionally, the defendants' financial motive is proof of their intent to defraud. United States v. Ranum, 96 F.3d 1020, 1026 (7th Cir. 1996) (fraudulent intent may be inferred from opportunity and motive to deceive); United States v. O'Brien, 14 F.3d 703, 708 (1st Cir. 1994) (defendant's "powerful economic motive" was proof of knowledge and fraudulent intent); United States v. Grandinetti, 891 F.2d 1302, 1306 (7th Cir. 1989) (financial motive was proof of intent to defraud financial institutions); United States v. Lamont, 565 F.2d 212, 215 (2d Cir. 1977) ("fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive") (internal quotations omitted).

The government proved that the defendants here had a powerful financial motive to engage in the fraud. Barker received over $4.3 million in commissions from the fraudulent MedPro loans he with PLS. Moreover, his entire business depended on this criminal partnership with Drayer. By Barker's own admission to Special Agent Howard, 99.9% of Carefree's business

was done with PLS. Without Barry Drayer helping Barker push his working capital and debt consolidation loans to the banks by falsely representing them as new equipment loans, Stephen Barker would have had no business. Indeed, as the jury could clearly infer from the testimony of the lender witnesses, many of the funding sources did not want to lend money on these riskier loans. At the very least, they would have scrutinized them more carefully. It was only through his illicit agreement with Barry Drayer, and his use of the sham MedPro Equipment Company, that Stephen Barker was able to secure his $4.3 million in commissions.

Drayer similarly received monetary benefits from the fraudulent scheme. He used PLS as his own private checking account, supporting his lifestyle. Drayer's entire family had PLS corporate credit cards and together accumulated over $1.6 million in credit card charges. Although some of the charges were for legitimate business expenses, Drayer's wife and children did not work at PLS and many of their charges were for things like college tuition, nail salon appointments and gym memberships. In addition, Drayer was receiving a salary and commissions from PLS (as Rochelle Besser testified, Drayer decided for himself how much he would report as commissions). Drayer also received hundreds of thousands of dollars from PLS in the form of loans. In sum, Drayer was supporting his lifestyle

through PLS, and keeping PLS n business through fraud. Barry Drayer also had another motive for making sure the money kept flowing in – he had to keep the Ponzi scheme going. Drayer was using more and more of money to pay off all the defaults and prepayments and cancelled loans PLS was hiding from the banks. To support this rolling debt and keep the scheme afloat, Drayer needed a constant flow of new money coming in. The way he obtained this money, and kept the scheme going for so long, was by fooling the banks into funding risky loans by misrepresenting them to be new equipment leases.

Based on the foregoing, a rational trier of fact could easily find beyond a reasonable doubt that the defendants knowingly participated in a conspiracy to commit bank fraud or wire fraud. Accordingly, the defendants have not met their "heavy burden," and their conviction on count one of the indictment should be upheld.

B. The Evidence Was Sufficient to Convict Defendant Drayer of Five Counts of Substantive Bank Fraud

In addition to the overwhelming evidence that Drayer was involved in a conspiracy to commit bank fraud, the government introduced evidence supporting Drayer's conviction for five counts of substantive bank fraud.

Specifically, count two charges Drayer with bank fraud with respect to Dr. Keith Collins' loan with Alliance Bank. As demonstrated by the testimony of Keith Collins and Keith

Shurtleff, that loan was fraudulent for two reasons. First, Dr. Collins did not apply for a new equipment lease - he testified that the equipment securing his loan was years old. Yet Barry Drayer directed his employees to prepare a false Riteway invoice listing Dr. Collins' old equipment, a false Schedule A describing the equipment as new, a false verbal audit sheet, and a false delivery and acceptance receipt, all for the purpose of misrepresenting to Alliance Bank that it was a new equipment lease. As Keith Shurtleff testified, Alliance Bank was only interested in funding new equipment leases. Because of Barry Drayer's actions, Alliance Bank was deceived into parting with its money on a loan it never would have funded absent the fraud.

In addition, Dr. Collins refinanced his loan. When that happened, PLS should have closed out the old loan and paid Alliance Bank the money from the refinance. Instead, as demonstrated by the summary of PLS loan filed prepared by Rochelle Besser and the testimony of Keith Shurtleff, PLS never closed out Dr. Collins' loan, and never paid Alliance Bank that money.

Count three related to the loan of Dr. James-Wilson with Alliance Bank. As testified to by Dr. James-Wilson, she applied for a loan to consolidate her credit card debt. Yet Barry Drayer packaged the loan to Alliance Bank as an equipment finance using Dr. James-Wilson's existing equipment. Further,

after Alliance bank funded the loan, PLS kept the money. Neither Dr. James-Wilson nor Alliance Bank ever received the money from this loan.

Counts four through six relate to fraudulent loans with Northwest Bank and People's Bank involving HSMT. As established by the testimony of Rochelle Besser, Susan Cottrell, Dr. Channabasappa and Prabhakar Pallapothu, the HSMT loans involved multiple levels of fraud. First, as Dr. Channabasappa and Pallapothu established, they never actually applied for the loans and their signatures were forged. Second, Barry Drayer represented the HSMT loans as medical equipment leases for a new medical clinic and never informed the lenders that the money was actually going to be used to finance a hotel. Third, Drayer had Susan Cottrell type false Riteway invoices listing existing equipment the doctors already had in their respective offices to make it appear that the loans were for new equipment purchases by the clinic. Fourth, Drayer submitted the same false Riteway invoices to multiple lenders to get duplicative financing. Finally, after Drayer fooled the banks into parting with their money to the tune of $2.3 million, Drayer and PLS sent only $650,000 to HSMT and kept the remaining $1.65 million obtained through these duplicative false invoices.

The government's evidence was clearly sufficient to support the conviction of Barry Drayer on all five substantive

counts of bank fraud. Accordingly, Drayer's motion for a judgment of acquittal on these counts should be denied.

C. The Evidence Was Sufficient to Convict Both Defendants of Conspiracy to Commit Money Laundering

To prove that the defendants engaged in a money laundering conspiracy, the government was required to establish that: (1) the defendant and at least one other person knowingly entered into an agreement to conduct or attempt to conduct a financial transaction; (2) those two or more individuals knew that the property involved in the transaction represented the proceeds of some form of unlawful activity; (3) those individuals acted either with the intent to promote the carrying on of specified unlawful activity, or knowing that the transaction was designed, in whole or in part, to conceal or disguise the nature, location, ownership, or control of those proceeds; (4) the property involved in the transaction were the proceeds of specified unlawful activity, specifically bank fraud and/or wire fraud. 18 U.S.C. §§ 1956(h), 1956(a)(1)(A)(I) and 1956(a)(1)(B)(i)(2004); United States v. Henry, 325 F.3d 93 (2d Cir. 2003)(Government must prove agreement to commit all substantive elements of a money laundering offense).

A financial transaction includes, among other things, a transaction which in any way or degree affects interstate or foreign commerce: (a) involving the movement of funds by wire or some other means; (b) involving one or more monetary instruments;

or (c) involving the transfer of title to any real property, vehicle, vessel or aircraft. 18 U.S.C. § 1956(c).

Here, the government proved that both defendants took the proceeds of the fraud – the money earned from bank fraud from the community banks and wire fraud from First Sierra – and ran it through a series of bank accounts for the purpose of furthering the fraud scheme. The government further proved that wiring the money through these bank accounts was designed to hide the true facts with respect to the nature, location, source, ownership and control of the funds.

Specifically, the government presented evidence that PLS wired nearly $25 million – the proceeds of the fraudulent MedPro loans – from PLS' accounts to a bank account set up by Stephen Barker in the name of MedPro. This money constituted the proceeds of bank fraud from the false MedPro invoice scheme against the community banks, and wire fraud from the same scheme against the non-FDIC lenders such as First Sierra. Where, as here, the government has shown the defendant's involvement in the unlawful activity, his knowledge of the source of the money is generally obvious. See, e.g., Henry, 325 F.3d 93 (2d Cir. 2003). MedPro was a sham company. The only reason for that bank account was to make it look like a real company, including making its fake invoices look real. This falsely made it appear that the financing was in fact for new equipment, when it was not. And as

soon as the money hit the MedPro account, Barker shifted it over to a separate account he controlled for Carefree. The separate bank account in the name of a phony company disguised the true relationship between MedPro and Carefree, including the fact that Barker controlled both.

The wire transfers to MedPro were done at Barry Drayer's direction, as he was the sole person who could authorize wire transfers. Indeed, in the case of certain lenders like First Sierra, PLS had to show proof that the money was being paid out to vendors. In the case of Riteway deals, Barry Drayer had PLS send copies of fake checks that were later voided. For MedPro deals, the wire transfer to MedPro served the same purpose. If PLS cut a check or wired the money to Carefree directly, that would have raised suspicions at First Sierra about what the money was for. So Barker arranged for the money to be run through a bank account with the word "equipment" – MedPro Equipment – to make the banks and First Sierra think the money is for new equipment. This deception helped the fraudulent invoice scheme work. The transfers made it appear that PLS was paying a legitimate vendor for new medical equipment it was financing for a doctor. Since the doctors didn't order any equipment from MedPro and Medpro never shipped any equipment to the doctors, the jury was entitled to infer that the purpose of wiring the money to MedPro (from which it was immediately transferred to Carefree)

was to promote the fraudulent invoice scheme by making it look to all outward appearances that PLS was paying a vendor for equipment.

Barker set up the account exclusively for MedPro and was the only person with access to the account. He then transferred the majority of that money into a separate Carefree account, from which he wrote checks to cash and cashier's checks to credit card companies and other creditors to pay off doctors' bills on consolidation loans, sent money to construction companies on construction loans, or made out checks directly to the doctors when they needed working capital to run their business. For these debt consolidation loans or construction loans, there was no legitimate reason for funneling the proceeds through an equipment account. The jury was entitled to infer from the use of the MedPro account that the reason Stephen Barker and Barry Drayer arranged to have the money wired first into a MedPro account was to hide the nature of the loans themselves – to hide the fact that these were debt consolidation loans, sale leasebacks of old equipment or construction loans, not loans for the purchase of new equipment, which is how the defendants portrayed these loans to the banks. This multi-tiered structure of different accounts both promoted the fraudulent invoice scheme and hid the nature, source, location, ownership, and control of those proceeds.

Based on this evidence, the jury was entitled to find that defendants Drayer and Barker engaged in a conspiracy to commit money laundering.

The jury could also find defendant Drayer guilty of the money laundering conspiracy on the separate grounds that he had PLS receive money from banks into one PLS account, the 063 account, and then immediately shifted that money into another PLS account, the "E" account. As Rochelle Besser testified, the money that went into the 063 account, which was the proceeds of the fraudulent loans PLS obtained from the community banks and First Sierra, should have been sent directly to doctors on their loans. Instead, PLS shifted that money into the "E" account to commingle it with other money so that PLS could use it for whatever purpose Barry Drayer desired. Such purposes included paying internal expenses, paying down on defaulted or bankrupt loans, and continuing to make monthly payments on cancelled or prepaid loans. By commingling this money into the "E" account, Drayer and Besser were able to hide the source of the funds – i.e., that the funds were loan proceeds that should have been disbursed directly to medical providers. In addition, by commingling the money into the "E" account, Drayer and Besser were able to promote the scheme by using those proceeds - that should have been held in escrow and distributed only to the medical providers – to instead prop up the Ponzi-like scheme by

making monthly payments on defaulted, bankrupt or prepaid loans. This constitutes strong evidence that Barry Drayer and Rochelle Besser engaged in a conspiracy to launder money.

For all of these reasons, the jury's verdict of guilty against both defendants for conspiracy to commit money laundering was supported by sufficient evidence and defendants' motions for a judgment of acquittal should be denied.

D. Drayer's Arguments Do Not Support a Judgment of Acquittal

In his motion, Drayer argues that the government failed to prove that he had "criminal intent." (Drayer Motion at 6). He argues that he repeatedly instructed his employees that "banks must get paid," showing his lack of intent to defraud. (Id.). However, the jury was entitled to infer that Drayer directed that banks receive the requisite periodic payments on the loans in order to prop up the Ponzi-like scheme. As the government argued at trial, if PLS stopped making those payments, the banks would have stopped lending additional money, and PLS would have gone out of business. Moreover, the *funds* that Drayer used to make periodic payments were themselves stolen from other banks. The government established at trial that Drayer directed PLS to keep prepayments from doctors, rather than remitting them in full to the appropriate bank. Drayer then caused PLS to use those prepayment funds to make periodic payments on bankrupt or otherwise defaulted loans. Thus, Drayer's conduct directing that

periodic payments be made in this manner constitutes proof of his criminal intent and is not remotely exculpatory.

In a related argument, Drayer contends that the banks should have questioned the fact that they were, until shortly before PLS's demise, receiving all their payments from PLS on time. (Drayer Motion at 5). This argument is ridiculous. Creditors do not complain when they get paid. It is when they do not get paid that they begin to ask questions. Based solely on common sense, the jury was entitled to reject Drayer's argument in this regard.

In another defective argument, Drayer argues that his effort to reach new payment plans with the banks as PLS' house of cards was collapsing is proof that he lacked criminal intent. (Drayer Motion at 7). However, the government proved at trial that Drayer was engaged in a rolling Ponzi scheme, in which he first defrauded AT&T, then First Sierra, and finally the Crawford FDIC banks, moving from one funding source to the next as his relationship with each one eroded. He attempted to lull each into a false sense of security to avoid discovery of his crimes. In this effort, he was successful for a number of years, until the mountain of Ponzi-like debt caused his company to collapse. In any event, this was a factual question for the jury to resolve. United States v. Chacko, 169 F.3d 140, 149 (2d Cir. 1999) (evidence of defendant's negotiations with bank and his

failure to flee when repayment of funds was called for did not preclude finding that he had intent to injure bank, as required for bank fraud conviction, inasmuch as it was for jury, not court, to make factual determination whether defendant was engaged in negotiations because he did not intend to defraud or whether he was engaged in negotiations because he did not want to face criminal prosecution).

Drayer's conclusion that the government failed to prove criminal intent is predicated on a wholesale distortion of the trial record. In particular, Drayer argues that Jennifer Tarantino had nothing incriminating to say about the defendant but instead testified that she re-routed doctors' mail at her father's direction. (Drayer Motion at 3). In fact, Tarantino testified that she created fraudulent checks, set up the fraudulent Riteway company and the sham Mailboxes Etc. accounts following the orders of *both* her father and her uncle, the defendant Barry Drayer, and she was corroborated by documents in this regard. (Tr. at 1088-89, 1095 , 1109; GX 35A, 36A & 37A). Similarly, Drayer argues, without a specific citation, that the defendant's brother, Roger Drayer, testified that the defendant did not intend to "bilk the company." (Drayer Motion at 3). He gave no such testimony. Moreover, the defendant was charged with defrauding the banks and funding sources, and not "the company," PLS. In that regard, Roger Drayer testified to a plethora of

fraudulent conduct by the defendant, including directing the creation of fraudulent checks and unauthorized mailbox accounts. (Tr. 1391-1400). In fact, Barry Drayer's participation in a variety of schemes designed to conceal the Ponzi-like scheme is itself evidence of his fraudulent intent. The use of fake telechecks, Western Union money grams and altered checks, and the creation of mailbox etc. accounts to change the addresses of medical providers who had prepaid their leases was all designed to conceal from the banks the fact that PLS was keeping prepayments and the proceeds on cancelled loans. The falsified checks made it appear that doctors were continuing to make monthly payments, and the mailbox accounts prevented the banks from billing medical providers that had already paid off their loans. As is often the case, evidence of the defendants' attempts to conceal the crime prove his intent. See United States v. Mozer, 828 F. Supp. 208, 212, n.4 (S.D.N.Y. 1993).

In the same vein, Drayer simply ignores vast segments of Susan Cottrell's and Rochelle Besser's testimony, who both testified, among other things, that Drayer oversaw the creation and use of a sham company, Riteway, to perpetrate the scheme, and that he insisted that PLS keep prepayment funds belonging to the banks. (Drayer Motion at 3). Indeed, Drayer's argument completely ignores the Riteway/MedPro false invoice scheme that was at the heart of the government's case. This was no course of

accepted conduct, as Drayer contends, but the deliberate creation of hundreds of false documents for the express purpose of misrepresenting the type of loan being applied for. As Roger Drayer testified, he and Barry Drayer created Riteway so that PLS could doctor up existing equipment and misrepresent loans as new equipment financing. As Susan Cottrell and Rochelle Besser testified, none of the Riteway invoices were true because all of them took existing equipment the doctors already owned and made it appear that the doctors were purchasing new equipment from Riteway as part of a new equipment financing arrangement. Similarly, as Susan Cottrell testified, the MedPro invoices were also false and served the same purpose. At Barry Drayer's instruction, MedPro invoices were sent to banks on debt consolidation loan, working capital loans, and practice acquisition loans. Like Riteway, the MedPro invoices gave the false appearance that the loan was for the purpose of new equipment financing.

Drayer argues that certain witnesses (his sister and niece) stated that they believed they had done nothing wrong. (Drayer Motion at 3 & 6). However, this mischaracterizes their testimony. Drayer's sister, Rochelle Besser, stated that she did not believe when she walked out of a civil deposition that she had admitted committing a crime. (Tr. 832-33). However, on redirect examination, she explained that at the deposition she

had not in fact admitted many of the facts underlying her criminal conduct and therefore did not fear arrest. (Tr. 975-76). In fact, both of these witnesses acknowledged their culpability by *pleading guilty* to the same conspiracy with which Drayer was charged. And both witnesses, on the stand, expressly acknowledged that they had engaged in wrongdoing, at Drayer's direction. (Tr. 979-981; 1112-1113). Moreover, as Roger Drayer testified, during the conspiracy, his sister Rochelle expressed fear that their brother Barry Drayer would send them all to jail – an obvious acknowledgment that she knew the actions she had been taking at Barry Drayer's direction were criminal in nature. (Tr. 1457-58).

With respect to the bankers, Drayer argues that they did not point to his criminal intent either. (Drayer Motion at 4). Of course, no such direct proof is required. The bankers' testimony established that the false statements – orchestrated by Drayer – were material to the banks, and that they suffered loss, which is itself proof of fraudulent intent. See United States v. Karro, 257 F.3d 112, 118 (2d Cir. 2001) (intent to harm, for purposes of proving scheme to defraud, can be inferred from the victim's exposure to potential loss); United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994) ("When the 'necessary result' of the actor's scheme is to injure others, fraudulent intent may be inferred from the scheme itself.").

Finally, with respect to the doctors, Drayer argues that their testimony proves he had no criminal intent because the doctors did not lose money. Again, Drayer has missed the point. Several doctors testified that they had not applied for or had not received certain loans. This helped prove that Drayer had misappropriated those funds from the banks. The fact that Drayer acknowledged that the doctors were not responsible for repaying those loans was an *admission* by him that the loans were fraudulent. Moreover, sufficient fraudulent intent can be found "from the intentional withholding of information from a lender which lowers the value of the transaction due to the lender's lack of information pertinent to the accurate assessment of the risk it faces and the propriety of extending credit to that particular individual." United States v. Karro, 257 F.3d 112, 118 (2d Cir. 2001). "Because this intent is sufficient, it is irrelevant whether the borrower intended in good faith to repay the loan." Id.; see also United States v. Rossomando, 144 F.3d 197, 201 (2d Cir. 1998) ("Where a defendant deliberately supplies false information to obtain a bank loan, but plans to pay back the loan and therefore believes no harm will 'ultimately' accrue to the bank, the defendant's good-faith intention to pay back the loan is no defense because he intended to inflict a genuine harm upon the bank – i.e., to deprive the bank of the ability to determine the actual level of credit risk and to determine for

itself on the basis of accurate information whether, and at what price, to extend credit to the defendant."). Thus, even with respect to the loans where PLS did not keep prepayments or otherwise cause an obvious loss to the funding institutions, the use of Riteway and MedPro invoices to obtain loan proceeds under false pretenses is sufficient evidence of fraudulent intent.

E. Barker's Arguments Do Not Support a Judgment of Acquittal

In his motion, Barker focuses his first two points on the shortfall of funds transferred from MedPro to Carefree, arguing that the precise number set forth in the indictment was slightly different than the number proven at trial. This argument is without merit.

At trial, the government offered evidence that $24 million was wired from PLS to MedPro and then the majority of that money, nearly $19 million, was immediately transferred to a Carefree account under the control of Barker. The government offered this evidence primarily to prove the money laundering conspiracy. Specifically, the government's theory was that Barker and Drayer arranged for proceeds from the bank fraud and wire fraud – the loan proceeds that were obtained through the use of fraudulent loan documents such as the MedPro invoices – to be deposited into a MedPro account in order to make it appear that MedPro was a real company that was receiving payments on real invoices, when in fact, it was a sham company that had issues

sham invoices. As evidenced from the exhibits introduced by the government at trial and the testimony of Special Agent Galioto, the lion's share of the money wired to MedPro from PLS was immediately transferred to a Carefree account and dispersed as Barker saw fit. This helped disguise the nature, source and ownership of the funds. Barker claims that even more of the funds were transferred to Carefree than alleged in the indictment. If true, such a fact would only strengthen the government's case not undermine it given the purpose for the government's introduction of this evidence.

In his second point, Barker emphasizes PLS's role in the fraud and the fact that Drayer and PLS were the direct contact to the banks. This argument of relative role does not provide a defense to a conspiracy charge. As courts in this circuit have consistently noted, conspirators play different roles, large and small, and the relative role of a conspirator is irrelevant to his guilt or innocence. See United States v. Snype, 441 F.3d 119, 139 (2d Cir. 2006) ("The law does not require the prosecution to prove that a defendant played any particular role in a conspiracy."); United States v. Vanwort, 887 F.2d 375, 386 (2d Cir. 1989) ("The size of a defendant's role does not determine whether that person may be convicted of conspiracy charges.").

Barker further argues that PLS gave independent approval of the loans prior to actually seeing an invoice from MedPro. Barker suggests that the MedPro invoice therefore did not play a role in obtaining loan approvals. However, it is approval by the *banks* that is the true issue. Barker and Drayer were co-conspirators working together in a criminal partnership to defraud the FDIC banks and other financial institutions through the use of false invoices. When Barker sent false MedPro invoices to Drayer it was not for the purpose of defrauding Drayer, his co-conspirator. As was made clear from Susan Cottrell's testimony, the banks had final authority to approve or decline loans after PLS submitted the final loan documents to them. It was this approval by the banks that was fraudulently obtained through the use of MedPro invoices created by Barker.

In point four, Barker repeats the argument defense counsel articulated to the jury – that MedPro was a real company whose purpose was to transfer title of equipment owned by the medical providers so it could be used as collateral for loans. This inference was argued to the jury and they were entitled to reject it in favor of the competing inference that MedPro was a sham company created and used for the purpose of pumping out false invoices. It is the task of the jury, not the Court, to choose the inferences that can be derived from the evidence. See Martinez, 54 F.3d at 1043; see also United States v. Abelis, 146

F.3d 73, 80 (2d Cir. 1998)(the "government need not disprove every possible hypothesis of innocence.") (citation and internal quotation marks omitted). A defendant cannot overturn a verdict by reasserting such an argument given that all inferences must be drawn in favor of the government.

In point five Barker unfairly claims that the government "smeared" him by introducing evidence of his failure to pay sales taxes. Nothing could be farther from the truth. In fact, the government cited this evidence as proof that Medpro was a sham company. Further, the evidence was used as further proof that the MedPro invoices were false because Barker included a line item for sales tax to make the invoices look like real invoices. The government's use of this evidence in closing argument was entirely proper. In the main closing, the government argued that the fact that Medpro's sales tax license closed out because Medpro "did not operate" helped show that Medpro was a sham. The government argued that Barker "opened up the tax permit so he could collect sales tax on the face of the invoice, make it look like a real vendor invoice . . . ." (3443-44). Further, the government argued that the only reason to put sale tax on the invoice was to "make it look like a real invoice, to fool the banks." (3451).

> Similarly, in rebuttal, the government argued:
>
> I agree with Mr. Buckley here in one respect, this is not a sales tax case. It's not a tax case. But the fact that he put a line for sales tax on there, and was not collecting it and was not remitting it, for what purpose is that line on the invoice? There is no explanation, except he is dressing it up. He's dressing it up to make it look like an invoice and to fool the bankers into parting with their money on deals that they would not have done, on deals where they are being deprived of the accurate information.

(3624). Thus, the government made proper use of the sales tax evidence and was in fact careful not to use it for improper purposes.

In points six through eight, Barker principally argues that Susan Cottrell was the strongest witness against him and contends that her testimony was insufficient to convict him. In fact, as set forth above, Cottrell's testimony was extremely damaging to Barker, including her testimony that Barker and Cottrell conducted sham telephone audits. Barker also argues that the government did not prove that he knew that phony documents he prepared were going to banks. But the government proved that Barker knew that the money for the loan was ultimately coming from outside financial institutions and that the documents he was preparing, including the false loan contracts, false schedule As, false delivery and acceptance receipts and false MedPro invoices were being sent to the banks.

Barker also argues that he did not prepare the documents but only used preprinted forms. This argument is unavailing. Barker directed his employees to prepare the documents by filling out information

In point ten, Barker argues that the fact that he was not present during a meeting at Martha's Vineyard is somehow proof that he was not a member of the conspiracy. This contention makes no sense. The other individuals present at that meeting were not members of the conspiracy, and in fact, according to Drayer's own witnesses, were trying to cut him out of the business. Clearly, this meeting was not a conspiratorial meeting and Barker's presence or absence has no bearing on his membership in the conspiracy. In any event, the fact that Barker was not present at a single meeting has no bearing on whether he was a member of the conspiracy. Co-conspirators need not be part of every aspect of the conspiracy.

Barker argues in point 13 that he did not know that Drayer was keeping some funds belonging to doctors or the banks, even with respect to Carefree borrowers. The fact that Drayer kept some funds due to Barker's clients does not disprove Barker's guilt. Co-conspirators often have disputes over the distribution of the proceeds of their crimes. The proof showed that the defendants acted in concert to defraud the banks. Barker and Carefree did receive over $4.3 million in commissions.

Even on those occasions when Drayer skimmed some off the top for himself, Stephen Barker was directly responsible for helping Drayer defraud the banks and get them to part with their money. The loan of Dr. Anita Srinivasa is a case in point. As Dr. Srinivasa testified, she was acquiring an existing practice with old equipment. She did not purchase any new equipment from a vendor and never purchased anything from MedPro. Yet Stephen Barker doctored up loan contracts to make it look like a new equipment finance agreement, created a fake MedPro invoice, and sent the documents off to Barry Drayer so PLS could send them off to the bank. It is of no moment whether Barker knew that on some of his deals PLS was going to obtain the money from the banks and never send it to Carefree. The point is that the bank never would have issued the loan if it had known the true purpose. Barker sent the false documents that allowed Barry Drayer to get the money from the banks that he ultimately stole.

In point sixteen, Barker points to the fact that his ownership of both Carefree and MedPro was a matter of public record. However, the weight of the evidence was against Barker and the jury was entitled to conclude that the defendant committed the crime but it was not a perfect crime. Had Barker committed the crime more perfectly he may not have been caught, but that is obviously not a defense.

Finally, Barker argues that his loans were merely legitimate sale/leasebacks secured by equipment. However, if that were true, the banks were never told about it. The banks were defrauded into believing that the loans were new equipment financing loans. They were defrauded by documents prepared at Barker's direction, including the false MedPro invoices. It is the very fact that Barker doctored up sale/leasebacks, construction, and debt refinancings, and represented them to the banks as new equipment financing deals that is the heart of the bank/wire fraud conspiracy.

POINT THREE

THE DEFENDANTS' MOTIONS FOR A NEW TRIAL UNDER RULE 33 ARE WITHOUT MERIT

In a throwaway argument at the very end of defendant Drayer's post-trial motion[5] defendants contend that the court should vacate the jury's verdict and grant a new trial under Rule 33.

In order to grant a motion for a new trial under Rule 33, a court must determine that "it would be a manifest injustice to let the guilty verdict stand." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992) (A trial judge may only overturn a jury verdict under Rule 33 when "exceptional circumstances can be

[5] Defendant Barker did not seek a new trial under Rule 33 in his own motion but subsequently filed a letter motion seeking to join in defendant Drayer's Rule 33 motion.

demonstrated.”). The Second Circuit has long held that the trial court’s discretion under Rule 33 "should be exercised sparingly." Sanchez, 969 F.2d at 1414; see also United States v. Hernandez, 2006 WL 861002, *5 (D. Conn. Mar. 31, 2006) (“Rule 33 motions are not favored and should be granted only in exceptional circumstances, and even then with great caution.”); United States v. Thomas, 894 F. Supp. 58, 63 (N.D.N.Y. 1995)(Motions under Rule 33 "are not favored and should be granted only with great caution in exceptional circumstances.").

The defendant bears the burden of proving the need for a new trial, and before ordering a new trial under Rule 33, a district court must find that there is “‘a real concern that an innocent person may have been convicted.’” United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001) (quoting Sanchez, 969 F.2d at 1414). The court "may not re-weigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." United States v. Martinez, 844 F. Supp. 975, 980 (S.D.N.Y. 1994)(citation omitted). A motion for a new trial under Rule 33 permits the court to evaluate the weight of the evidence and the credibility of witnesses. See Sanchez, 969 F.2d at 1413. Importantly, however, courts may only reject the jury’s assessment of the credibility of witnesses in “the most extraordinary circumstances,” such as when the testimony is “patently incredible or defies physical realities.” Id. at 1414.

Indeed, even where courts in this circuit have clearly identified *perjured* testimony they have refused to grant a new trial unless the court could find that the jury "probably would have acquitted in the absence of the false testimony." Id. at 1413-14, 1415 (refusing to grant a new trial under Rule 33 on the basis of perjured testimony because it "could not be said that the jury probably would have acquitted in the absence of the false testimony").

The defendants have failed to articulate, much less demonstrate, any "exceptional circumstances" that would justify overturning the jury's verdict. As discussed in detail above, the evidence against Barker and Drayer was more than sufficient to convict them of all of the crimes charged in the indictment. Defendants have not identified any testimony that was "patently incredible or defies physical realities." In fact, all of the testimony by cooperating witnesses was corroborated by the documentary evidence and the testimony of other witnesses. Further, this is not a case like United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000), where the core of the government's evidence rested on a single witness whose testimony was "riddled with inconsistency" and "contradicted by every other witness." Here, there were multiple cooperating witnesses who each corroborated the other and whose testimony was supported by a myriad of documentary evidence.

In short, defendants have failed to bear the burden of proving the extraordinary circumstances and "manifest injustice" required for a new trial under Rule 33.

CONCLUSION

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

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Respectfully Submitted,

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