

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

UNITED STATES OF AMERICA :  
 :  
 v. : Case No. 2:10-cr-72  
 :  
 THOMAS KOMASA and :  
 HEIDI KOMASA, :  
 :  
 Defendants. :

Jury Charge

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them. You will receive a copy of the superseding indictment to take with you into the jury room. This case is a criminal prosecution brought by the United States against the defendants, Thomas Komasa and Heidi Komasa.

Count One charges Thomas and Heidi Komasa with conspiracy to commit mail, wire, and financial institution fraud.

Counts Two through Nine charge Thomas and Heidi Komasa with committing the substantive offenses of, and aiding and abetting in, mail, wire, and financial institution fraud. Finally, Count Ten charges Thomas Komasa with committing financial institution fraud by depositing a check in one bank account that was drawn on a closed account in another bank.

Thomas and Heidi Komasa have pled not guilty to these

charges.

**ROLE OF INDICTMENT**

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse a defendant of a crime prior to trial. An indictment is not evidence. The superseding indictment in this case does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way. It simply describes the charges against Thomas and Heidi Komasa.

You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the superseding indictment and the denial made by Thomas and Heidi Komasa's not guilty pleas. You are to perform this duty without bias or prejudice against Thomas and Heidi Komasa or the prosecution.

**PRESUMPTION OF INNOCENCE, REASONABLE DOUBT AND BURDEN OF PROOF**

The law presumes that Thomas and Heidi Komasa are innocent of the charges against them. The presumption of innocence lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt that Thomas and Heidi Komasa are guilty. Should the government fail to prove the guilt of either Thomas or Heidi Komasa beyond a reasonable doubt, you must find that particular defendant not guilty.

The question naturally is what is a reasonable doubt? The

words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. However, reasonable doubt may arise from a lack of evidence.

In a criminal case, the burden is upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government. For each offense charged in the superseding indictment, and separately as to each defendant, if

after fair and impartial consideration of all the evidence you have a reasonable doubt, you must find that defendant not guilty of that offense. If you view the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—you must find that defendant not guilty. If, however, after fair and impartial consideration of all the evidence you are satisfied of that defendant's guilt of that offense beyond a reasonable doubt, you should vote to convict.

#### **MULTIPLE COUNTS**

The superseding indictment charges Thomas and Heidi Komasa in multiple counts. Each count alleges Thomas and/or Heidi Komasa committed different crimes. You must consider each count and any evidence pertaining to it separately and return a separate verdict of guilty or not guilty as to Thomas and Heidi Komasa.

#### **"ON OR ABOUT" EXPLAINED**

Counts Two through Ten in the superseding indictment charge that offenses were committed "on or about" certain dates. Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the superseding indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

**EVIDENCE**

You have seen and heard the evidence produced in this trial and it is the sole responsibility of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been received in evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention to certain guidelines by which you are to evaluate the evidence. There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of Thomas or Heidi Komasa beyond a reasonable doubt, you must find him or her not guilty.

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings I have made in the course of the trial, I did not intend to indicate to you any of my own views, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible.

The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all the exhibits that have been received in evidence. Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proven, such reasonable inferences as you feel are justified in light of your experiences. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

**STIPULATION OF FACTS**

When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proven.

**CREDIBILITY OF WITNESSES**

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward Thomas or Heidi Komasa, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of

witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

#### **EXPERT WITNESSES**

You have heard testimony from an expert witness. An expert is allowed to express an opinion on those matters about which the expert has special knowledge and training. Expert testimony is



presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. In weighing the expert's testimony, you may consider the expert's qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

**INTEREST IN OUTCOME**

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

**LAW ENFORCEMENT WITNESSES**

You have heard the testimony of law enforcement officials in this case. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept the testimony of law enforcement officials, and to give to that testimony whatever weight, if any, you find it deserves.

**PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS**

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-court statements not made under oath only to determine the credibility of the witness and not as evidence of any facts contained in the

statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained therein.

**RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE**

You may not consider the race, religion, national origin, sex, or age of Thomas or Heidi Komasa or of any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

**GOVERNMENT AS A PARTY**

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality. This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, this case is important to Thomas and Heidi Komasa, who are charged with serious crimes.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the Court.

**DEFENDANT NOT TESTIFYING**

You may have observed that Thomas Komasa did not testify in this case. In a criminal case, a defendant has a constitutional right not to testify, and the government may not call him or her as a witness. Whether or not a defendant testifies is a matter of his or her own choosing. A defendant has no obligation to testify or to present evidence, because it is the government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he or she is innocent. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining Thomas Komasa's guilt or innocence of the crimes charged, you are not to consider, in any manner, the fact that he did not testify. Do not even discuss it in your deliberations.

**IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION OR FROM MERE PRESENCE**

You may not infer that Thomas and/or Heidi Komasa is guilty of participating in criminal conduct merely from the fact that he or she associated with other people who were guilty of wrongdoing. You also may not infer that a defendant is guilty of participating in criminal conduct merely from the fact that he or she was present at the time the crime was being committed and had knowledge that it was being committed.

**CHARTS & SUMMARIES ADMITTED AS EVIDENCE**

The government and the defendants have presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries along with the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

**OTHER ACTS**

You are only to determine whether Thomas and/or Heidi Komasa are guilty or not guilty of the charges in the superseding indictment. Your determination must be made only from the evidence in the case. Neither Thomas nor Heidi Komasa is on trial for any conduct or offense not charged in the superseding indictment. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to these charges against the defendant.

**INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE**

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that applies to your determinations in this case. It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful

to your oath as jurors if you find a verdict that is contrary to the law that I give to you. However, it is the sole responsibility of the jury to determine the facts in this case. I do not, by any instructions I give to you, intend to persuade you in any way as to any question of fact.

**COUNT ONE: CONSPIRACY TO COMMIT FRAUD**

Count One of the superseding indictment charges Thomas and Heidi Komasa with conspiracy to violate federal law.

The relevant statute on this subject is Title 18 of the United States Code, section 1349. It provides: "Any person who attempts or conspires to commit any offense under [the federal anti-fraud statutes]" shall be guilty of an offense.

**Purpose of the Statute**

Under the law, a "conspiracy" is an agreement or a kind of partnership in criminal purposes in which each member becomes the agent or partner of the other members.

Congress has deemed it appropriate to make conspiracy, standing alone, a separate and distinct crime from the actual violation of any specific federal laws, which the law refers to as "substantive crimes." This is because collective criminal activity poses a greater threat to the public's safety and welfare than individual conduct, and increases the likelihood of a particular criminal venture.

Because the essence of a conspiracy is the making of the scheme itself, it is not necessary for the government to prove

that the conspirators actually succeeded in accomplishing their unlawful plan. Indeed, you may find Thomas and/or Heidi Komasa guilty of the crime of conspiracy even though the substantive crimes which were the object of the conspiracy were not actually committed.

**Elements of Conspiracy**

In order to satisfy its burden of proof on the conspiracy charge, the government must establish each of the following two essential elements beyond a reasonable doubt:

First, that two or more persons entered into the unlawful agreement charged in the superseding indictment; and

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

**Element One: Existence of an Agreement**

The first element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered into the unlawful agreement charged in the superseding indictment.

The superseding indictment alleges the objective of the conspiracy was to commit mail fraud, in violation of Title 18 of the United States Code, section 1341, wire fraud, in violation of Title 18 of the United States Code, section 1343, and bank fraud, in violation of Title 18 of the United States Code, section 1344.

If you find beyond a reasonable doubt that the objective

of the conspiracy was to commit even one of these three types of fraud, you may find that the joint plan or common design is proven.

In order for the government to satisfy this element, it must prove there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act. You need not find that the alleged members of the conspiracy actually met and entered into any express or formal agreement. You need not find that the alleged members stated in words or writing what the object or purpose of the conspiracy was, or every precise detail of that scheme. The agreement may only consist of a mutual understanding that the members would commit some illegal activity by means of a common plan or course of action, as alleged in the superseding indictment.

There may or may not be direct proof of the agreement. However, because a conspiracy is sometimes characterized by secrecy, you may or may not infer its existence from the circumstances and the conduct of the parties involved. You may therefore consider the actions and statements of all of those you find to be participants as proof that a common design existed for acting together to accomplish an unlawful purpose. Acts that may seem innocent when taken individually may indicate guilt when viewed collectively and with reference to



the circumstances in general.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

**Element Two: Membership in the Conspiracy**

The second element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that Thomas and/or Heidi Komasa knowingly and willfully became members of the conspiracy.

If you are satisfied that the conspiracy charged in the superseding indictment existed, you must next ask yourselves who the members of that conspiracy were. In order to make this determination, you must decide whether Thomas and/or Heidi Komasa knowingly and willfully joined the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective.

You must find that Thomas and/or Heidi Komasa joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement, and with the intent of aiding in the accomplishment of those ends, in order to satisfy the knowledge and intent element of the conspiracy charge. In

other words, the government must prove beyond a reasonable doubt that Thomas and/or Heidi Komasa acted with the specific intent to commit mail, wire, or financial institution fraud. Proof of such intent need not be direct. Intent may be proved by circumstantial evidence alone.

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have a stake in the venture or its outcome. A financial interest in the outcome of the scheme is not essential. Nevertheless, if you find that Thomas and/or Heidi Komasa had such an interest, that is a factor which you may properly consider in determining whether or not he or she was a member of the conspiracy charged in the superseding indictment.

The fact that acts of a defendant, without knowledge of the conspiracy, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. The defendant's knowledge is a matter of inference and must be established by his own acts or statements, as well as those of the other alleged co-conspirators. A defendant need not have known the identities of each and every member, nor been fully informed of all of their activities, nor all of the details of the conspiracy.

The extent of a defendant's participation has no bearing on his or her guilt. A conspirator's liability is not measured

by the extent or duration of his or her participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor roles in the scheme. The law does not require that each participant in the conspiracy play an equal role.

If the evidence establishes beyond a reasonable doubt that Thomas and/or Heidi Komasa knowingly and willfully entered into an agreement to commit the substantive offense charged in the superseding indictment, the fact that he or she did not join the agreement at its beginning, did not know all of the details of the agreement, did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal, is not important to your decision regarding membership in the conspiracy.

However, mere association with others, mere presence at the place where a crime takes place or is discussed-or knowing about criminal conduct-does not, in and of itself, make someone a member of the conspiracy.

In sum, a defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering the illegal undertaking. He or she thereby becomes a knowing and willing participant in the unlawful agreement. In other words,

he or she becomes a conspirator.

**Acts and Declarations of Co-Conspirators**

I have admitted into evidence against each defendant the acts and statements of the other defendant because the government charges Thomas and Heidi Komasa were confederates or co-conspirators of each other.

The reason for allowing this evidence to be received has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy.

Accordingly, the reasonably foreseeable acts, declarations, statements and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy, are deemed, under the law, to be the acts of all of the members, and all of the members are responsible for such acts, declarations, statements and omissions.

If you find beyond a reasonable doubt that the defendant whose guilt you are considering was a member of the conspiracy charged in Count One of the superseding indictment, then any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of the conspiracy, may also be considered against that defendant. This is so even

if such acts were done and statements were made in his or her absence and without his or her knowledge.

However, before you may consider the statements or acts of a co-conspirator, you must first determine that the acts and the statements were made during the existence, and in furtherance, of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy or if they were not done or said in furtherance of the conspiracy, they may be considered by you as evidence only against the member who did or said them.

**COUNTS TWO & THREE: MAIL FRAUD**

Counts Two and Three of the superseding indictment charge that Thomas and Heidi Komasa devised a scheme to defraud and in furtherance of that scheme knowingly caused the mails to be used, in violation of Title 18 of the United States Code, section 1341.

Section 1341 provides as follows:

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 . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . . any such matter or thing, shall be [guilty of a crime].

**Elements of the Offense**

In order to sustain this charge, the government must prove

each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to obtain money or property by materially false and fraudulent pretenses, representations or promises, as alleged in the superseding indictment;

Second, that the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud, or that he or she knowingly and intentionally aided and abetted others in the scheme; and

Third, that in execution of that scheme, the defendant used or caused the use of the mails, or a private or commercial interstate carrier as specified in the superseding indictment.

**First Element - Existence of a Scheme or Artifice to Defraud**

The first element that the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud the victim of money or property by means of false or fraudulent pretenses, representations or promises.

This first element is almost self-explanatory.

A "scheme or artifice" is merely a plan for the accomplishment of an object.

A scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term which embraces all the various

means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is merely a plan to deprive another of money or property by trick, deceit, deception or swindle.

The scheme to defraud is alleged to have been carried out by making false and fraudulent statements, representations and promises.

A statement, representation, or promise is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement or promise is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half truths or the concealment of material facts, and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

The false or fraudulent representation must relate to a material fact or matter. A material fact is one which would

reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision (e.g., with respect to a proposed investment).

This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.

The representations which the government charges were made as part of the scheme to defraud are set forth in paragraphs 10-19 of the superseding indictment. It is not required that every misrepresentation charged in the superseding indictment be proved. It is sufficient if the prosecution proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud.

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property.

However, the government is not required to prove that Thomas and/or Heidi Komasa personally originated the scheme to defraud. Furthermore, it is not necessary that the government prove that Thomas and/or Heidi Komasa actually realized any gain from the scheme or that the intended victim actually suffered any loss. In this case, it so happens that the government does contend that



proof establishes that persons or companies were defrauded and that Thomas and Heidi Komasa profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.

A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

If you find that the government has sustained its burden of proof that a scheme to defraud, as charged, did exist, you next should consider the second element.

**Second Element-Participation in the Scheme with Intent**

The second element that the government must prove beyond a reasonable doubt is that Thomas and/or Heidi Komasa participated in the scheme to defraud knowingly, willfully and with specific intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to

determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he or she committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his or her words, his or her conduct, his or her acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of Thomas and/or Heidi Komasa is a complete defense to a charge of mail fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

Under the mail fraud statute, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or

deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

There is another consideration to bear in mind in deciding whether or not the defendant acted in good faith. You are instructed that if the defendant participated in the scheme to defraud, then a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that Thomas and/or Heidi Komasa acted in good faith. If Thomas and/or Heidi Komasa participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on his or her part that the scheme would, for example, ultimately make a profit for the investors, will excuse fraudulent actions or false representations by him or her.

As a practical matter, then, in order to sustain the charges against Thomas and/or Heidi Komasa, the government must establish beyond a reasonable doubt that he or she knew that his or her conduct as a participant in the scheme was calculated to deceive and, nonetheless, he or she associated himself or herself with the alleged fraudulent scheme for the purpose of causing some loss to another.

The government can also meet its burden of showing that Thomas and/or Heidi Komasa had knowledge of the falsity of the statements if it establishes beyond a reasonable doubt that he or

she acted with deliberate disregard of whether the statements were true or false, or with a conscious purpose to avoid learning the truth. If the government establishes that Thomas and/or Heidi Komasa acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant in question actually believed the statements to be true. This guilty knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish.

To summarize, if you find that Thomas and/or Heidi Komasa was not a knowing participant in the scheme or that he or she lacked the specific intent to defraud, you should find him or her not guilty. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely the existence of the scheme to defraud, but also this second element, that Thomas and/or Heidi Komasa was a knowing participant and acted with specific intent to defraud, and if the government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant.

**Third Element-Use of the Mails**

The third and final element that the government must establish beyond a reasonable doubt is the use of the mails in furtherance of the scheme to defraud. The use of the mails as I have used it here includes material sent through either the United States Postal Service or a private or commercial interstate carrier.

The mailed matter need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for the defendant to be directly or personally involved in the mailing, as long as the mailing was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the mailing by others. This does not mean that the defendant must specifically have authorized others to do the mailing. When one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not actually intended, then he or she causes the mails to be used.

With respect to the use of the mails, the government must establish beyond a reasonable doubt the particular mailing charged in the superseding indictment. However, the government does not have to prove that the mailings were made on the exact date charged in the superseding indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the mailing was made on a date substantially similar to the date charged in the superseding indictment.

**COUNTS FOUR, EIGHT, NINE & TEN: FINANCIAL INSTITUTION FRAUD**

Counts Four, Eight and Nine of the superseding indictment

charge that Thomas and Heidi Komasa committed or attempted to commit financial institution fraud against a federally insured bank. Count Ten charges Thomas Komasa alone with devising and executing, or attempting to execute, a scheme to defraud a federally insured bank and/or a federally insured credit union.

18 U.S.C. § 1344 provides as follows:

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 guilty of a crime].

**Elements of the Offense**

In order to prove Thomas and/or Heidi Komasa guilty of the crime of financial institution fraud, as charged in the superseding indictment, the government must establish each of the following elements beyond a reasonable doubt:

First, either that there was a scheme to defraud a financial institution, or that there was a scheme to obtain money or funds owned or under the custody or control of a financial institution by means of materially false or fraudulent pretenses, representations or promises as charged in the superseding indictment;

Second, that Heidi and/or Thomas Komasa executed or attempted to execute the scheme with the intent to defraud the financial institution; and

Third, that at the time of the execution of the scheme, the bank had its deposits insured by the Federal Deposit Insurance Corporation, or the credit union had its accounts insured by the National Credit Union Share Insurance Fund.

**First Element-Scheme to Defraud or Scheme to Obtain Money or Property**

The first element that the government must prove beyond a reasonable doubt is either that there was a scheme to defraud or that there was a scheme to obtain money or property by means of materially false and fraudulent information as described in the superseding indictment. Thus, element one can be satisfied in one of two ways. In order to convict on Counts Four, Eight, and Nine, you must unanimously agree on at least one of either of the two prongs: scheme to defraud or scheme to obtain money or property.

However, as I will explain below, on Count Ten-the charge that Thomas Komasa devised and executed, or attempted to execute, a scheme to defraud by depositing a check drawn on a closed account-you must unanimously agree that the government has proven a scheme to defraud to find it has satisfied element one.

A "scheme to defraud" is defined as a pattern or course of conduct concerning a material matter designed to deceive a federally insured financial institution into releasing property with the intent to cause the financial institution to suffer an actual or potential loss.

Alternatively, as to Counts Four, Eight and Nine, the government may prove there was a scheme to obtain money or property owned by or under the custody and control of a bank by means of false or fraudulent pretenses, representations or promises as described in the superseding indictment. A representation is fraudulent if it was falsely made with the intent to deceive. Deceitful statements of half truth, the concealment of material facts, and the expression of an opinion not honestly entertained may constitute false or fraudulent representations under the statute. The law states that a check is not a statement, promise or representation. As such, this prong does not apply to Count Ten, which concerns a check.

Although it is not necessary for the government to prove an actual loss of funds by the financial institution, the government must prove beyond a reasonable doubt that by executing or attempting to execute the scheme alleged in the superseding indictment, the defendant placed the financial institution at a risk of loss and that the financial institution did not knowingly accept such a risk.

**Second Element-Intent to Defraud**

The second element the government must prove beyond a reasonable doubt is that Thomas and/or Heidi Komasa executed or attempted to execute the scheme knowingly, willfully and with specific intent to defraud the financial institution.



I defined what it means to act knowingly, willfully, and with intent to defraud in discussing the second element of mail fraud. I refer you to that discussion for Counts Four, Eight, Nine, and Ten as well.

The government also charges Thomas and Heidi Komasa with attempting to execute a scheme to defraud or to obtain money or property. To find that Thomas and/or Heidi Komasa attempted, but did not successfully execute, a scheme to defraud or to obtain money or property, you must first answer the following. In order to prove that Thomas and/or Heidi Komasa attempted to execute the scheme, the government must prove beyond a reasonable doubt that (1) the defendant intended to execute the scheme alleged in the superseding indictment, and (2) that the defendant did some overt act that was a substantial step in an effort to execute the scheme. Merely preparing to commit a crime is not a substantial step. The defendant must go beyond mere preparation, and his or her act must strongly confirm that he or she intended to execute the scheme. However, the government does not have to prove that Thomas and/or Heidi Komasa did everything except the last act necessary to complete the scheme. A substantial step beyond mere preparation is enough.

**Third Element-Bank or Credit Union was Federally Insured**

The last element the government must prove beyond a reasonable doubt is that the financial institution named in the

particular count was insured by the Federal Deposit Insurance Corporation at the time of the execution of the alleged scheme to defraud, or in the case of a credit union, that it was insured by the National Credit Union Share Insurance Fund.

It is not necessary for the government to prove that Thomas and/or Heidi Komasa knew the identity of the particular financial institution or that Thomas and/or Heidi Komasa knew that the institution was insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. It must prove, however, that Thomas and/or Heidi Komasa intended to defraud a financial institution.

Counts Four, Eight and Nine accuse Thomas and/or Heidi Komasa of scheming to defraud National City Mortgage and National City Bank. You have heard testimony that National City Mortgage was, in 2005 and 2006, a division of National City Bank. You have also heard testimony that although National City Bank had its deposits insured by the Federal Deposit Insurance Corporation, National City Mortgage was not itself a bank. Nevertheless, you may find that a scheme which is formally aimed at an uninsured entity, but which in substance may work to defraud its parent company, which is insured, may be prosecuted under the financial institution fraud statute.

**COUNTS FIVE, SIX & SEVEN: WIRE FRAUD**

Counts Five, Six and Seven of the superseding indictment charge that Thomas and Heidi Komasa devised a scheme to defraud and in furtherance of that scheme knowingly caused interstate

wires to be used, in violation of Title 18 of the United States Code, section 1343.

Section 1343 provides as follows:

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 communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be [guilty of a crime].

#### **Elements of the Offense**

In order to sustain this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to obtain money or property by materially false and fraudulent pretenses, representations or promises, as alleged in the superseding indictment;

Second, that Thomas and/or Heidi Komasa knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud or that he or she knowingly and intentionally aided and abetted others in the scheme; and

Third, that in execution of that scheme, Thomas and/or Heidi Komasa used or caused the use of the interstate wires as specified in the superseding indictment.

The first two elements of the wire fraud charge are that (1) there existed a scheme or artifice to defraud as charged in the

superseding indictment and (2) that the defendant knowingly and willfully participated in the scheme. I have already explained those two elements to you in my instructions on mail fraud, and direct you to apply that portion of the mail fraud instructions to Counts Five, Six, and Seven as well.

**Third Element - Use of the Wires**

The third and final element that the government must establish beyond a reasonable doubt is the use of an interstate or international wire communication in furtherance of the scheme to defraud.

The wire communication must pass between two or more states as, for example, a telephone call between New York and New Jersey; or it must pass between the United States and a foreign country, such as a telephone call between New York and London. A wire communication also includes a wire transfer of funds between banks in different states or between a bank in the United States and a bank in a foreign country.

The use of the wires need not itself be a fraudulent representation. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for Thomas and/or Heidi Komasa to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which he or she is accused of participating.

It is sufficient to establish this element of the crime if the evidence justifies a finding that Thomas and/or Heidi Komasa caused the wires to be used by others. This does not mean that Thomas and/or Heidi Komasa must specifically have authorized others to make the call or transfer the funds. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires can reasonably be foreseen, even though not actually intended, then he or she causes the wires to be used.

With respect to the use of the wires, the government must establish beyond a reasonable doubt the particular use charged in the superseding indictment. However, the government does not have to prove that the wires were used on the exact date charged in the superseding indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on a date substantially similar to the dates charged in the superseding indictment.

#### **AIDING AND ABETTING**

Counts Two through Ten of the superseding indictment charge Thomas and/or Heidi Komasa with aiding and abetting the offenses of mail, wire and financial institution fraud.

The aiding and abetting statute, Title 18 of the United States Code, section 2(a) provides that:

Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the government to show that Thomas and/or Heidi Komasa himself or herself physically committed the crime with which he or she is charged in order for the government to sustain its burden of proof. A person who aids or abets another to commit an offense is just as guilty of that offense as if he or she committed it himself or herself.

Accordingly, you may find Thomas and/or Heidi Komasa guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether Thomas and/or Heidi Komasa aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it is necessary that a defendant knowingly associate himself or herself in some way with the crime, and that he or she participate in the crime by doing some act to help make the crime succeed.

To establish that Thomas and/or Heidi Komasa knowingly

associated himself or herself with the crime, the government must establish that the defendant or defendants intended to defraud the victim named in the particular count.

To establish that Thomas and/or Heidi Komasa participated in the commission of the crime, the government must prove that he or she engaged in some affirmative conduct or overt act for the specific purpose of bringing about that crime.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime, is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether Thomas and/or Heidi Komasa aided or abetted the commission of the crime with which he or she is charged, ask yourself these questions:

Did he or she participate in the crime charged as something he or she wished to bring about?

Did he or she knowingly associate himself with the criminal venture?

Did he or she seek by his or her actions to make the criminal venture succeed?

If Thomas and/or Heidi Komasa did, then he or she is an aider and abettor, and therefore guilty of the offense. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider and abettor, and you must find him or her not guilty.

**CONCLUSION**

I caution you, members of the jury, that you are here to determine the guilt or innocence of Thomas and Heidi Komasa solely from the evidence in this case. I remind you that the mere fact that they have been indicted is not evidence against them. Also, they are not on trial for any act or conduct or offense not alleged in the superseding indictment.

The punishment provided by law for the offenses charged in the superseding indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict. It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. To return a



verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to the counts contained in the superseding indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count. Your foreperson will then sign and date the verdict form and you will then return to the courtroom.

If, during your deliberations you should desire to communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take

precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than the other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

A copy of this charge will go with you into the jury room for your use.

I appoint \_\_\_\_\_ as your foreperson.

Dated at Burlington, Vermont this 26th day of June, 2012.

/s/William K. Sessions III  
William K. Sessions III  
U.S. District Court Judge