IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	NO. 5:04-CR-077-04-C
VS.	§	
	§	
TOM DARDEN (1)	§	
FRANK THOMPSON (2)	§	
RICK THOMPSON (3)	§	
MONTE HASIE (4)	§	

DEFENDANT MONTE HASIE'S ANSWERS TO THE COURT'S QUESTIONS AND BRIEF IN SUPPORT OF JUDGMENT OF ACQUITTAL

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DEFENDANT MONTE HASIE'S ANSWERS TO THE COURT'S QUESTIONS AND BRIEF IN SUPPORT OF JUDGMENT OF ACQUITTAL

Having previously proved and conceded facts that establish Hasie's innocence, the government now asks this Court to disregard the testimony of its star witness, who exculpated Monte Hasie, and ignore its numerous concessions which mandate his acquittal. Instead, it proceeds on the *pure assumption*, aided by obfuscation, that Hasie was guilty from day one.[1] However, Hasie, as with any other criminal defendant, cannot be *assumed* into prison. *United States v. Bell*, 623 F.2d 1132, 1137 (5th Cir. 1980) (entering acquittal of perjury). The government is required to introduce evidence, and to *prove* beyond a reasonable doubt, that the defendant is, in fact, guilty. In this case, it must establish that he had the requisite criminal knowledge and specific intent. *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (Court of Appeals "will not uphold a conviction ... which was obtained by nothing more than piling inference upon inference, or where the evidence raises no more than a mere suspicion of guilt.") (internal citations omitted). This the government did not do. Hasie is entitled to an acquittal on all counts.

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[1]The government's exaggeration, conclusory assumptions, and misrepresentations of its own case against Monte Hasie, contradict its sovereign duty. *See Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629 (1935).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

Indeed, the government now disavows–necessarily–the testimony of its main witness, who unequivocally testified that no conspiracy arose until March 2000, and who had to admit that Hasie was *not* aware of the extent of the debt the Thompsons owed First State Bank ("FSB"). Further, the government proceeds only on the *assumptions* both that Hasie and Darden had some intimate and knowing connection and criminal conversations– not evidenced in the record– and that Thompson was an irrelevant figure whose testimony this Court should now ignore. This is preposterous.

The only evidence the government presented was that Hasie and Darden barely knew each other (Tr. 710), and there was no evidence they reached a criminal agreement– much less what the content of that agreement was. The government did not–and could not–prove that Hasie knew the amount of the Thompson's debt to the bank, the amount of the stock actually pledged, or even more importantly, that Darden was concealing **anything** from the bank. Instead, the government mistakenly relies on the two "safekeeping receipts" that Hasie signed (GX 2A (A-1) & 2B (A-2)). These receipts, on their face, reflect that **only 5,530 shares of Procter & Gamble ("P&G") stock were pledged** to the Bank (GX 2B (A-2)). Further, fatal to the government's case is the unalterable fact that Hasie concealed nothing from the bank. Hasie sent statements[2] to the bank reflecting the now questioned transactions. These statements could have been opened and read by *anyone* at the bank, were in the bank's files, and should have been reviewed by the new bankers before they renewed the Thompson's credit.

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[2]The government's brief in response to this Court's questions in this matter contains not a single reference to these statements– which affirmatively put the entire bank on notice that the P&G shares were margined (Tr. 289, 311, 318-25, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). Indeed, the government would have this Court find that Hasie had an affirmative duty to hand-deliver each and every relevant communication to every single member of the loan committee and the bank board of directors. Neither common sense nor the law demand such hand-holding.

The government has conceded the facts that mandate Monte Hasie's acquittal.[3] The government has conceded that *the bank* had the duty to protect its security interest[4] and that FSB President, Tom Darden, knowingly released the P&G shares to Rick Thompson to be margined (Gov't Resp. at 9[5]; G #190 at 25); (*see also* Tr. 826: Admission by Kirk Thomas that Nichols confirmed that Darden knew about the margining from December 1999). Hasie was entitled to rely on Darden's and Thompson's authority–actual and apparent, to margin the shares. Second, the government concedes that Hasie did not know the full extent of the Thompsons' debt (Gov't Resp. at 9)[6]. (Darden/FSB created no financial instrument to indicate that the P&G shares were fully pledged and/or not to be margined; Addendum to Presentence Report at 2 (A-3, *infra*); (*see also* Tr.

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[3]The government has already conceded and/or the evidence conclusively establishes: (1) "First State Bank had the duty to ensure that its security interest was perfected" (G #190 at 25); (2) Hasie did not know the extent of the Thompsons' debt nor FSB's interest (A-4); (3) both the December 2, 1999, and December 13, 1999, letters were non-binding and did not even mention, let alone preclude margining via transfer between the Thompsons' accounts; (4) that Hasie discouraged both the IBI and AIPN purchases; (5) that only Darden and Thompson had a conspiratorial conversation in March 2000; (6) that FSB/SNB had a defective lien at all relevant times after the release of the P&G shares; (7) that the bank was in possession of Paine Webber statements that affirmatively indicated that the P&G stock was margined; and, (8) that Darden released the P&G shares "to be margined," which release was ratified and promoted by other bank officers.

[4]"If a jury is misled into considering as unlawful the omission of an act that the defendant is under no duty to perform, then a finding of conspiracy based on such conduct cannot stand." *United States v. Curran*, 20 F.3d 560, 571 (3rd Cir. 1994) (reversing defendant's conviction of conspiracy and false statements for lack of duty to disclose). Hasie's jury was similarly misled, and reversal is required.

[5]Government's Response and Brief in Opposition to Defendant Monte Hasie's Motion to Re-Urge Previous Rule 29 Motion for Judgment of Acquittal, and in the Alternative Motion for New Trial and Motion for Arrest of Judgment (Dkt. #152, 6-29-05). The Government's brief in response to this Court's questions is cited herein as G #190 at __.

[6]*See also* Tr. 964 (Admission by Nichols that, after he learned of the margining, Hasie asked him how much the Thompsons owed).

533, 549, 550-51, 581-82, 603-04). Complete and specific knowledge of the debt and pledge, and a duty for Hasie to protect the bank, were prerequisites to any conviction. Without such knowledge and legal duty, Hasie cannot have had any criminal intent. Third, the government concedes that the letter agreements Hasie signed were non-binding *and* insufficient to perfect FSB's lien on the shares (Gov't Resp. at 9). (Darden/FSB created no financial instrument to indicate that the P&G shares were fully pledged and/or not to be margined); (Presentence Report at 4 (A-4)); (*see also* Tr.409, 704, 706-09, 918-19, 921-922, 940-41) (admissions of bank officers from March 2000, that they knew they had a defective security interest). Therefore, nothing precluded the margining of the P&G shares.

Finally, Hasie concealed nothing as would be required for a fraud. As the government conceded, confirmations and statements showing the margining were sent to FSB (GX 2D (A-5); 2E (A-6); Hasie Ex. 17-20 (A-7)). At no time did Hasie affirmatively hide the fact of margining. All bank employees, including the new owners, were in possession of the documents demonstrating margin transactions on the P&G stock.

Monte Hasie is innocent, and a judgment of acquittal must be entered on all counts. The government has no evidence that Hasie agreed with anyone to violate the law, or that he had any criminal knowledge or intent to do so. Quite to the contrary, the government's own case proved that: (i) Hasie had no legal duty to the bank, but rather to the clients who opened the PaineWebber account with bank knowledge and approval; (ii) the bank president released the collateral with full knowledge it would be margined, and he had the actual and apparent authority to do so; (iii) Hasie had no knowledge of the amount of Thompson's debt to the bank; (iv) statements disclosing the margin purchases were sent to the bank; (v) even the bank's new owners knew that the bank's

security interest was not perfected; and (vi) the bank's new owners had available to them all information to see that the stock was margined before they purchased the bank, and were on written notice that statements were provided and their lien was not perfected.

Not only did Hasie **not** agree to any criminal scheme, but he strongly advised the Thompsons against purchasing other stock (Tr. 235-36, 327, 508, 592-93; GX 2F (A-8)).[7] **Indeed, there is no evidence that Hasie ever knew that the actions the Thompsons or anyone else were taking would cause harm to, much less *defraud*, the Bank–nor is there a shred of evidence that *Hasie* himself intended to do so. In addition, the money laundering counts are legally and factually insufficient, and reversal is required on all counts.**

A. STANDARD OF REVIEW

Hasie moved for judgment of acquittal when the government rested and closed (Tr. 977). The court denied the motion, but indicated it might reconsider the decision at a later time (Tr. 982). At the close of all the evidence, Hasie renewed his motion for judgment of acquittal under Rule 29 (Tr. 1242). Again, the court denied the motion, but reserved reconsideration (Tr. 1243). After the verdict, Hasie filed another Rule 29 motion (A-9). The court vacated its earlier order denying Hasie's original motion for acquittal and gave notice that it would reconsider that motion (A-10). Because the original motion was brought when the government rested, only the evidence adduced in the government's case in chief may be used in its attempt to support the verdict. *See* FED.R.CRIM.P. 29(b), Advisory Comm. Notes (1994 Amendments); *United States v. Wahl*, 290 F.3d

[7]See also Addendum to Presentence Report at 2 (A-3) (Government concedes that defendant was not aware of (1) "insider trading between Darden and Rick Thompson," (2) Darden's encouragement that Thompsons purchase IBI stock, and (3) the Thompson's improper use of a line of credit to purchase the IBI stock.

370, 374-75 (DC Cir. 2002); *United States v.Perez*, 526 F.2d 859, 863-64 (5th Cir. 1976); *State of Arizona v. Manypenny*, 672 F.2d 761, 765-66 (9th Cir. 1982). The Government has conceded that only its case is to be reviewed on this motion (Gov't Resp. at 4).

A motion for judgment of acquittal should be granted when "the evidence is insufficient to sustain a conviction of such offense or offenses." FED.R.CRIM.P. 29(a). When " the evidence tends to give equal or nearly equal circumstantial support to guilt and to innocence," reversal is required. "When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998) (internal citations omitted). Hasie was entitled to judgment of acquittal when the government rested its case in chief. *See United States v. Reyes*, 302 F.3d 48, 50 (2d Cir. 2002); *United States v. Grey*, 405 F.3d 227, 237 (4th Cir. 2005).

The government cannot convert non-existent and failed civil UCC claims into a criminal conviction. *See United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980) (violation of civil banking regulations does not equal criminal misapplication). Similarly, the government's case fails for legal insufficiency because it depends on a duty to disclose that Hasie did not have.[8] *See Curran*, 20 F.3d at 566-68 (reversing conspiracy and conviction under § 1001 because defendant had no legal duty to disclose, accessorial liability requires that the defendant know his conduct is unlawful; and jury instruction erroneously defined duty).

B. ANSWERS TO THE COURT'S QUESTIONS.

[8]At a minimum, Hasie was entitled to an instruction that allowed his conviction only if the government proved Hasie knew Darden had a duty to the bank and knowing that his own conduct was unlawful, joined with Darden specifically intending to violate the law. *See Ratzlaf v. United States*, 510 U.S. 141, 145, 114 S.Ct. 655, 657-58 (1994); *Curran*, 20 F.3d at 568-70.

1. What effect does the Uniform Commercial Code have on the priority status of any security interests in the P&G stock by First State Bank as opposed to Paine Webber once the stock had been released from the bank and margined by Paine Webber?

The Uniform Commercial Code conclusively establishes that Paine Webber had priority status in the P&G stock at all times relevant to this inquiry. Once the stock was released by FSB to Thompson and given to PaineWebber without restriction, and in the absence of a perfected security interest, PaineWebber had priority status on the Proctor and Gamble stock. UCC § 9-328 (1) ("[A] security interest held by a secured party having control of investment property under Section 9-106 has priority over a security interest held by a secured party that does not have control over the investment property.");[9] *cf.* (Hasie Ex. 28 (A-11)). *See also* UCC §§ 9-322, 9-325, 9-327, 9-328. This control and priority status extended to the margining of the P&G stock. In this sense, the additional fact that the shares were margined via transfer between the Thompson's accounts at PaineWebber had no independent effect on the priority status over those shares as between PaineWebber and FSB. Of course, the margining resulted in the dispute between FSB and

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[9] *See also* Official Comment (3) to UCC § 9-328 ("Under paragraph (1), a secured party who obtains control has priority over a secured party who does not obtain control. The control priority rule does not turn on either temporal sequence *or awareness of conflicting security interests*. Rather, it is a structural rule, based on the principle that a lender should be able to rely on the collateral without question if the lender has taken the necessary steps to assure itself that it is in a position where it can foreclose on the collateral without further action by the debtor.") (emphasis added). In this case, because no account control agreement was in place, FSB was unable to foreclose on the collateral without further action by the Thompsons - i.e. signature on the appropriate three-party account control agreement.

We note, however, that the government never proved as a matter of law that an account control agreement was required. In addition, the bank could have opened an account at PaineWebber in the name of the bank itself, but did not do so (Tr. 483). *See*, *e.g. Whitney Nat Bank v. Baker*, 122 S.W.3d 204 (Tex.App. 2003) (The name on the account is prima facie proof of ownership of the account.). Even the bank recognized that this simple measure would have given it control. (*Cf.* Hasie Ex. 28 (A-11).)

PaineWebber, but the initial release by FSB to Thompson, coupled with possession by PaineWebber without the bank having a perfected security lien on that stock, gave PaineWebber priority status. *Cf.* (Tr. 704, 706-09: Admissions by Kirk Thomas that FSB had a defective security interest and that PaineWebber had a priority lien position by virtue of possession); (Tr. 940-41: Admission by Nichols that letter *did not* give SNB a first lien position).

There is no evidence that Hasie preliminarily "conspired" with Darden to obtain the P&G stock. The government's argument lacks support either by any evidence or reasonable inference in the record. The government's own witnesses established that no conspiracy was even contemplated until March 2000, three months after Darden had released, and Thompson had delivered, the shares to Paine Webber. Neither did the government's case establish that Hasie knew the extent of the Thompson's indebtedness to FSB. On the contrary, the government's only witness (relevant to this inquiry) admitted he never told Hasie the amount of the debt.

> **If Paine Webber had a superior priority interest upon the stock being margined, what duty did Hasie have to ensure Paine Webber's rights be maintained as opposed to First State Bank's rights?**

None. Hasie's legal duties ran to his employer, PaineWebber,[10] with additional duties of confidentiality running to his clients, the Thompsons (Tr. 312); *see* 15 U.S.C. § 6801(a) ("[E]ach financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."); *cf. Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp 440, *reargument*

[10]*See*, *e.g. Advance Ross Electronics Corp. v. Green*, 624 S.W.2d 316, 318 (Tex.App.1981) ("[T]here is an implied obligation on the part of an employee to do no act which has a tendency to injure an employer's business or financial interest."); *cf. Norris v. Housing Authority of City of Galveston*, 980 F.Supp. 885, 895 (S.D. Tex. 1997).

denied, 723 F.Supp. 200, *affirmed*, 916 F.2d 820, *cert. denied*, 499 U.S. 907, 111 S.Ct. 1109 (A bank has a duty of confidentiality with regard to a customer's accounts at the bank). Hasie had no fiduciary or other duty to FSB in the absence of a perfected security lien or the bank being his client. The government presented no fact or legal authority demonstrating that Hasie had any fiduciary duty to FSB, and it cannot do so. To the extent that Hasie entered into any agreements with FSB, he did so exclusively at the direction of his client, the Thompsons (Tr. 235-36, 263, 306, 309-10, 312, 316-17, 327, 486-87, 508, 520, 581-82, 588, 592-93).

PaineWebber retained a superior priority interest upon the Proctor and Gamble stock placed in its possession and in the absence of an effective account control agreement generated and executed by all three parties. *See supra,* Hasie's answer to question 1(a). Indeed, as noted below, FSB was obligated to generate and execute such an agreement prior to release of the P&G shares, or to open the account itself. *See supra*, Hasie's answer to question 1(a) (Hasie Ex. 28 (A-11)). The bank did not take the steps necessary to secure the account, and Hasie had no duty, especially in light of the fact that he had no knowledge of the financial arrangements between FSB and the Thompsons, to insure that FSB adequately secured its lien. *See* UCC § 9-104 (Bank has control only when (1) they have actual possession, (2) three-party account control agreement permits their control without consent of debtor, or (3) they become a customer of the investment bank with respect to the relevant account(s)); *cf.* UCC § § 9-312, 9-314. Because the bank was neither a customer nor a lien holder, PaineWebber had a priority interest in the Thompsons' accounts, and Hasie's duty ran exclusively to PaineWebber and the Thompsons.

2. What effect does apparent authority have upon the Government's statement on page 15 of its Response that "Darden did not have any problems releasing the Procter & Gamble stock to be margined" (Gov't Resp. at 15), in relation to Hasie's allowing the account to be margined?

Hasie relied upon Darden's actual and apparent authority at all times, including for the purpose of executing the December 1999 letters. These letters permitted margining via transfers between the Thompsons' accounts #60675 and #60850. There is no evidence that Hasie knew that margining would negatively impact the bank. Hasie relied on Darden's and Thompson's authority to execute certain facially innocent financial transfers. Indeed, as far as the evidence showed, Darden, acted "within the scope of his duty," and was "the bank." *Hewitt v. First Nat. Bank*, 252 S.W. 161, 162 (1923). Further, this is not a situation where Hasie relied on an officer's knowledge of fraudulent activity. Hasie knew nothing of any fraud. There is no evidence that he knew that Darden was concealing any information from the bank, and Hasie was not concealing anything. He sent statements and trade confirmations to the bank (Tr. 289, 311, 317-21, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)).

The government urges this Court find that the question of authority is irrelevant to this inquiry (G #190 at 20). This assertion ignores two centuries of common law in addition to clear precedent in this Circuit. Indeed, "[i]t is elementary that a bank is bound by the acts of its officer while acting within the scope of his authority, either actual or apparent." *Insurance Co. Of North America v. Fredonia State Bank*, 469 S.W.2d 248, 252 (Tex.Civ.App. 1971) (Bank estopped from denying apparent authority of one who serves as Executive Vice President.); *cf. F.D.I.C. v. Texas Bank of Garland*, 783 S.W.2d 604, 606 (Tex.App. 1989). *See In the Matter of Bobby Boggs, Inc.*, 819 F.2d 574, 578 n.5 (5th Cir. 1987) (Assistant Vice President of bank had apparent authority to

subordinate the bank's priority interest); *F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir. 1992) ("[C]ourts impute a bank officer or directors's knowledge to the bank."); *Minor v. Mechanics Bank of Alexandria*, 26 U.S. 46, 70 (1828) ("The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favor of third persons possessing no other knowledge."); *cf. Bank of the United States v. Dandridge*, 25 U.S. 64 (1827); *Fleckner v. Bank of United States*, 21 U.S. 338 (1823). Here, a reasonably prudent person was entitled to believe that Darden had the authority he purported to exercise. *Ames v. Great S. Bank*, 672 S.W.2d 447, 450 (Tex. 1984); (Tr. 702: "Tom Darden ... was the officer of record on th[e] account[s] and responsible for [them]."). Nothing in the record demonstrates otherwise.

3. Were the 40,000 shares of Procter & Gamble stock released from First State Bank's vault in December of 1999?

Yes. Tom Darden admitted that he released the shares of P&G stock (GX 48 (A-12); *see also* Gov't Resp. at 14) (Darden allowed release of shares); (Gov't Resp.at 15) ("Darden [Bank President] did not have any problem releasing the Procter & Gamble stock to be margined."). The government presented no other evidence or argument regarding the actual release of the shares nor the date of that release.

The government now argues that, while (1) the shares were physically released, and (2) Darden had no problem releasing the shares to be margined, FSB "never 'released' the shares from being pledged as collateral" (G #190 at 21). Contrary to the government's erroneous assertions, the physical release of control of the shares defeated the bank's priority status in the collateral. UCC

§§ 9-328, 9-328(3); *see infra* answer to question 4. It was the bank's duty and commercial obligation to maintain control over the stock. The government has conceded as much (G #190 at 25). The bank could either open the account in its own name or create and execute an effective account control agreement to secure its interest. UCC §§ 9-104, 9-314; (Hasie's Ex. 28 (A-11)); *see infra* answer to question 6.

Finally, the government misrepresents the testimony as to PaineWebber's internal procedures as to account control agreements. Nothing in those procedures required PaineWebber to *initiate* an account control agreement to help the bank secure its interest. PaineWebber procedures merely required that when and if a bank generated and submitted an account control agreement, such an agreement must be memorialized in a PaineWebber form (Tr. 230-31, 365). Moreover, the government did not prove that Hasie, who had been with Paine Webber only two months at the time, even knew those procedures.

4. It is unclear how the 40,000 shares of remaining Procter & Gamble stock, excluding the prior liquidated amounts, left the possession of the bank to come into the possession or control of Paine Webber. The Government states on pages 14 and 15 of its Response that "Darden allowed Frank Thompson and Rick Thompson to take the Procter & Gamble stock from the First State Bank vault, so they could take it to Hasie to open the Paine Webber Frank Thompson Limited Partnership account #60850 . . . Rick Thompson testified that he was the one who took the stock to Paine Webber." (Gov't. Resp. At 14-15). What effect did this have upon First State Bank's priority status and security rights in the collateral once the stock had been released?

The bank fully released the stock, its priority status and its security interest when it handed the stock to Rick Thompson and relinquished all control to the Thompsons and PaineWebber. Moreover, the Thompsons explicitly acknowledged that the P&G Shares were in the possession of PaineWebber (Tr. 515; GX 1O (A-13)).

The Uniform Commercial Code establishes that PaineWebber had a priority interest at this time and over and above FSB. *See* UCC § 9-328 (Priority of security interest in investment property is prioritized by virtue of "control"); UCC § 9-328(3) ("A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party."); Official Comment to UCC § 9-328 (2000) ("Paragraph (1) states the most important general rule-that a secured party who obtains control has priority over a secured party who does not obtain control.").

The government has conceded that Darden had no problem releasing the stock to be margined. Now, it suggests that (1) FSB never intended to release its priority interest, (2) FSB did not knowingly release its priority interest,(3) FSB did not even know the stock was transferred to Paine Webber, and (4) Darden's release of the stock could not bind the bank (G #190 at 23). But, Darden was the bank. *See supra,* answer to question 3. Furthermore, Bryan Stephenson testified that he had actually encouraged Darden to send the shares to PaineWebber (Tr. 434-35).

Regardless of what he "intended," Darden on behalf of FSB, whether rightly or wrongly, knowingly released the shares to be margined, and this action bound the bank. *Insurance Co. Of North America v. Fredonia State Bank*, 469 S.W.2d at 252 (bank is bound by the acts of its officer while acting within the scope of his authority, either actual or apparent.). Further, the government has produced no evidence that Hasie knew Darden was defrauding the bank at this point or ever. The government's own witnesses testified that (1) no conspiracy to defraud the bank was realized until March 2000;[11] (2) Hasie hardly knew Darden; (3) statements were sent to FSB showing

[11]The government here cites to *United States v. Saks*, 964 F.2d 1514, 1518-19 (5th Cir. 1992), a substantive bank fraud case–not a conspiracy. This case might have some relevance to Darden's

margining, and (4) that the transfer of stock did, in fact, give PaineWebber a priority interest in the shares.

Darden's knowing release of the shares to be margined bound FSB. The bank had far more information about the Thompsons' finances than did Hasie. At the point of release, FSB no longer had a priority interest in the shares. All of these facts were confirmed and within the knowledge of the bank through multiple statements and confirmations sent to FSB demonstrating the margining of the shares (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). The government admits but seeks to ignore that it was the sole duty of FSB to protect its own interests.[12]

5. Did Defendant Hasie sign any safekeeping/collateral receipts showing that First State Bank maintained a security interest on the entire 40,000 shares of Procter & Gamble stock at the time the 40,000 shares of stock were released? The government states on page 14 of its Response that "Hasie signed safekeeping/collateral receipts to take the Procter & Gamble stock from the First State Bank vault so Hasie could open the Paine Webber account #60850." (Gov't Response at 14.) The Court is unable to locate the Government Exhibit evidencing these latter safekeeping/collateral receipts for a period of time in December 1999. The only safekeeping/collateral receipts located by the Court are Government's Exhibits 2A (June 1998) and 2B (September 1999).

Hasie signed nothing acknowledging a security interest held by the bank on the 40,000 shares, and the government did not prove that he knew there should be one. The only safekeeping receipts introduced by the government were its Exhibits 2A (June 1998) (A-1) and 2B

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and the Thompsons' convictions, but it has nothing relevant to say about Hasie. The defendants in *Saks* were *bank customers*, who made multiple *affirmative fraudulent misrepresentations* directly to a bank. These were the principals in a scheme to defraud and their actions were unequivocally intended to enrich themselves. Hasie had no ability to effect the actions of the bank: Hasie was not a customer; Hasie concealed nothing from the bank; and, unlike Hasie, the bank was in possession of all relevant information.

[12] *See* G #190 at 25 (Government admission that "First State Bank had the duty to ensure that its security interest was perfected.").

(September 1999) (A-2). Neither of these exhibits originated with any of the transactions in this case. These documents, on their face, show that **only 5,530 residual shares were pledged to FSB** (GX 2B; A-2). Hasie's signature on the receipts is undated. The only December date on them, in another's handwriting, is December 15, 1999–*after* the accounts were opened. The government has no evidence that Hasie knew the extent of the pledge exceeded 5,530 shares, and it has absolutely no evidence that Hasie knew the amount of the Thompson's debt to FSB. *See also* Addendum to Presentence Report at 2 (A-3) (conceding that Hasie did not know the extent of the debt). There is no evidence Hasie knew of *any* pledge when the account was opened.

6. Whose duty was it to make sure that an account control agreement was executed and in place?

It was the bank's sole duty to protect what it alone knew to be its interests. Indeed, the government has conceded this fact (G #190 at 25: **"First State Bank had the duty to ensure that its security interest was perfected**."). This concession defeats the government's entire case. There was not and could not have been anything unlawful in Hasie allowing the stock to be margined when he had no legal duty to FSB whatsoever.

It is undisputed that Hasie never even knew the amount the Thompson's owed the bank, and the government's entire debate about and focus on an account control agreement is a "red herring."[13] Very simply, Darden could have protected the bank's interest either by having the bank's in-house

[13]In all cases, the testimony uniformly demonstrated that, during the period of the alleged conspiracy, the bank officers in this case did not even know what an account control agreement was. *See*, *e.g.* Tr. 141-43: Darden admitted that he did not know how to perfect a lien against stock; Tr. 445: Stephenson admitted that he did not know what an account control agreement was in December 1999; Tr. 366: Paine Webber had no reference to "account control agreements" in their policy manual.

brokerage firm open an account for the bank in-house, or, by placing the stock in a PaineWebber account **in the name of the bank**. He did neither. Instead, he fully released the stock to Thompson. Whether by an account control agreement or by putting the stock in a PaineWebber account in the name of FSB, it was the bank *alone* that was legally and factually responsible for protecting its interests. *See supra,* Hasie's answer to question 1. Furthermore, as previously noted, the government misrepresents the testimony as to PaineWebber's internal procedures for account control agreements: nothing in those procedures required PaineWebber to *initiate* an account control agreement to help the bank secure its interest. Rather, PaineWebber required that when and if a bank generated and submitted an account control agreement, the agreement must be memorialized using a PaineWebber form (Tr. 230-31, 365).

An account control agreement necessarily protects and perfects a creditors security interest in the assets of its debtor. As such, the UCC titles such an interest as "Perfection By Control." UCC § 9-314; *see also* UCC § 9-104. The "control" is that exercised by the lender or creditor. Because the agreement benefits that creditor, as against the debtor and any other rights maintained by the third-party broker, it necessarily falls on the party that benefits most directly from the arrangement– the creditor– to create and facilitate execution of the document. In this context, FSB or SNB were obligated to ensure that the bank kept control–via an account control agreement or otherwise. Indeed, both the government concessions (G #190 at 25), and the testimony of bank officers Tom Darden, Kurt Thomas, and Bryan Stephenson support this duty (Tr. 141-49, 409, 704-09, 714, 893; GX 42 (A-14)).[14]

[14]Thomas testified that in early 2001 he created and submitted to PaineWebber a blank account control agreement (Tr. 714-14, 887-88). In April of 2001 he had Thompson sign an account

In any case, the testimony of these officers as well as the accounting literature make clear that the account control agreement is primarily established to protect/benefit the legal rights of the creditor. UCC § 9-328 (1). As such, that entity is responsible for making sure that it maintains control of its collateral whether by executing an account control agreement, *prior to* creation of a brokerage account, or by simply opening the account in the name of the bank (Hasie Ex. 28 (A-11)). **Hasie had no duty, fiduciary or other, to insure that FSB protected its interest–the scope, nature and extent of which it never even identified to Hasie**. UCC §§ 9-104, 9-314. Hasie's duties ran to his clients and Paine Webber. *See supra* Hasie's answer to #1 (part 2).

Should an account control agreement have been executed prior to the release of the stock certificates to ensure First State Bank's priority status?

Not necessarily. *If* the bank wanted to secure a first lien position on the collateral, and *if* an account control agreement was required by law at the time (which the government never proved), yes. Or, the bank could easily have opened an account with its in-house broker *or* at PaineWebber in the name of the bank, in which event no account control agreement would

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control agreement which was then forwarded to PaineWebber (Tr. 716-17, 888). This agreement was still not valid because it bore only the signature of the customer–Frank Thompson. It needed the further signature and assent of the creditor–an officer of FSB or SNB. UCC § 9-328(2)(B); (Tr. 893). The uncontradicted testimony also demonstrated that an account control agreement was not submitted earlier (1) because the Thompsons would not sign it, and (2) the Thompsons were telling everyone that they were moving their accounts from SNB. Finally, and as testified to by PaineWebber officer, McWilliams, only upon and after that documentation would a branch manager then forward such an account control agreement to the corporate offices for approval (Tr. 230-31, 365). Of course, this testimony only referred to the period *after* the alleged conspiracy was complete and in no way implicated procedures or practices in place at either FSB, SNB, or PaineWebber during the years 1999 and 2000 (Tr. 364-66). In that regard, Thomas admitted that the bank knew its interest was not perfected at least by October 2000 (Tr. 704-09, 714), yet did not send Paine Webber a blank account control agreement until February or March of 2001. (*Cf.* Tr. 931, 938, 944, 954, 960).

have been needed at all, and this entire problem would have been avoided (Hasie Ex. 28 (A-11)). *See also* Hasie's answer to # 6 above. In any event, Hasie had no knowledge, control, duty, authority, or responsibility to make this choice or take this action.

7. The Government states on page 16 of its Response that "[o]n December 2, 1999, Hasie and Darden prepared a letter [of] agreement to conceal and misrepresent to the First State Bank officers and the First State Bank Loan Committee that the Procter & Gamble stock was not to be margined." (Gov't Resp. at 16, citing Exhibits 2C, 3). Government's Exhibit 2C is not the letter of agreement, but rather an incomplete account control agreement that is undated, mostly blank, and signed by only Rick Thompson. Government's Exhibit 3 makes no mention of whether Procter & Gamble stock will or will not be margined.

There is no evidence that this letter was drafted to conceal anything by anyone–and certainly not by Hasie. There was little or no evidence put on by government as to the drafting of the letter–let alone the intent of any of the parties. In any case, the December 2, 1999 letter did not explicitly preclude either transfers or margining (Gov't Resp. at 9), which were *affirmatively authorized* by the Thompson's account application and deposit on December 6, 1999 ("no margin" box left unchecked) (Tr. 263, 301-303: Customer's responsibility to check "no margin" box). As such, Hasie did not violate the terms of the letter by allowing the P&G shares to be margined or via transfers between accounts.

Further, not even Rick Thompson, the key participant, knew of any intent to deceive the bank until his March 2000 conversation with Darden when *he* learned *Darden* was not telling the bank about the margining (Tr. 521-24, 605).[15] There is no evidence that this knowledge was ever shared

[15]As part of this conversation, Darden told Thompson that he did not need PaineWebber to send any more statements to FSB (Tr. 520). Thompson then testified that he went to PaineWebber and without explanation, told Hasie that FSB did not need to have future statements sent to them (Tr. 520-21, 603-04). Cynthia McWilliams testified that the Lubbock Branch of PaineWebber had no

with Hasie. In addition, the government has conceded both that the letters (1) were non-binding, and (2) did not even use the word margin (Presentence Report at 4, 6 (A-4); G #190 at 26). The government now attempts, *post-hoc*, to *assume* some conspiratorial mind-meld between Darden and Hasie in December 1999, when its own star witness who had already pleaded guilty and was the axis upon which the alleged conspiracy rotated, affirmatively testified that not even he knew of any wrongdoing until March 2000 when he learned that Darden was hiding information from the bank. However, there is no evidence that Hasie *ever* learned this–much less that Hasie *agreed* to it. Instead, the only evidence as to Hasie is that he *disclosed* the transactions to the bank (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). The evidence simply does not exist as to any agreement–criminal or fraudulent– between Hasie and Darden in December 1999– or *ever*.

8. What evidence regarding the December 13, 1999 letter supports the statement that "[t]his letter was prepared to deliberately conceal the fact that the stock had already been margined, and to authorize Paine Webber to transfer funds from one account to another"? (Gov't Resp. at 16). This second letter also makes no mention of margin.

None. There is no evidence that this letter was drafted to conceal anything by anyone–and certainly not by Hasie. There was little or no evidence put on by the government as to the drafting of the letter–let alone the intent of any of the parties. Even Rick Thompson said he knew of no intent to deceive the bank until his March 2000 conversation with Darden. *See supra,* answer to question 7.

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policy in 2000 as to the cessation of duplicate statements (Tr. 390-91). As such, the government introduced no evidence that a letter of authorization or other written instruction was necessary for an account holder to order PaineWebber to stop delivering duplicate statements (Tr. 379-85, 390-91). Further, the evidence showed that it was the client who was responsible for discontinuing disbursement of duplicate statements (Tr. 380). In any case, no evidence demonstrated Hasie's involvement in or knowledge of the reasons for the cessation of duplicates, and nothing in these events demonstrates any criminal intent on the part of Hasie.

The non-binding December 13, 1999 letter, which superceded the December 2, 1999 letter, explicitly authorized transfers, without additional authorization from FSB, between the two PaineWebber accounts (*See* Tr. 309-10; 902; GX 4 (A-15)). Because there was no cash in the P&G account, this necessarily authorized margining via transfer between accounts (Tr. 309-10). Further, the evidence showed that the first transfer of funds between PaineWebber accounts occurred on December 14, 1999 (GX 2D (A-5); 2E (A-6), after the December 13, 1999, letter was in effect.

The government now argues that, even if the admittedly non-binding letters permitted margining via transfers between accounts, a fraud occurred anyway, because Hasie was aware that the P&G stock was fully pledged as collateral on the Thompsons' loans at FSB. But *Hasie did not know this, and the government could not, and cannot, prove that he did.* Nor can the government prove that Hasie concealed anything. To the contrary, Hasie sent statements and trade confirmations to the bank and to the Thompsons, who discussed them with Darden (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)).

Without the necessary predicate knowledge that the entire 40,000 shares were pledged (and that Darden was concealing the margining from the bank), Hasie could not possibly be shown to have criminal intent to defraud as a matter of law. Further, Hasie's conviction is precluded by the fact that he sent statements to the bank that fully disclosed the margin transactions. Not only did he *not* engage in the concealment required for a fraud conviction, but he made disclosures which preclude it. Because Hasie did not have any guilty knowledge, *which the government concedes* (Addendum to Presentence Report at 2 (A-3)), there cannot be the requisite criminal intent.

Without proof beyond a reasonable doubt of criminal knowledge and intent, a judgment of acquittal must be entered for Hasie on all counts. Indeed, circuit precedent requires his acquittal. *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983) ("[E]vidence that only places the defendant in a climate of activity that reeks of something foul"is insufficient to show his criminal knowledge."); *Rahseparian*, 231 F.3d at 1262 (Defendant's "conspiracy and [] fraud convictions turn on whether the jury could reasonably infer beyond a reasonable doubt that [defendant] knew [the principal] was [committing] unlawful [acts].... it could not."). "[A]n inference is only reasonable where there is a probability that the conclusion flows from *the proven facts*. An inference is unreasonable where the jury engaged in a degree of *speculation and conjecture* that renders its findings a guess or mere possibility." *Rahseparian*, 231 F.3d at 1262 (internal citations omitted) (emphasis added).

9. What legal duty did Hasie owe to First State Bank to inform it as to whether the Procter & Gamble stock was margined?

None. "[T]he duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (internal citations omitted); *cf. Insurance Co. Of North America v. Morris*, 981 S.W.2d 667, 674 (Tex.1998) ("[N]o duty of disclosure arises without evidence of a confidential or fiduciary relationship.").[16] Under the arrangements made between FSB and PaineWebber, which did not include a three-party account

[16]The government's silly assertion (G #190 at 27) that Nichols "trusted" Hasie (as a friend) to look after the bank's interest implies no affirmative duty–legal or otherwise. Hasie did not know the nature or extent of the bank's interest beyond the 5,530 shares. *See Morris*, 981 S.W.2d at 667, 674 ("Mere subjective trust does not transform arms-length dealing into a fiduciary relationship.") (internal citations omitted); *(see also supra* note 6 and 11 and accompanying text).

control agreement, and because FSB did not open the account in its own name but instead, fully released the shares to the Thompsons and PaineWebber, Hasie had no obligation to disclose.[17] FSB and PaineWebber did not have a confidential or fiduciary relationship. *See*, *e.g. Condrey v. SunTrust Bank of Georgia*, 429 F.3d 556, 569-70 (5th Cir. 2005) (no affirmative duty where no confidential relationship and defendant was not even a customer of the bank); *Rimade Ltd. v. Hubbard Enterprises, Inc.*, 388 F.3d 138, 143 (5th Cir. 2004) (same under Texas law: finding of no intent to defraud upheld); *Lewis v. Bank of America*, 347 F.3d 587 (5th Cir. 2003) (reversal of fraud conviction upheld where no duty to disclose and where reliance was not justified).[18] Hasie was not a customer of the bank. FSB was not a customer of PaineWebber. Hasie had no legal duty to disclose.

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[17]Furthermore, at all times relevant to this inquiry, FSB had an equal opportunity to discover the true facts: Darden knew at all times, and statements sent to FSB affirmatively demonstrated the margining (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). *See*, *e.g. Coldwell Banker Whiteside Associates v. Ryan Equity Partners Ltd.*, 181 S.W. 879, 888 (Tex.App. 2006) (Duty to disclose arises only when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth). Hasie concealed nothing, and at all times FSB and SNB had equal opportunity to discover the relevant facts. Indeed, only the bank knew how precarious the Thompsons' financial situation was.

[18]"An obligation to disclose must exist before a party may be held liable for fraud based upon the concealment of material facts. In the absence of a confidential relationship, no duty to disclose exists when parties are engaged in arm's-length business negotiations. [The] law is also clear as to what constitutes a confidential relationship. Any relationship shall be deemed confidential where one party is so situated as to exercise a controlling influence over the will, conduct and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc. The mere fact that one reposes trust and confidence in another does not create a confidential relationship. A confidential and fiduciary relationship must be shown by proof, and the burden is upon the party asserting the existence of such relationship to affirmatively show the same." *Condrey*, 49 F.3d at 569-70 (internal citations omitted).

However, in any event, Hasie did make full disclosure by sending statements to the bank reflecting that the stock was margined (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). FSB knew that the Thompsons' account #60850 was being margined from December of 1999. It is undisputed that PaineWebber sent statements from December 1999 and January 2000 to FSB in January 2000 and February 2000 (Tr. 289, 311, 324, 329, 409-12, 521-24, 605). These statements affirmatively showed that the P&G shares were being margined (Tr. 318, 321, 325; Hasie Ex. 17-20 (A-7); *see also* Tr. 409-12) (Stephenson admission that Darden knew about margining from duplicate statements sent to FSB in January and February 2000). Indeed, these statements were sent directly to Tom Darden (Tr. 329). Further, Rick Thompson had conversations with Darden about these statements in February 2000 (Tr. 519-26, 605). At all times, Hasie knew the bank had more information about the Thompsons' finances than he did.

10. If Rick Thompson testified that he first learned in March of 2000 that Darden was concealing from First State Bank the fact that the Procter & Gamble stock was margined, what evidence supports a finding that Hasie was aware of this information at the time the stock was used to fund the Paine Webber account and actually margined? (*See* Gov't Resp. at 17).

None. The government now wants to disavow the testimony of its key witness, Rick Thomspon, as inconsistent with its new theory that Darden and Hasie somehow arranged, through telekinesis, a conspiracy prior to March 2000, and without the knowledge of Rick Thompson. The testimony of Rick Thompson speaks for itself: Hasie did not know the extent of the Thompsons' debt at any time (Tr. 532-33, 551: Rick Thompson never told Hasie the extent of the Thompson's debt; 581: Rick Thompson could not testify that Hasie knew all the shares were pledged as collateral; Gov't Resp. at 9: Darden/FSB created no financial instrument to indicate that the P&G shares were

fully pledged and/or not to be margined; Addendum to Presentence Report at 2 (A-3: Hasie may not have known extent of the debt). The government proved that no conspiracy even existed between Darden and Thompson until March 2000, and that was revealed *only* in a conversation between Rick Thompson and Darden (Tr. 521-26, 605). No evidence proved that Hasie knew anything about a conspiracy prior to March 2000 or at *any* time thereafter. Similarly, there is no evidence that Hasie knew that Darden lacked authority to release the stock–or that Darden *in fact* lacked that authority.

11. Is there evidence that shows that Hasie knew Darden may not have been informing the officers of First State Bank and the loan committee of the fact that the Procter & Gamble stock was no longer in the possession of the bank and that it had been margined?

No, there is no evidence that Hasie knew Darden was concealing anything from other officers at FSB, and it cannot be disputed that Hasie disclosed the transactions and margining which were in the statements. Not even Rick Thompson knew that Darden was concealing anything until March 2000 (Tr. 521-26). The government's new argument as to Hasie's knowledge of the conspiracy is premised on the unproved assertion that Hasie knew the full extent of the Thompsons' debt and that the stock was fully pledged. Indeed, the government and its witnesses have already conceded that Hasie **did not** know this necessary fact (Tr. 532-33, 551, 581; Addendum to Presentence Report at 2 (A-3)). There is no evidence that Hasie knew the relevant financial statements would not be, or were not being, shown to other officers at FSB. Moreover, if the statements were not reviewed by other bank officers, it was attributable to their own neglect or Darden's concealment–*not* to any wrongdoing by Hasie.

There is no evidence that Hasie was involved in or had any knowledge of Darden's memorandum to Bryan Stephenson on March 7, 2000 (GX 5 (A-16): erroneous representation of

Thompson's holdings in Account # 60675 and Account # 60850). There is no evidence that Hasie was involved in or had knowledge of the document prepared for FSB's Loan and Discount Meeting of June 14, 2000 (Gov. Ex. 8 (A-17): erroneous representation of Thompson's holdings in Account # 60675 and Account # 60850). Indeed, no evidence in the record showed that Darden (or any other employee of FSB) and Hasie had any communications about these matters. On the contrary, the evidence, including the testimony of Rick Thompson, conclusively showed that it was Darden who had full knowledge of the Thompson's holdings and who unilaterally chose to falsely represent those holdings to the board of directors of FSB (Tr. 523-26, 646-50, 653-54; GX 5 (A-16); 8 (A-17); *see also* GX10A (A-18); 10B (A-19)): internal bank documents showing that Darden falsely represented the Thompson's holdings at PaineWebber; Tr. 529-30: Rick Thompson testified that Darden affirmatively misled the loan committee in October 2000). These false representations, along with the bank's failure to adequately perform due diligence, were solely responsible for the bank's decisions to renew the Thompson's loans. *United States v. Odiodio*, 244 F.3d 398, 401-02 (5th Cir. 2000) (bank fraud convictions reversed where bank was in best position to detect fraud and subsequent holder of instruments had no opportunity to discover that fraud). Hasie had neither knowledge of nor involvement in those activities or bank decisions.

If so, at what point in time did Hasie gain such knowledge?

The government did not prove that Hasie ever gained this knowledge during the alleged conspiracy. Indeed, it was not until April 25, 2001, when Nichols told Hasie he did not know of any margin on the P&G shares, that Hasie learned other bank officers were unaware. More

importantly, Hasie had no reason to think the bank did not know of the margin, because the bank had the statements.[19]

12. What evidence shows that Hasie, not Darden, misrepresented or made false statements to the loan committee and officers of First State Bank that the Procter & Gamble stock had not been margined?

There is no evidence that Hasie misrepresented anything to the bank or that he knew that Darden was doing so. Contrary to the Government's assertion (Gov't Resp. at 9), Hasie accurately represented the Thompson's holdings in Account # 60675 on June 12, 2000 (GX 7 (same as Hasie's Ex. 23) (A-20); 2E (A-6)). This exhibit simply listed the Thompsons' holdings in account #60675. It was Darden alone who prepared the document which falsely represented the Thompsons' holdings in **both** account #60675 **and** account #60850. Further, Hasie never represented to officials of either FSB, or the later constituted State National Bank ("SNB"), that the P&G shares had not been margined. As the recitations above demonstrate, every affirmative representation made by PaineWebber and Hasie demonstrated that the P&G shares were being margined via transfers to the Thompsons' account # 60675 (GX 2D (A-5); 2E (A-6); 3 (A-21); 4 (A-15); 15G (A-22)).

Indeed, during the due diligence relative to SNB's purchase of FSB, the record showed that (1) statements demonstrating margining were in FSB's possession (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)); (2) the December 13, 1999 letter authorizing transfers and referencing statements provided to the bank were in FSB's possession (GX 4 (A-15)); and, (3) SNB

[19]Tom Nichols admitted that he never asked Hasie whether the P&G stock was margined prior to April 25, 2001 (Tr. 963, 965, 967, 970). Thus, when SNB/Nichols finally asked Hasie whether the P&G stock was margined–the *only* time Hasie was asked–Hasie answered truthfully that the stock was margined.

representatives conceded their own recognition that the bank did not have a perfected security interest (Tr. 409-12, 704-09, 714, 898-99, 902-03, 940-45). Indeed, it seems remarkably disingenuous for the government to assert that the bankers (Stephenson, Thomas, Nichols) did not have knowledge of the margining of the P&G account in light of the evidence that they knew that the Thompsons had purchased over a million shares of other stocks at a time when they (alone) also knew that all of the Thompson's accounts and assets were supposedly pledged to the bank (Tr. 409-12, 633-34, 676, 679; GX 5 (A-16); 8 (A-17); 10A (A-18); 10B (A-19)); *see also* Gov't Resp. at 13: "Rick Thompson testified that [the Thompsons] did not have any other collateral to pledge to their loans at First State Bank, and that Darden knew this because he knew all about their business."). *Cf. Odiodio*, 244 F.3d at 401-02 (bank fraud convictions reversed where bank was in best position to detect fraud).[20]

In addition, the letters signed by Hasie, Darden and the Thompsons both indicated that all statements would be sent to the bank. To the extent the bank did not have every statement regarding the collateral of its largest borrower, Kirk Thomas and Tom Nichols (had either of them done his job) could have and should have asked for and reviewed the full statements in their "due diligence" review of the bank records. *Cf. Odiodio*, 244 F.3d at 401-02 . No evidence was introduced that Hasie made any false representations at *any* time to either FSB or SNB.

[20]As other evidence implicating both the bank's failure to adequately oversee the Thompsons' accounts and the disingenuousness of the government's protestations here, Rick Thompson testified that bank officers continually told him to "diversify" his stock portfolio (Tr. 519-20, 22, 25). With only P&G stock in their portfolio as late as fall 1999, such diversification necessarily implied margining or sale of P&G shares.

13. What evidence is there that cash was released from Paine Webber account #60850, other than being moved between Paine Webber accounts as allowed by the December 13, 1999 Letter of Agreement?

There is a single wire transfer of $113,779 cash from Paine Webber account # 60850 to a Thompson account at FSB, directed in writing by Thompson on December 9, 1999 (GX 37A (A-23)), and apparently effected by Beth Staley (Tr. 235). This wire transfer was consistent with the Thompsons' account application which did not restrict transactions (Tr. 228-29). At most, the government can argue that this transaction was contrary to the *intent* of the December 2nd letter, but its admission that both December letters are **non-binding** forecloses its contention that this transfer was *legally* precluded by the December 2nd letter. *See* U.C.C. § 9-104. Further, the bank ratified this transfer in the December 13th letter, and the money went to FSB.

Assuming *arguendo* that this transfer constituted a release of cash or necessitated margining contrary to the spirit and intent of the non-binding December 2nd letter, the evidence still does not satisfy the government's burden of proving Hasie's criminal knowledge or intent.[21] First, the government did not introduce any evidence demonstrating that Hasie was aware of or authorized this transfer. Second, it has conceded that the non-binding December 2nd letter does not even address the issue of margining (G #190 at 26). Moreover, the transferred amount was the equivalent to cash the

[21] The government's response to Question 13 is bereft of citation to exhibits, transcript or legal authority. Its assertion here that Hasie was attempting also to cover up the APIN stock purchases by the December 13th letter is legally irrelevant to this question, non-sensical *and* finds no support in the record. The record reflects that $112,500 was originally deposited to make a margin purchase of IBI stock–*long before* the deposit of and completely unrelated to the P&G (Tr. 170-71; GX 17 (A-25)). The subsequent purchase of AIPN, after the transfer back to the bank of the $113,779 deposited to purchase the IBI, was *against* Hasie's advice. He vigorously attempted to convince the Thompson's *not* to margin the P&G to buy AIPN (Tr. 235-36, 327, 508, 592-93; GX 2F (A-8)). On the flip side, Darden (FSB) touted the AIPN stock and encouraged the Thompsons' purchase of same (Tr. 145, 507, 513, 518-20).

Thompsons had deposited with PaineWebber *more than a month before* the P&G stock was ever deposited. Thompson deposited $112,500 cash with Paine Webber on November 1, 1999, when he opened account # 60765, and shortly thereafter, added to it with a personal check (Tr. 26, 29, 31, 34, 101, 106, 109; GX16B (A-24)). Significantly, the government has also conceded, as it must, that *there was no evidence that Hasie knew the Thompsons misused a line of credit to make this deposit* (Addendum to Presentence Report at 2 (A-3)).

Third, there is no evidence that this wire transfer of $113,779 was made pursuant to any illegal agreement with Hasie. Fourth, the bank had possession of all relevant documents at all times relevant to the alleged conspiracy–both through account statements from PaineWebber and internal statements documenting the deposit into the Thompsons' account at FSB.

Fifth, there is no evidence a conspiracy existed before March 2000, and the government proved only that the later conspiracy was between Darden and Thompson. Sixth, the transaction was ratified by Darden's signature on the subsequent non-binding December 13th letter which explicitly authorized transfers between accounts, wire transfers to FSB, and, at least implicitly, authorized margining. It certainly did not *preclude* margining. Lastly, the government did not introduce any evidence to demonstrate that this transaction was done with the requisite criminal intent to defraud or conceal,[22] nor can the bank prove that it was harmed by this transaction. The money was transferred to an account with FSB in the Thompson's name. FSB could have assumed complete control of the funds upon receipt of the wire transfer at that time had it chosen to do so, and *the*

[22] *See United States v. Schnitzer*, 145 F.3d 721, 734 (5th Cir. 1998) (to establish bank fraud, government must prove that defendant "engaged in a pattern or course of conduct *designed to deceive*" the bank) (internal citations omitted) (emphasis added).

evidence is that the $113, 779 was reapplied to reduce the Thompson's line of credit with the bank (Tr. 109).

The only other cash disbursements are dividend payments to Frank Thompson. *See infra*, answer to question 14.

14. Is there sufficient evidence from which a reasonably jury could conclude that Hasie joined willfully in any unlawful scheme with the intent to further the unlawful purpose?

No. The evidence is insufficient as a matter of law.

a. The Evidence Is Insufficient To Convict Hasie Of Counts 1, 4, and 14.

Count 1 charges Hasie with conspiracy to commit bank fraud in violation of 18 U.S.C. § 371 and §§ 1344 (1) and (2); and Counts 4 and 14 charge him with aiding and abetting false statements to a bank in violation of 18 U.S.C. § 2 and § 1014. Fraud requires intentional concealment of material facts and specific intent to violate the law by a defendant who knows his conduct is unlawful and intends to harm the victim. *Schnitzer*, 145 F.3d at 734; *United States v. Hanson*, 161 F.3d 896, 900 (5th Cir. 1998). The government proved none of these elements against Hasie. Indeed, its entire prosecution depends on the existence of a duty that Hasie simply did not have. *Chiarella*, 445 U.S. at 228 (there can be no fraud absent a duty to speak).

In any event, Hasie disclosed the margining to the bank. There is no evidence that he did anything unlawful–much less that he *intended* to do so or *knew* his conduct was unlawful. And, there is not a shred of evidence that he knew or intended to cause any harm to the bank. Even viewed in the light most favorable to the government, any and all of the government's evidence against Hasie is, at best, susceptible of either an illegal or a legal interpretation. As such, it is legally

incapable of sustaining proof of Hasie's knowing joinder in an illegal agreement or scheme, and his acquittal is required. *United States v. Wieschenberg*, 604 F.2d 326, 336 (5th Cir. 1979) (reversing conviction for insufficiency).

At its core, this case is about the bank's attempt to absolve itself of its financial responsibility to properly secure the Thompson's collateral (*Cf.* G #190 at 25). Instead of acknowledging its exclusive common-law and UCC-mandated duty to perfect its own security interest, the bank has continued to attempt, first via a civil suit against Hasie and PaineWebber,[23] and now through this unprecedented criminal action, to shift its responsibility onto Hasie, who had neither a duty, a statutory responsibility or even authority, to insure that the bank was perfecting its security interest in the Thompson's collateral.

b. The Admissible Evidence Is Insufficient To Prove That Hasie Joined A Conspiracy To Commit Bank Fraud As Alleged In Count 1.

Conspiracy to commit bank fraud and the substantive crime of bank fraud are specific intent crimes, requiring that the government show beyond a reasonable doubt that the defendant *willfully intended to violate the law*. Conspiracy, itself, requires *at least* the degree of criminal intent necessary to commit the substantive offense itself. A conspiracy under 18 U.S.C. § 371 requires proof of: (i) an agreement between the defendant and a co-conspirator to violate the law of the United States; (ii) an overt act by one conspirator in furtherance of the conspiracy; and, (iii) that the

[23]Indeed, the Bank was unable to prevail in the civil action under a less demanding burden of proof (Tr. 779). Thereafter, the Bank blatantly instigated this criminal investigation, conducted by the Internal Revenue Service, and not by the Federal Bureau of Investigation which refused to investigate (Tr. 906). Furthermore, Thomas admitted that SNB and the Thompsons reached an agreement to settle the entire dispute in May 2001 (Tr. 798). (*Cf.* Tr. 919-20; DX 231 (A-26)). It was only after *the Thompsons* failed to comply with that agreement that SNB initiated the civil suit and included Hasie (Tr. 798).

defendant *willfully joined a conspiracy*, *knowing its unlawful purpose*, and *with the intent to further the unlawful purpose*. *United States v. Richards*, 204 F.3d 177, 205 (5th Cir.), *cert. denied*, 531 U.S. 826 (2000) (specific intent to defraud); *United States v. Dadi*, 235 F.3d 945, 950 (5th Cir.2000) (emphasis added). Here, there is no evidence that Hasie (1) agreed to anything with the alleged coconspirators, (2) knew of any conspiracy to defraud the bank, much less (3) that he voluntarily joined a conspiracy specifically intending to defraud the bank.

Under 18 U.S.C. §§ 1344 (1) or (2), the government was first required to demonstrate that one of the conspirators knowingly executed or attempted (1) to execute a scheme or plan to defraud FSB or SNB, or (2) to obtain money or property from FSB or SNB by means of false or fraudulent pretenses, representations, or promises. Under 18 U.S.C. § 1344, the requisite intent to defraud is established only if the government proves beyond a reasonable doubt "that the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself." *Hanson*, 161 F.3d at 900; *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999).

The essence of a conspiracy is a meeting of the minds–a shared criminal intent and agreement to violate the law. *United States v. Levy*, 969 F.2d 136, 141 (5th Cir. 1992). A conspiracy conviction cannot rest on suspicion and innuendo or be built "on inference upon inference." *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992) (reversing conviction). The Fifth Circuit has overturned a conspiracy conviction when it was based solely on inferences from conversations "susceptible of either an illegal or legal interpretation." *Wieschenberg*, 604 F.2d at 326, 331-32, 334-45. "If the evidence tends to give equal or nearly equal circumstantial support to guilt and to innocence . . . reversal is required: When the evidence is essentially in balance, a reasonable jury

must necessarily entertain a reasonable doubt." *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998); *accord*, *United States v. Reveless*, 190 F.3d 678, 687-88. n. 16 (5th Cir. 1999) (reversing because when "the evidence is in equipoise, as a matter of law it cannot serve as a basis of a finding of knowledge"). Here, the government proved neither Hasie's knowledge of an illegal conspiracy *nor* his agreement to join it. *United States v. Manges*, 110 F.3d 1162, 1173 (5th Cir. 1997), and there is no evidence he had any criminal intent.

To demonstrate knowledge of the conspiracy, the government was required to prove that Hasie knew that Darden and/or the Thompsons were attempting to or did defraud the bank. As a predicate to any knowing intent to join this conspiracy, the government was required to show first that Hasie knew that all of the P&G shares were pledged as collateral to FSB, that margining that collateral would impair the bank's interests, and that Darden was concealing this fact from the bank. Without that knowledge, Hasie cannot have had any intent, criminal or otherwise, to defraud the bank.

First, the government did not prove that Hasie knew all the shares were pledged, and instead, it proved that he did *not* even know the amount of the Thompsons' debt (Tr. 532-33, 551, 581, Dkt. #152 at 9). Second, there is no evidence Hasie knew or intended any harm to the bank. Third, instead of proving that Hasie knew that Darden was misrepresenting or concealing the value of the Thompsons' accounts to defraud the bank, the evidence showed that Hasie disclosed the margining and all account information directly to the bank by sending it statements that the bank *received* and *anyone* could have reviewed (Tr. 289, 311, 324, 329, 409-12, 521-24, 605; Hasie Ex. 17-20 (A-7)). Hasie had neither access to nor knowledge of the internal bank documents which showed that Darden and/or the Thompsons' were misrepresenting the extent of the collateral in the Thompsons'

accounts. Without knowledge of and participation in those misrepresentations and concealment, the government has no evidence that Hasie conspired to defraud the bank.

Finally, one cannot join a conspiracy by silence. Some affirmative documentation of the defendants knowledge, criminal intent and agreement to join the conspiracy must be demonstrated. As a matter of law, mere silence cannot sustain a conviction for conspiracy or intent to defraud. *United State v. Dyar*, 574 F.2d 1385, 1388-89 (5th Cir. 1978); *Armco Indus. Credit Corp. v. SLT Warehouse* Co., 782 F.2d 475, 486 (5th Cir. 1986); *see United States v. Continental Group, Inc.*, 603 F.2d 444, 465-66 (3rd Cir. 1979). Other than fully disclosing the fact and extent of margining, the evidence only demonstrates Hasie's silence and lack of involvement with the misrepresentations made by Darden. These were internal bank communications–to which Hasie was not privy and as to which Hasie had neither a duty nor the ability to effect. Hasie's remote connection to these events is simply insufficient upon which to predicate the knowing, intentional activity and agreement required for a conspiracy conviction.

The essence of a conspiracy is shared criminal intent premised on a meeting of the minds which must be proved as to each defendant. *United States v. Treadwell*, 760 F.2d 327, 336 (D.C. Cir. 1985); *see also Levy*, 969 F.2d at 141. Without evidence to prove the meeting of the minds to commit an unlawful act, reversal [is] required. *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988). There is no evidence that Hasie collaborated with Darden or the Thompsons upon a criminal course of action, and this is not an element on which there can be ambiguity. *Dyar*, 574 F.2d at 1389; *see Parker*, 839 F.2d at 1473, 1478 (reversing for lack of common agreement to violate the law).

Rick Thompson never testified as to any agreement or understanding with Hasie, express or implied, to defraud the bank, make false statements, or launder money. Thompson never identified a single conversation or document in which such unlawful acts were discussed. Nor did Thompson ever explain how or when Hasie joined in the conspiracy to which Thompson plead guilty. On the contrary, Thompson testified that *even he* was unaware of the *possibility* of fraud or falsity until a meeting with Tom Darden in March 2000, when Darden explicitly told Thompson that he did not realize the extent of the margin against the Proctor and Gamble stock, and that Thompson could not sell it because they're [Darden's corporate superiors and the bank loan committee] going to know it's margined" (Tr. 523). There is no evidence this was ever told to Hasie.

From testimony by the government's own witness, the alleged conspiracy could have begun only when Thompson realized that Darden was not disclosing to the Bank's loan committee or directors the fact or extent of the margin against the Proctor and Gamble stock. This realization was months after the Proctor and Gamble stock had been placed at PaineWebber; months after it had been margined; months after the December 1999 letters were signed; and at least two months after the first statement, demonstrating that the Proctor and Gamble stock had been margined, had been sent to the bank. There is no evidence that Hasie ever knew that this fact was being concealed from other bank officers, and there is no evidence, nor could there be, that he played any role in that concealment. The government's own case establishes that the *bank president* knew of the margin, and statements showing it were sent to the bank. It also proved that other officers had access to and the opportunity to review all of the documents (Tr. 289, 311, 324, 329, 409-12, 521-24, 605, 687, 730, 902, 940-45; GX 4 (A-15); Hasie Ex. 17-20 (A-7)).

Finally, the government failed to demonstrate that Hasie had *any* criminal intent, let alone the requisite criminal intent required for a conspiracy and fraud convictions. For example, the government asserts that the purchase of AIPN stock in account #60675 demonstrates Hasie's intent to defraud the bank. But the evidence unequivocally and conclusively showed that Hasie told the Thompsons' *not* to buy this stock, and when they insisted, he affirmatively required them to sign an "unsolicited" statement–affirmatively indicating that he was against this purchase (Tr. 235-36, 327, 508, 592-93; GX 2F (A-8)). *See infra* note 21 and accompanying text. All of Hasie's convictions must be reversed.

As to Hasie, the evidence is not ambiguous or even in equipoise. There is *no evidence* of Hasie's criminal knowledge or intent–much less of his *agreement* to commit any crime. Hasie made full disclosure to the President of the Bank as authorized by his client to whom he owed confidentiality and fiduciary duties. That Darden misused or misrepresented or concealed from the bank information that Hasie sent him incriminates only Darden–*not* Hasie. There is nothing more Hasie could have done. There was no evidence that Hasie had any reason even to suspect that the bank president would not fulfill his own duties to the bank. *Rahseparian*, 231 F.3d at 1262 (even suspicion of illegal activity is insufficient to convict for conspiracy).

c. The Evidence Is Insufficient To Prove That Hasie Made False Statements To A Bank As Alleged In Counts 4 and 14.

As to both Count 4 and Count 14, the Government concedes that it was, at a minimum, required to prove beyond a reasonable doubt (1) that Hasie made a false statement to FSB or SNB; (2) that Hasie knew the statement was false when he made it; (3) that Hasie did so for the purpose

of influencing FSB or SNB (Gov't Resp. at 22). The government failed to prove any of these elements, inferentially or otherwise.

i. The Evidence Is Insufficient To Prove That Hasie Made A False Statement To FSB As Alleged In Count 4.

Count 4 specifically charged that Hasie knowingly made a false statement to FSB in the December 13, 1999, letter with the specific intent of influencing that bank to make a loan. The government contends that Hasie knowingly prepared this letter "with the intent to deliberately mislead and conceal from FSB the fact that the P&G stock had already been margined" (Gov't Resp. at 24). However, the government's concessions that the letter does not address the issue of margining, and that it was non-binding in any event require acquittal. The letter contains neither a false statement nor a misleading one. There is certainly no evidence that Hasie knew any statement in the letter was false when he signed it or that he sought to influence the bank in so doing.

Further, because the government has conceded that Darden had released the stock, and no instrument, either in the form of an agreement or a letter, indicated that the entire 40,000 shares of P&G stock were collateral for FSB and/or not to be margined, Hasie's conviction on this Count cannot stand. Hasie had no duty to insure that FSB adequately perfected a lien in the Thompson's stock–or even that they needed one. He did not know the amount of the debt. Hasie had no knowledge that Darden *would later misrepresent* to bank officers that the shares were not margined. Indeed, because Darden had actual and apparent authority as president of FSB, and because Darden released the stock to be margined" (Gov't Resp. at 9), Hasie's conviction is untenable. No knowledge of falsity is even possible under circumstances where Hasie is negotiating, arranging and

formally disclosing transactions to the primary officer of the bank who, unlike himself, has full knowledge of the Thompsons' finances.

Further, the government proved conclusively that Hasie did not know the extent of the Thompson's debt to FSB. This alone requires acquittal on this count. Without this knowledge, Hasie cannot have believed that any representation in the letter would have been false, nor could he have had the specific intent to influence the bank to make a loan.[24] Indeed, there is no evidence that Hasie knew the Thompsons sought additional financing from the bank.

ii. The Evidence Is Insufficient To Prove That Hasie Made A False Statement To FSB As Alleged in Count 14.

Amazingly, Count 14 charged Hasie with knowingly making a false statement to FSB via his February 26, 2001 letter requesting the *bank's approval* for continued disbursement of dividends on the P&G stock to the Thompsons. Nothing in the letter is false. The Thompsons had always received the dividends from the P&G shares (Tr. 590-92). Frank Thompson lived on them *before* and *after* Hasie's involvement (Tr. 590-92). No evidence was presented that such disbursements of these dividends were ever meant to be interrupted or discontinued by FSB. To the contrary, continued authorization for these disbursements was later confirmed in writing by Kirk Thomas, and *this was ratified even by the new owners of the bank with knowledge of the precarious nature of Thompsons' loans and that its security interest was not protected* (GX 14-B (A-27); 15C (A-28); Tr.

[24]Even if it could be argued that the letter was misleading on its face, it was not in fact. It was Darden who encouraged the Thompsons to buy this AIPN stock at that time, and Hasie who told them NOT to do so. Accordingly, there is no evidence that the letter influenced the bank. Darden knew what the Thompsons were doing, the extent of their assets and their debt and the arrangement with PaineWebber. Bank officers knew their security interest was not perfected.

713-14). Indeed, Thomas admitted that FSB/SNB did not even have a security interest in the dividends (Tr. 793). As such, FSB/SNB had no authority to preclude release of the dividends in any case (Tr. 793: "Dividends were never factored into the collateral" for the Thompsons' accounts). Thomas didn't even refer the continued authorization for disbursement of the dividends to the bank's loan committee (Tr. 793). Finally, dividends continued to be released until August 2001, months after the civil dispute between SNB and Paine Webber began (GX 2E-A-6).

Because release of these dividends had always occurred, including the period when FSB possessed the P&G shares, Hasie cannot have had the requisite criminal intent to influence the bank, and the letter was neither false nor misleading. Furthermore, there is no evidence that the release of dividends contravened any agreement between Hasie, FSB, and the Thompsons.

d. Counts 19-37 Alleging Money Laundering Do Not Criminalize Hasie's Conduct, and the Evidence is Legally Insufficient to Sustain His Convictions.

Counts 19 through 36 charge Hasie with money laundering "promotion" and international money laundering in violation of 18 U.S.C. §1956(a)(1)(A)(i)and (2).[25] Count 37 charges him with money laundering criminally derived property of a value in excess of $10,000 in violation of 18

[25]Counts 19 through 36 are also legally invalid in that they charged Hasie with *international* money laundering under §1956(a)(2). The indictment does not adequately allege the five essential elements of that offense. "First, it must show that the transportation or attempted transportation of funds was across U.S. borders. Second, the funds in question had to be the proceeds of specified unlawful activity. Third, [the defendant] must have known that the funds represented such proceeds. Fourth, his transportation of the funds must have been designed (in whole or in part) to conceal or disguise the nature, location, source, or control of the proceeds. Fifth, [the defendant] had to know that such concealment was the design of his enterprise." *United States v. Cuellar*, ___ F.3d ___, 2006 WL 399581 (5th Cir. February 22, 2006) (reversing international money laundering convictions for insufficient evidence of concealment). However, there was no evidence of an international transaction, and the case was not submitted to the jury on this charge.

U.S.C. § 1957. Because (1) Hasie's conduct simply does not fall within the purview of either of these statutes and (2) the evidence is insufficient to support his convictions, Hasie is entitled to a judgment of acquittal on all of the money laundering counts.

Monte Hasie is entitled to an acquittal on the money laundering counts because the statutes simply do not reach his conduct. Conduct that does not constitute an offense requires reversal–even as plain error. *United States v. Angeles-Mascote*, 206 F.2d 529, 530-32 (5th Cir. 2000) (*en banc*). "The purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities." *United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir.1995). The money laundering statutes cannot be turned into "money spending" statutes. *United State v. Brown*, 186 F.3d 661, 670-71 (5th Cir. 1999).

The money laundering promotion statute under which Hasie was wrongly convicted criminalizes only "funds or property that are derived from specified illegal activity, where the transactions are intentionally aimed at promoting specified unlawful activity." *United States v. Miles*, 360 F.3d 472, 477 (5th Cir. 2004). "Strict adherence to the specific intent requirement contained in the text of the money laundering promotion statute" is required to ensure that only "*conduct that is really distinct from the underlying specified unlawful* activity is punished under this provision." *Miles*, 360 F.3d at 477 (emphasis added) (reversing money laundering promotion convictions for insufficient evidence of specific intent). The plain text of the statute requires that the transaction "in fact involves the proceeds of specified unlawful activity . . . with intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(I). This is not

a case of concealment,[26] nor were the transactions designed to create the appearance of legitimate wealth from illegitimate funds.

"Promoting" means something additional from the underlying offense that actually takes the already obtained unlawful proceeds and uses them to *further* the specified unlawful activity. *Miles*, 360 F.3d at 477 (Government must prove directly "an intent to promote such illegal activity or pro[ve] that [the] transaction, on its face, indicates an intent to promote such illegal activity."); *Brown*, 186 F.3d at 670 (Additional "element is not satisfied by mere evidence of promotion, or even knowing promotion, but requires evidence of *intentional* promotion.") (emphasis in original). In this case, Hasie did not *obtain* any unlawful proceeds within the meaning of the statute, nor did he then engage in additional transactions to further or promote the alleged bank fraud. To the contrary, he advised against the transactions the Thompsons engaged in. Regardless, the transactions even the Thompsons engaged in here were not additional acts of *promoting* the bank fraud, but were part and

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[26]For example, it cannot be said that Hasie's conduct was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" or that Hasie knew that such concealment was the design of his enterprise. *United States v. Cuellar*, ___F.3d ___, 2006 WL 399581 (5th Cir. 2006) (reversing money laundering conviction for insufficiency, despite evidence far more incriminating than exists against Hasie). The accounts were in the Thompson's names, the source of the funds was the P&G stock the Thompsons had long held, the location was plain, the bank knew where the funds were, and the bank knew it did not have control of the funds. Statements were sent to the bank. This was a facially innocuous transaction with locally known persons of apparent good standing and personal wealth exceeding $4 million. There was no illegitimate business involved. On its face, at least as to Hasie, it was a simple business transaction. Most importantly, NOTHING was concealed–and certainly not within the meaning of the money-laundering statutes. *Cf. Cuellar* (reversing money laundering for insufficiency of concealment and knowledge of design to conceal despite the fact the defendant had obvious drug money hidden in his car and was driving to Mexico); *United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir. 1999) (reversing money laundering, promotion and concealment, conviction of a defendant who used fraudulently obtained credit cards to purchase computers because the design of the transaction was to buy computers).

parcel of it. Indeed, banker Tom Nichols said that it was the margining that moved money from the bank (Tr. 946). However, the stock was never *deposited* on account with FSB, and no withdrawal was made. The "design" of the margining–even by the Thompsons–was to increase their legitimate wealth, presumably to enable them to pay off their loans more easily. Had this worked, and had the market gone up instead of down, the bank would not have complained at all about Darden's release of this stock. In any event, these transactions do not constitute "money laundering" within the meaning of these statutes.

At a minimum, the Rule of Lenity requires this Court to interpret the statute as excluding the conduct at issue from money laundering. *United States v. Blankenship*, 382 F.3d 1110, 1130 (11th Cir. 2004) (reversing money laundering conviction). In Hasie's case, the "proceeds" of the specified unlawful activity are not even "proceeds" but losses, and regardless, they are one in the same with the "unlawful activity." Affirming Hasie's convictions for money laundering would extend the statute to virtually any financial transaction related to allegedly unlawful activity–"a result directly at odds with the text and purpose of the statute." *Blankenship*, 382 F.3d at 1130. Here, as in *Blankenship*, "this seems to be a simple case of government overreaching." *Id*. at 1131 (entering judgment of acquittal on all money laundering counts).

In any event, the evidence is legally insufficient to sustain his convictions. To convict Hasie of money laundering under both 18 U.S.C. § 1956(a)(1)(A)(i) (Counts 19 through 36) and 18 U.S.C. § 1957 (Count 37), the government was required to prove that Hasie had knowledge that the property involved in the financial transaction(s) represented the proceeds of unlawful or criminal activity.[27]

[27]Notwithstanding the questions of either knowledge or intent, Hasie's convictions for money laundering cannot be sustained because the underlying transfers, authorized by the Uniform

See, *e.g. Miles*, 360 F.3d at 477. Further, the government was also required to prove that Hasie carried on the financial transaction(s) with the specific intent to further the specified unlawful activity. *Id*.

As for the intent necessary for a "promotion" conviction, the Fifth Circuit "has held that the Government must present either *direct proof* of an intent to promote such illegal activity or proof that a given type of transaction, on its face, indicates an intent to promote such illegal activity." *Miles*, 360 F.3d at 472, 477 (emphasis added); *see also Brown*, 186 F.3d at 670-71. "*Absent a showing of specific intent, the promotion prong is not satisfied even by a showing that the financial transaction did promote the carrying on of unlawful activity*." *Olaniyi-Oke*, 199 F.3d at 770 (emphasis added) (reversing conviction for insufficiency). This same Court has instructed that "strict adherence to the specific intent requirement" is critical to evaluating the evidence and conduct used to support such convictions. *Miles*, 360 F.3d at 477; *Brown*, 186 F.3d at 670.

Indeed, the Fifth Circuit has clearly voiced its concern that "without such close scrutiny on the question of intent, the money laundering promotion statute would "simply provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts." *Miles*, 360 F.3d at 477. Here, an overzealous prosecutor wrongly used the statute as a means to impose additional criminal liability even in the absence of "expenditures." Even if this were money laundering, the government

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Commercial Code section 9 and the explicit directives of FSB, were not even unlawful. See *Rahseparian*, 231 F.3d at 1262. Because the government has already conceded that Darden (FSB) released the P&G stock to be margined, the underlying financial transfers were not unlawful. Hasie was unaware of, and indeed there was no legal or contractual obligation to prevent the shares from being margined. This was not drug money, or any kind of transaction which on its face indicated an intent to promote an illegal activity. On this basis alone, Hasie's convictions must be reversed.

presented no evidence as to Hasie's specific knowledge that the property involved represented the proceeds of unlawful activity or as to his intent to further a "specified unlawful activity" as required under the statute.

First, the government has no "direct proof" of Hasie's intent to promote an illegal activity. He made no statements evidencing his knowledge or intent, and no one testified to any conversations with him that would prove any. This case has none of the indicia of money laundering, and the government failed to prove *any* of the essential elements or hallmarks of the offense. These transactions were not structured to avoid attention; no illegal profits were deposited into a legitimate business account; there was no concealment of the real owner; there was no expert testimony that this is a practice of criminals. *Cf. Blankenship*, 382 F.3d at 1129 (Anyone looking at the available documents "would be able to tell immediately .... the nature, the location, the source, the ownership, or the control of the proceeds.") (internal citations omitted). As in *Blankenship*, anyone looking at the account would be able immediately to follow the revenue stream. At all times, the money was in an account with the Thompsons' name. There was no "increase in secrecy" by opening either account (*Id.* at 1129), and full disclosure of account transactions was made to the bank.

Second, the government failed to prove that Hasie had knowledge that the transaction was to accomplish anything other than facilitate the Thompsons' ability to use the stock and to sell it expeditiously when appropriate. There is no evidence that Hasie had any knowledge of any unlawful activity, any knowledge of bank fraud–much less that he had the requisite specific intent to further it.

In short, Hasie did not join a money-laundering scheme. The case was wrongly indicted and legally infirm. The government categorically failed to prove that Hasie had the requisite knowledge of unlawful activity or specific intent to further any unlawful purpose.

CONCLUSION

Monte Hasie has led an exemplary life dedicated to his family, church and community. This prosecution has cast a pall over his reputation and ruined his livelihood–in the absence of *any* evidence that he even knew anyone was committing fraud–much less *any* evidence that *he intended* to do so or affirmatively joined that effort. The government has cited no authority extending criminal liability to anyone in the attenuated position of Hasie and in the absence of direct proof of his knowledge of and intentional involvement in the commission of a crime. Indeed, there is no such authority. We respectfully request that this Court set aside these wrongful convictions and enter the judgment of acquittal to which Monte Hasie is entitled under an impartial and just application of clear and controlling precedent. For these reasons and all of those previously urged in Hasie's motions for judgment of acquittal, arrest of judgment, and new trial, his convictions on all counts should be reversed and acquittal rendered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sidney Powell, do hereby certify that on March 2, 2006, I electronically filed Defendant Monte Hasie's Answers to the Court's Questions and Brief in Support of Judgment of Acquittal with the Clerk of the Court for the United States District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system will send a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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