UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES	)	
	)	
v.	)	Criminal No. 2:97CR054-07
	)	
CLAIRE PECK	)	

JURY INSTRUCTIONS

This case is a criminal prosecution brought by the United States against the defendant Claire Peck. The Grand Jury indictment charges the defendant in three types of charges. You will receive a copy of the indictment to take with you into the jury room.

Count 1 of the indictment alleges the defendant conspired to commit mail fraud and wire fraud in violation of 18 United States Code section 371.

Counts 2, 4, 6, 8, 10, 11, 16, 17, 19, 20, 23, 29, 31, 34, 35 of the indictment charge that the defendant committed the crime of mail fraud by participating in a scheme to defraud by means of false representations and promises; and in furtherance of that scheme, she knowingly caused private and commercial interstate mail carriers to be used.,

Count 38 of the indictment charges that the defendant committed the crime of wire fraud by participating in a scheme to defraud; and in furtherance of that scheme, she knowingly caused interstate or foreign wire communication facilities to be used.

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 the defendant of a crime

preliminary to trial. The indictment is not evidence. The indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant.

The defendant pleaded not guilty to all of the charges in the indictment. 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 indictment and the denials made by the not guilty plea. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

MULTIPLE COUNTS

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which the defendant is charged. The fact that you may find the defendant not guilty or guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

REASONABLE DOUBT

The law presumes a defendant to be innocent of a crime. Thus, although accused, a defendant begins the trial with a "clean slate" -- with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against a defendant. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. 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.

You must remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

So if, after careful and impartial consideration of all the evidence in the case, you have a reasonable doubt that the defendant is guilty of an offense charged in the indictment, then you must acquit the defendant of that offense. Unless the government proves, beyond a reasonable doubt, that the defendant has committed each and every element of the offense charged in the indictment, you must find the defendant not guilty of the offense. Furthermore, if you view the evidence in the case as reasonably permitting either of two conclusions as to any count -- one of innocence, the other of guilt, you must, of course, adopt the conclusion of innocence and find the defendant not guilty of that count.

As I have instructed you, the law presumes that a defendant is innocent of

the charges against him or her. The presumption of innocence lasts throughout the trial and ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the Government fail to prove the guilt of a defendant beyond a reasonable doubt, you must acquit the defendant.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province 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 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 their 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. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. As you have probably noticed, this courtroom has no windows. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet

umbrella. Now, you cannot look outside of the courtroom and you cannot see whether it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. 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 for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

You may convict a defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

EXPERT WITNESSES

You have heard testimony from expert witnesses. 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' 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.

TESTIMONY AND ARGUMENTS EXCLUDED

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. 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 government and the defendant, and all exhibits received in evidence.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. You should not assume that I hold any opinion on matters to which my questions may have related. At all times, you, the jurors, are at liberty to disregard all questions and comments by me in making your findings as to the 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 proved.

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 are not limited merely to the statements of the witnesses. 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 proved, such reasonable inferences as you feel are justified in light of your experiences.

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, since 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 the defendant, 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 to you in this case.

LAW ENFORCEMENT WITNESS

You have heard the testimony of several law enforcement officials. 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 their 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 the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

IMPERMISSIBLE TO INFER
PARTICIPATION FROM ASSOCIATION

You may not infer that the defendant is guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

RECORDINGS AND WIRETAPS

The government has offered evidence in the form of tape recordings of the defendant's conversations. These recordings were obtained without the knowledge of the parties to the conversations, but with the consent and authority from a court in Canada. The use of these procedures to gather evidence is lawful, and the government is entitled to use the tape recordings in this case.

CHARTS AND SUMMARIES ADMITTED AS EVIDENCE

The government has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of 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.

ACCOMPLICES CALLED BY THE GOVERNMENT

You have heard from at least one witness who testified that he was involved in planning and carrying out the conspiracy offense charged in the indictment.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

I have given you some general considerations on credibility and I will not repeat them all here. Nor will I repeat all of the arguments made on both sides. However, let me say a few things that you may want to consider during your deliberations on the subject of accomplices.

You should ask yourselves whether these particular witnesses would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth?

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to the accomplice witnesses.

GOVERNMENT WITNESS - NOT PROPER
TO CONSIDER GUILTY PLEA

You have heard testimony from at least one government witness who pled guilty to charges arising out of the same facts as this case. You are instructed that you

are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

CO-DEFENDANTS' PLEA AGREEMENTS

There was testimony from government witnesses who pled guilty after entering into an agreement with the government to testify. There is evidence that the government agreed to dismiss some charges against the witnesses in exchange for the witness' agreement to plead guilty and testify at this trial against the defendant.

The government is permitted to enter into this kind of plea agreement. You, in turn, may accept the testimony of such a witness and convict the defendant on the basis of this testimony alone, if it convinces you of the defendant's guilt beyond a reasonable doubt.

However, you should bear in mind that a witness who has entered into such an agreement has an interest in this case different than any ordinary witness. A witness who realizes that he may obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

INSTRUCTIONS ON THE
SUBSTANTIVE LAW OF THE CASE

Having told you the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable 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 province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

THE INDICTMENT AND THE STATUTE

The first count of the indictment charges the defendant with conspiring to commit mail and wire fraud. The relevant statute on this subject is 18 U.S.C. § 371. It provides:

> If two or more persons conspire . . . to commit any offense against the United States. . ., and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of an offense against the United States).

PURPOSE OF THE STATUTE

In this case, the defendant is accused of having been a member of a conspiracy to violate federal laws prohibiting the use of the mails and the interstate wire communication facilities in furtherance of a scheme to defraud. A conspiracy is a kind of criminal partnership--a combination or agreement of two or more persons to join

together to accomplish some unlawful purpose.

The crime of conspiracy to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal laws, which the law refers to as "substantive crimes."

You may find the defendant guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crimes which were the object of the conspiracy were not actually committed.

Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime even if the conspiracy is not successful. 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 success of a particular criminal venture.

ELEMENTS OF CONSPIRACY

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

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

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

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and

Fourth, that the overt act(s) which you find to have been committed were committed to further some objective of the conspiracy.

EXISTENCE OF AGREEMENT

The first element which 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 indictment.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that 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 may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

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.

MEMBERSHIP IN THE CONSPIRACY

The second element which the government must prove beyond a reasonable

doubt to establish the offense of conspiracy, is that the defendant knowingly, willfully and voluntarily became a member of the conspiracy.

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. Did she participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker?

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

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that she knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of her own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need she have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on her part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of 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 parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that the defendant's mere presence at the scene of an alleged crime does not, by itself, make her a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal without being a criminal herself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of

the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

In sum, the 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. She thereby becomes a knowing and willing participant in the unlawful agreement--that is to say, a conspirator.

COMMISSION OF OVERT ACT

The third element which the government must prove beyond a reasonable doubt, to establish the offense of conspiracy, is that at least one of the overt acts charged in the indictment was knowingly committed by at least one of the conspirators, at or about the time and place alleged.

The indictment, which will be submitted to you along with these instructions, charges that overt acts were committed in the District of Vermont.

In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the indictment be proven. Proof of one is sufficient.

Similarly, you need not find that the defendant herself committed any overt act. It is sufficient for the government to show that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes, in the eyes of the law, the act of all of the members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced

beyond a reasonable doubt, that it occurred at or about the time and place stated.

Finally you must find that the overt act was committed in Vermont.

COMMISSION OF OVERT ACT
IN FURTHERANCE OF THE CONSPIRACY

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of some object or purpose of the conspiracy, as charged in the indictment. The overt act, standing alone, may be an innocent, lawful act. However, an innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiracy. You are therefore instructed that the overt act does not have to be an act which, in and of itself is criminal or constitutes an objective of the conspiracy.

ACTS AND DECLARATIONS OF CO-CONSPIRATORS

You will recall that I have admitted into evidence against the defendant the acts and statements of others because these acts and statements were committed by persons the government charges to be co-conspirators of the defendant.

The reason for allowing this evidence to be received against the defendant 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 was a member of the conspiracy charged in the indictment, then, any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy, may be considered against the defendant. This is so even if such acts were done and statements were made in the defendant's absence and without her knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the issue of a defendant's guilt, you must first determine that the acts and 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.

THE INDICTMENT AND THE STATUTE

Count _____ of the indictment accuses the defendant of committing the crime of mail fraud. Those counts charge the defendant and her co-defendants with defrauding persons. During this trial, the Government has chosen to present evidence relating to only some of these persons. Accordingly, the court has dismissed those

counts involving victims whom the Government chose not to call as witnesses. The remaining mail fraud counts charge that the defendant participated in a scheme to defraud, by means of false representations and promises, and in furtherance of that scheme she knowingly caused private and commercial interstate carriers to be used.

The relevant statute on this subject is Section 1341 of Title 18 of the United States Code. It provides, in pertinent part:

> 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, . . . deposits or causes to be deposited, any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, . . . or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of a crime].

ELEMENTS OF THE OFFENSE

In order to sustain these mail fraud charges, 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 false and fraudulent pretenses, representations or promises, as alleged in the 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; and

Third, that in execution or in furtherance of that scheme, the use of a private or commercial interstate carrier occurred as specified in the indictment.

FIRST ELEMENT--EXISTENCE OF
A SCHEME OR ARTIFICE

The first element the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud or to obtain 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 design or plan for the accomplishment of some goal or objective.

A scheme to defraud is any plan, device, or course of action to deprive another person of 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 some unfair advantage over another person by intentional misrepresentations, suggestions, or suppression or concealment of the truth, or deliberate disregard of the truth.

Thus, a "scheme to defraud" is merely a plan to obtain something of value by trick, deceit, deception or swindle.

A statement, representation, claim or document 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 is fraudulent if it was falsely made with the intent to deceive. Deceitful statements of half truths or the concealment of material facts may also constitute fraud under the statute. The expression of an opinion not

honestly entertained may also constitute false or fraudulent statements under the statute.

False representations can be made in two ways. First, by affirmatively stating facts as true when the facts are not true. And second, by omitting or concealing material facts that are necessary to make what was said truthful.

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 fraudulent representation or statement 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 about the subject to which it relates.

This means if you find a particular statement 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.

It is not required that every misrepresentation charged in the 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.

It is not necessary for the Government to establish that anyone actually relied on or suffered damages as a consequence of the alleged scheme or artifice to

defraud. It is only a scheme to defraud--and not the actual, completed fraud--which must be proved to sustain a conviction for mail fraud.

Nevertheless, the Government does have the burden of proving that some actual harm or injury to someone was contemplated by the defendant. If you find the defendant made a false material statement in the expectation that it would be relied upon, that is enough to prove that harm was contemplated.

The Government is not required to establish that the defendant realized any gain from the scheme, or that the intended victim actually suffered any loss. If you find that there existed such a scheme to defraud, it is not necessary for you to find anyone was defrauded or that the defendant profited. The issue is whether there was such a scheme.

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

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

SECOND ELEMENT--PARTICIPATION
IN A SCHEME WITH INTENT

The second element that the government must establish beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully and with 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 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, her words, her conduct, her acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged 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 a defendant 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 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.

As a practical matter, then, in order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that the defendant knew that her conduct as a participant in the scheme was calculated to deceive and nonetheless she associated herself with the alleged fraudulent scheme for the purpose of causing harm to another.

The government can also meet its burden of showing that a defendant had actual knowledge of falsity if it establishes beyond a reasonable doubt that 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 beyond a reasonable doubt that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed that the statements were true. This guilty knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme and lacked the specific intent to deceive, you must acquit the defendant. However, if you find the government has established beyond a reasonable doubt the existence of a scheme to defraud and that the defendant was a knowing participant who acted with specific intent to defraud; and also if the

government establishes the third element, on 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 of mail fraud is the use of the private or commercial interstate carrier in furtherance of the scheme to defraud. In this case, the Indictment alleges that a private interstate carrier was used to advance the alleged fraud when boxes of gemstones were sent via UPS to out-of-state customers from the offices of PDI in South Burlington, Vermont.

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

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

The matter that is carried by carrier need not disclose on its face a fraudulent representation or purpose or request for money but need only be intended to further or assist in carrying out the scheme to defraud.

With respect to the use of a private carrier or courier, the government must

establish beyond a reasonable doubt the particular use charged in each of the mail fraud counts. However, the government does not have to prove that the use of the carrier was made on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the private carrier was used on a date substantially similar to the dates alleged in the indictment.

THE INDICTMENT AND THE STATUTE

Count ___ of the indictment charges that the defendant devised a scheme to defraud and in furtherance of that scheme knowingly caused interstate or foreign wire communication facilities to be used. This charge has been referred to as the wire fraud count.

The relevant statute on this subject is Section 1343 of Title 18 of the United States Code. It provides:

> 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 writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [is guilty of an offense].

ELEMENTS OF THE OFFENSE

In order to sustain this wire fraud 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 false and fraudulent pretenses, representations or promises, as alleged in the 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; and

Third, that in execution or in furtherance of that scheme, the use of interstate or foreign wire communication facilities occurred as specified in the indictment.

The first two elements of the wire fraud charge are that (1) there existed the scheme or artifice to defraud as charged in the indictment; and (2) that the defendant knowingly and willfully participated in the scheme. I have already explained those two elements to you in connection with my instructions on mail fraud, and direct you to apply those rules to this wire fraud count as well.

THIRD ELEMENT -- USE OF THE WIRES

The third and final element of the wire fraud count is that interstate or foreign wires were used in furtherance of the scheme to defraud. Wire communications include telephone calls and facsimile transmissions. An interstate or foreign wire communication is one which passes between two or more states as, for example, a telephone call or facsimile transmission between New York and New Jersey; or is in foreign commerce, such as a telephone call from New York to London.

It is not necessary for the defendant to be directly or personally involved in any wire communication, as long as the communication is reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participation.

In this regard, it would be sufficient to establish this element of the crime if the testimony justifies a finding that the defendant caused the wires to be used by others; and this does not mean that the defendant herself must specifically have

authorized others to make the telephone call (or send a facsimile). 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 she causes the wires to be used.

The use of the wires need not itself be fraudulent. There is no requirement that fraudulent representation or request for money be made in the interstate wire communication. It is sufficient if the wires were used to further or assist in carrying out the scheme to defraud.

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

AIDING AND ABETTING

Counts ____ charge the defendant with aiding and abetting the crimes of mail fraud and wire fraud.

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

THE ELEMENTS OF AIDING AND ABETTING

Under the aiding and abetting statute, it is not necessary for the government

to show that the defendant herself physically committed the crime with which she is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if she committed it herself.

Accordingly, you may find a defendant guilty of the mail and wire fraud charges if you find beyond a reasonable doubt that the government has proved 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 the defendant aided or abetted the commission of the crime.

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

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

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 the mere acquiescence by a defendant in the criminal conduct of others, even with guilty

knowledge, is not sufficient to establish aiding and abetting. And aider and abettor must have some interest in the criminal venture.

To determine whether the defendant aided or abetted the commission of the crime with which she is charged, ask yourself these questions:

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

Did she associate herself with the criminal venture knowingly and willfully?

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

If she did, then the defendant is an aider and abettor, and therefore guilty of the offense.

PINKERTON CHARGE

There is another method by which you may evaluate the possible guilt of the defendant for the mail and wire fraud crimes, even if you do not find that the government has satisfied its burden of proof with respect to each element of the substantive crime.

If, in light of my instructions, you find, beyond a reasonable doubt, that the defendant was a member of the conspiracy charged in Count 1 of the indictment, and thus, guilty on the conspiracy count, then you may also, but you are not required to, find her guilty of the substantive mail and wire fraud crimes provided you find, beyond a reasonable doubt, each of the following elements:

First, that the crime charged in the substantive count was committed;

Second, that the person or persons you find actually committed the crime were members of the conspiracy you found existed;

Third, that the substantive crime was committed pursuant to the common plan and understanding you found to exist among the conspirators;

Fourth, that the defendant was a member of that conspiracy at the time the substantive crime was committed;

Fifth, that the defendant could have reasonably foreseen that the substantive crime might be committed by her co-conspirators.

If you find all five of these elements to exist beyond a reasonable doubt, then you may find the defendant guilty of the substantive crime charged against her, even though she did not personally participate in the acts constituting the crime or did not have actual knowledge of it.

The reason for this rule is simply that a co-conspirator who commits a substantive crime pursuant to a conspiracy is deemed to be the agent of the other conspirators. Therefore, all of the co-conspirators must bear criminal responsibility for the commission of the substantive crimes.

If, however, you are not satisfied as to the existence of any of these five elements, then you may not find the defendant guilty of the substantive crime, unless the government proves, beyond a reasonable doubt, that the defendant personally committed, or aided and abetted the commission of, the substantive crime charged.

NOTES

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 a fellow juror. Your notes should remain in the jury room and will be collected at the end of the case.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you today solely from the evidence in this case. I remind you that the mere fact that the defendant has been indicted is not evidence against her. Also, the defendant is not on trial for any act or conduct or offense not alleged in the Indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should know that the punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

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 the other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. But also do not surrender your honest convictions about the case solely because of the opinion of other 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.

At this time, I would like to offer my sincere thanks to the alternates.

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 each of the counts contained in the Indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count of the Indictment. 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 then 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.

Also, copies of this charge will go with you into the jury room for your use.

I appoint _____ as your foreperson.

Dated, Burlington, Vermont
~~March~~ April 1, 1999

William K. Sessions III
United States District Judge