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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,)	CR 06-0556 CRB
16 Plaintiff,)	
17 v.)	THE UNITED STATES' RESPONSE
18)	TO THE DEFENDANT'S MOTION FOR
19 GREGORY L. REYES,)	A JUDGMENT OF ACQUITTAL
20 Defendant.)	
21)	

22 The United States of America, by and through its undersigned counsel, hereby responds
23 to Gregory L. Reyes' Memorandum of Points and Authorities in Support of the Motion for
24 Judgment of Acquittal dated July 3, 2007 ("Defendant's Memo"). For the reasons set forth
25 herein, the motion should be denied.
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1 I. THE STANDARD FOR DECIDING A RULE 29 MOTION

2 When considering a motion for acquittal under Federal Rule of Criminal Procedure 29,
3 the district court must view the evidence in the light most favorable to the government and draw
4 all reasonable inferences in the government's favor.

5 "[T]he relevant question is whether, after viewing the evidence in the light most
6 favorable to the prosecution, any rational trier of fact could have found the essential elements of
7 the crime beyond a reasonable doubt." *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th
8 Cir. 2002) (internal quotation omitted); *see also United States v. Salmonese*, 352 F.3d 608, 618
9 (2d Cir. 2003) (that inferences favorable to the defendant could also be drawn from the evidence
10 is of no import because "the task of choosing among permissible competing inferences is for the
11 jury, not a reviewing court").

12 The Court may not view the government's evidence in isolation, but must examine that
13 evidence in conjunction and as a whole. *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir.
14 2005). Circumstantial evidence and reasonable inferences drawn from that evidence alone are
15 sufficient to sustain a conviction. *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.
16 1992); *United States v. Nelson*, 419 F.2d 1237, 1239 (9th Cir. 1969) ("For at least a third of a
17 century, this court has rejected the notion that it is improper to infer a fact issue from other facts
18 which have been established by circumstantial evidence;" "[C]ircumstantial evidence is not
19 inherently less probative than direct evidence. Under some conditions it may even be more
20 reliable . . ."). The court must also credit both direct and circumstantial evidence without
21 evaluating or speculating on the weight the jury might give it. *United States v. Martin*, 228 F.3d
22 1, 10 (1st Cir. 2000).

23 In ruling on a Rule 29 motion, a district court "must bear in mind that 'it is the exclusive
24 function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and
25 draw reasonable inferences from proven facts.'" *Alarcon-Simi*, 300 F.3d at 1176 (*quoting United*
26 *States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977)). Thus, this Court may not weigh the evidence,
27 substitute its opinion for that of the jury, or make credibility determinations. *United States v.*

1 *Giampa*, 758 F.2d 928, 934–35 (3d Cir.1985). The Court’s only function at this stage is to
2 determine whether the government adduced evidence sufficient to sustain a conviction. *Id.*
3 Indeed, “A finding of insufficiency should be ‘confined to cases where the prosecution’s failure
4 is clear.’ Courts must be ever vigilant in the context of Fed.R.Crim.P. 29 not to usurp the role of
5 the jury by weighing credibility and assigning weight to the evidence, or by substituting its
6 judgment for that of the jury.” *Brodie*, 403 F.3d at 133 (citations omitted).

7
8 II. TO PROVE CRIMINAL INTENT, THE EVIDENCE MUST SHOW ONLY
9 THAT THE DEFENDANT KNEW HE ENGAGED IN A WRONGFUL ACT

10 The Ninth Circuit in *Tarallo* outlined three basic elements needed to satisfy 15 U.S.C. §
11 78ff. First, there must be criminal intent as defined by the term “willful.” Second, the
12 defendant’s conduct, whether he knew it or not, must violate the securities laws. Third, the
13 defendant’s conduct, again, whether he knew it or not, must involve a significant risk of affecting
14 the violation that has occurred. *Tarallo*, 380 F.3d at 1187.

15 A. Willfully

16 To prevail, the evidence must prove that the defendant acted “willfully.” 15 U.S.C. §
17 78ff. To prove the defendant acted “willfully,” it is “necessary only that the prosecution
18 establishes a realization on the defendant’s part that he was doing a wrongful act.” *United States*
19 *v. Tarallo*, 380 F.3d 1174, 1187 (9th Cir. 2004)(internal quotation, citation omitted). *See also*,
20 *United States v. O’Hagan*, 139 F.3d 641, 647 (8th Cir. 1998) (“Courts that have interpreted
21 “willfully” in [15 U.S.C. § 78ff(a)] have reached the same conclusion that we reach in this case:
22 “willfully” simply requires the intentional doing of the wrongful acts – no knowledge of the rule
23 or regulation is required.”).

24 If the evidence establishes that the defendant acted knowing that he was doing a wrongful
25 act, then the government has met its burden with regard to the required criminal intent.¹ It is

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27 ¹ The defendant’s suggestion that “wrongful” means “inevitably nefarious, clearly
28 ‘reprehensible,’ or obviously evil,” Defendant’s Memo. at 27 n.15 (citing *Ratzlaf v. United*

1 well-settled that the government need not prove that the defendant knew that he was breaking the
2 law. *Tarallo*, 380 F.3d at 1187. Indeed, the defendant need not even be aware of the existence
3 of the rule he is alleged to have violated. *Id.* See also *United States v. Schwartz*, 464 F.2d 499,
4 509 (2d Cir. 1972)(“The final clause of [15 U.S.C. § 78ff(a)], however, makes it clear that the
5 statute contemplates a ‘willful’ violation by one who has no knowledge of the violated rule or
6 regulation. Since specific intent to violate the law presupposes knowledge of the law, it follows
7 that such a specific intent is not necessary to sustain a conviction.”).

8 The government need not prove that the defendant was familiar with a statute, regulation,
9 accounting rule, or anything else as long as he knows what he is doing is wrong. In *United States*
10 *v. Brown*, 578 F.2d 1280 (9th Cir. 1978), for example, the defendant argued that the government
11 failed in its proof because it had not shown that he was aware that his conduct related to a
12 “security” under the federal securities laws. The Ninth Circuit rejected this argument:

13 We think that the government is required to prove specific intent
14 only as it relates to the action constituting the fraudulent,
15 misleading or deceitful conduct, but not as to the knowledge that
16 the instrument used is a security under the Securities Act. The
17 government need only prove that the object sold or offered is, in
18 fact, a security; it need not be proved that the defendant had
19 specific knowledge that the object sold or offered was a security.

18 *Id.* at 1284. As the court observed, requiring proof only that the defendant knew his conduct was
19 wrongful “is not a trap for the unwary because the thrust of it [*i.e.*, the federal securities laws] is
20 fraud.” *Id.*; see also *United States v. English*, 92 F.3d 909, 915 (9th Cir. 1996) (securities laws do
21 not require proof of a specific intent to break the law; “[s]ince fraud is an inherently bad act . . .

22 _____
23 *States*, 510 U.S. 135, 137 (1994)), has been repeatedly rejected in the context of securities law
24 violations. See, e.g., *O’Hagan*, 139 F.3d at 647 (the rationale of *Ratzlaf* does not apply to 15
25 U.S.C. § 78ff); *English*, 92 F.3d at 914-16 (distinguishing *Ratzlaf* (where the Court was
26 concerned with a different statutory scheme and the criminalization of innocent behavior), from
27 cases of securities fraud, which are “not a trap for the unwary because the thrust of it is fraud”)
(citations, internal quotation omitted); *Charnay*, 537 F.2d at 357 (“Proof of an ‘evil motive’
appears unnecessary.”) (citation omitted) (Sneed, J., concurring).

1 there is no danger in prosecuting the innocent, feckless, or reckless”) (internal quotation, citation
2 omitted).

3 B. Conduct Caused a Significant Risk of a Violation of the Securities Law

4 Apart from the defendant’s criminal intent, the evidence must independently prove that
5 the defendant’s act violated the securities laws. This requires nothing more than that the
6 government prove the other non-scienter elements required in any securities fraud case. In
7 addition, the defendant’s act must involve “a significant risk of effecting the violation that has
8 occurred.” *Tarallo*, 380 F.3d at 1187 (internal quotation, citation, footnote omitted). This other
9 evidence, however, is independent of the proof of the defendant’s mental state, *i.e.*, that he knew
10 he was engaged in a wrongful act.

11 If he willfully participated in an act that involves a “significant risk” of violating the
12 securities laws, then the defendant is criminally liable. *Charnay*, 537 F.2d at 352 (indictment
13 sufficient where it “alleges a knowing participation by all of the defendants in the perpetration of
14 the manipulation which created the artificially depressed market price and consequent fraud and
15 deceit.”); *Schwartz*, 464 F.2d at 509 (“Proof of a specific intent to violate the law is not necessary
16 . . . provided that satisfactory proof is established that the defendant intended to commit the act
17 prohibited.”).

18
19 *United States v. Peltz*, 433 F.2d 48 (2d Cir. 1970) is the seminal case on this issue. In
20 *Peltz*, the defendant was convicted of, among other things, violating SEC Rule 10a-1(a) (which
21 prohibits a person from engaging in certain short sale trading) by falsely telling a broker that he
22 owned the securities sold. After the court determined that the government did not need to prove
23 that the defendant knew of Rule 10a-1(a), the question remained what mental state the
24 government was required to show. The analysis articulated by Judge Friendly has been adopted
25 by the Ninth Circuit, as set out in *Tarallo*:

26 ///

1 [I]t was necessary only that the prosecution establishes a
2 realization on the defendant's part that he was doing a wrongful
3 act. We accept this with the qualifications . . . that the act be
4 wrongful under the securities laws and that the knowingly
5 wrongful act involve a significant risk of effecting the violation
6 that has occurred.

7 *Peltz*, 433 F.2d at 55 (internal quotation and citations omitted). The court found that there was
8 "ample evidence that Peltz was aware 'he was doing a wrongful act,' namely, telling the brokers
9 he was long when he knew he was not." *Id.* Peltz – like this defendant – lied. That was legally
10 sufficient to establish that Peltz knew he was doing a wrongful act. The other elements were
11 satisfied by evidence of the defendant's conduct independent of his state of mind: "His false
12 statements, negating the facts that would have induced the brokers to take the requisite steps to
13 avoid a violation of 10a-1(a), created a serious risk that such a violation would occur, as it did."
14 *Id.* (citation omitted).

15 Similarly in *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), the defendant was the
16 president of a public company charged with, among other things, filing a false Form 10-K that
17 failed to disclose loans to company insiders in excess of \$20,000 as required by regulation. The
18 court rejected the defendant's argument that there was insufficient evidence of his state of mind
19 to support a conviction:

20 Dixon did a "wrongful act," in the sense of our decision in *Peltz*,
21 when he caused the corporate books to show, as of December 31,
22 1970, debts of his father and of Lewis which in fact were his own.
23 True, Dixon may have thought his year-end thimblery would
24 provide escape from a rule different from the one that existed. But
25 such acts are wrongful "under the Securities Acts" if they lead, as
26 here, to the very violations that would have been prevented if the
27 defendant had acted with the aim of scrupulously obeying the rules
28 (which would have necessarily involved correctly ascertaining
them) rather than of avoiding them. Such an intention to deceive is
enough to meet the modest requirements of the first clause of [15
U.S.C. 78ff(a)] when violations occur.

Id. at 1396; see also *United States v. Chiarella*, 588 F.2d 1358, 1371 (2d Cir. 1978), *rev'd. on*
other grounds, 445 US 222 (1980) ("under the *Peltz-Dixon* test, the willfulness requirement of

1 [15 U.S.C. 78ff(a)], is satisfied by a general awareness of wrongful conduct, which may exist
2 even if a defendant believes his chicanery is in technical compliance with the law").

3 That the securities laws impose such a “modest” level of proof of scienter is grounded in
4 part on the fact that a criminal conviction under those laws “necessarily involves fraudulent
5 conduct and breaches of duty by the defendant. Such acts do not involve conduct that is often
6 innocently undertaken.” *O’Hagan*, 139 F.3d at 647; *see also, e.g., English*, 92 F.3d at 915.

7 In addition, the federal securities laws are “public welfare offenses” and do not
8 “encounter the same demanding constitutional and interpretive standards applicable to other
9 criminal offenses.” *Charnay*, 537 F.2d at 355, 356 ((neither § 10(b) nor Rule 10b-5 is
10 “interpreted narrowly when employed as a basis for criminal prosecution, even though a narrow
11 interpretation is ordinarily considered proper with respect to statutes defining crimes”) (Sneed, J.,
12 concurring). As a result the same “expansive interpretation necessary to insure the maintenance
13 of fair and honest exchanges” employed in civil securities fraud actions is employed in criminal
14 ones. *Id.* at 356

15 This modest level of proof is further informed by the fact that a defendant may not be
16 imprisoned – although he may be convicted – for violating the securities laws if he proves at
17 sentencing that he had no knowledge of the rule or regulation. *Tarallo*, 380 F.3d at 1188; *see*
18 *also United States v. O’Hagan*, 521 U.S. 642, 665-66 (1997) (15 U.S.C. § 78ff’s “willfulness”
19 test and its provision that a defendant may avoid incarceration if he proves he had no knowledge
20 of the applicable rule are “two sturdy safeguards Congress has provided regarding scienter”); 15
21 U.S.C. § 78ff(a).

22 As one court put it, the rationale in other cases concerning other statutory schemes, “that
23 knowledge of the law is required in order to prevent criminal conviction for conduct that may
24 often be innocently undertaken, does not apply to [15 U.S.C. § 78ff]. Criminal conviction for
25 violation of rules and regulations implementing § 10(b) necessarily involves fraudulent conduct
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1 breaches of duty by the defendant. Such acts do not involve conduct that is often innocently
2 undertaken.” *O’Hagan*, 139 F.3d at 647.²

3 Analytically, the common elements of the securities fraud violations at issue in this trial
4 reduce themselves to the following two questions: First, did the defendant do something he
5 knew was wrongful? Yes, he falsified Brocade’s stock option grant minutes and then lied about
6 it (described at length below), which is legally sufficient proof that he acted with an intent to do
7 something wrong. Second, did the defendant’s conduct involve a “serious risk” of the violation
8 of the securities laws? Yes, the defendant’s falsification of the stock option grant minutes
9 resulted in the falsification of the company’s books and records, resulted in false statements
10 being made to the auditors, caused the company to file financial statements with the SEC that
11 materially inflated Brocade’s bottom line, and misled Brocade’s shareholders and the investing
12 public.³

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15 ² *United States v. Cassese*, 428 F.3d 92 (2d Cir. 2005), cited by the defendant at the July
16 6 hearing, is not helpful. In that case the parties disagreed about the proper standard. The
17 defendant argued that to show willfulness the government was required to prove that the
18 defendant specifically knew that the transaction he traded on was a tender offer under the
19 securities laws. The government, on the other hand, took the position that it was not required to
20 prove that that the defendant knew that he was violating a rule that governed trading relating to a
21 tender offer, but rather was required to prove only that he realized that he was committing a
22 wrongful act. *Id.* at 97-98. The Second Circuit did not purport to redefine the well-established
23 definition of willfulness, determining that the government had not met its burden under even that
24 standard. *Id.*; *see also id.* at 103 (“The majority finds it unnecessary to reach this issue,
25 concluding that, even if willfulness only requires proof that Cassese generally understood the
26 unlawfulness of his actions, the government failed to carry its burden.”) (Raggi, J., dissenting).

27
28 ³ The scienter element can be satisfied by evidence that the defendant acted recklessly as
well as intentionally. Reckless conduct involves not merely simple, or even inexcusable,
negligence, but an extreme departure from the standards of ordinary care, and which presents a
danger of misleading investors or accountants that is either known to the defendant or is so
obvious that he must have been aware of it. The defendant is reckless if he had reasonable
grounds to believe material facts existed that were misstated or omitted, but nonetheless failed
to obtain and disclose such facts although he could have done so without extraordinary effort.
See, e.g., Tarallo, 380 F.3d at 1188-89; *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69

1 III. THE EVIDENCE IS LEGALLY SUFFICIENT TO PROVE THE DEFENDANT
2 INTENDED TO DO SOMETHING HE KNEW WAS WRONG

3 A. The Defendant Routinely Executed Grant Minutes He Knew Were False

4 The critical fact of this case now seems uncontroverted: the defendant routinely engaged
5 in so-called look-backs to pick low stock prices for the option grants using historical stock
6 performance information. The inferences that naturally flow from this now-undisputed proof are
7 laden with consequence for the defendant. If the grant minutes were signed using look-backs,
8 then the defendant knew the corporate records he was signing were false.

9 This critical point is most clearly understood by following the logic of a single option
10 grant using the look-back procedure. Take the so-called November 28, 2001 option grant (Ex.
11 912), for example. On January 28, 2002, Stephen Beyer used the look-back procedure to select
12 the November 28, 2001 pricing date because it was a low stock price. Beyer at 257-58;⁴ Ex. 128.
13 Then, later in January 2002 or in early February 2002, Colleen Devine drafted for the first time
14 the unexecuted grant minutes using the November 28, 2001 date. Devine at 133. After the
15 unexecuted grant minutes were finalized, they were submitted by the HR personnel through
16 Stephanie Jensen for the defendant's approval and signature. *Id.* at 135.

17
18 Through late January 2002, the defendant has had no involvement whatsoever in the so-
19 called November 28, 2001 option grant. On or about February 6, 2002, Stephen Beyer
20 announced that the defendant had executed the so-called November 28, 2001 grant minutes
21 "yesterday." Ex. 134 ("[a]s yesterday afternoon we have final signature approval for all Q1
22 QSAP stock as well as new hire stock through Jan 22 [*i.e.* the new hire grants on October 30,

23
24 (9th Cir. 1990). The defendant acknowledges that proof of recklessness suffices to establish
25 scienter. *See* Defendant's Memo. at 22.

26
27 ⁴ The government's citations to the trial transcript reference the witness's name followed
28 by the page numbers.

1 2001, November 28, 2001 and January 22, 2002]"). Therefore, we know that the defendant first
2 approved and executed the so-called November 28, 2001 option grant sometime between late
3 January 2002 and February 5, 2002.

4 A rational juror could reasonably conclude the following: First, contrary to what is stated
5 on the minutes, there was no "meeting" on November 28, 2001. *See* Ex. 912 ("Committee of the
6 Board of Directors Meeting Date: November 28, 2001"). Second, the date of November 28, 2001
7 was selected by the HR personnel without any involvement of defendant Reyes. Third, the
8 defendant knew that the grant minutes were false because he knew there was no meeting on
9 November 28, 2001 and because he knew that the fair market price of the stock on the day he
10 signed the grant minutes was not the price stated on the minutes. *See id.* ("Fair Market Value:
11 \$28.82"). And fourth, knowing the document was false, the defendant signed the grant minutes
12 anyway.

13 As a general matter, the same logic applies to all the other approximately eight-eight (88)
14 grant minutes executed after the fact using the look-back procedure. *See* Exs. 947, 947.1 (listing
15 grants at issue). Therefore, the government is entitled to the reasonable inference that the
16 defendant knew the grant minutes he signed using the look-back procedure were false.

17
18 B. The Defendant's Lies About the Look-Backs at Brocade Are
19 Legally Sufficient to Prove He Knew What He Did Was Wrong

20 Having routinely executed grant minutes he knew were false, the question becomes did
21 the defendant execute the false grant minutes with an intent to do something wrong? A juror
22 could reasonably conclude that the defendant executed the false grant minutes knowing that he
23 was doing something wrong because he lied about it.

24 Craig Martin left no doubt that defendant Reyes stated repeatedly that there were no look-
25 backs to price option grants at Brocade. Martin at 2155-56, 2158-60, 2212-13. Why would this
26 defendant lie about the use of look-backs? He lied for the same reason many criminal defendants
27 lie about their conduct. He lied because he knew he had done something wrong.

1 False exculpatory statements are evidence of consciousness of guilt. *United States v.*
2 *Perkins*, 937 F.2d 1397, 1401-1402 (9th Cir. 1991) (approving the following instruction when a
3 defendant lied to an arresting officer: "Conduct of a defendant, including statements knowingly
4 made and acts knowingly done upon being informed that a crime has been committed, or upon
5 being confronted with a criminal charge, may be considered by the jury in light of all other
6 evidence in the case in determining guilt or innocence. When a defendant voluntarily and
7 intentionally offers an explanation or makes some statement tending to show his innocence, and
8 this explanation or statement is later shown to be false, the jury may consider whether this
9 circumstantial evidence points to a consciousness of guilt. Ordinarily it is reasonable to infer that
10 an innocent person does not usually find it necessary to invent or fabricate an explanation or
11 statement tending to establish his innocence. Whether or not evidence as to a defendant's
12 voluntary explanation or statement points to a consciousness of guilt, and the significance to be
13 attached to any such evidence, are matters exclusively within the province of the jury."); *United*
14 *States v. Wood*, 550 F.2d 435, 442-43 (9th Cir. 1976) (approving jury instruction providing that
15 "when a statement is made alleging innocence which later is shown to be false, it is ordinary to
16 infer a consciousness of guilt."); *see also United States v. Newman*, 6 F.3d 623, 628-29 (9th Cir.
17 1993) (because jury could infer that defendant lied to investigators about being near the scene of
18 a fire, his false exculpatory statements were evidence of consciousness of guilt); *United States v.*
19 *Ruggiero*, 56 F.3d 647, 655 (5th Cir. 1995) ("After the investigation into his transactions
20 commenced, Parker lied to the SEC, conferred with Ruggiero, and then changed his story. A
21 reasonable juror could conclude that these actions indicated that Parker knew the information
22 that he received from Ruggiero was improperly acquired, and that the evidence was sufficient for
23 a reasonable juror to find knowledge or at least recklessness."); *SEC v. Musella*, 748 F. Supp.
24 1028, 1040 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1990) (defendant's "false exculpatory
25 statement evidences consciousness of guilt and has independent probative value of scienter"). At
26 a minimum, the defendant's motion should be denied because the government is entitled to the

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1 inference that a juror could reasonably infer the defendant lied about the look-backs because he
2 knew what he did was wrong.

3 C. The Defendant Knew The Look-Backs Had Accounting Consequences

4 For the reasons cited above, it is enough for the government to prove, as it has, that the
5 defendant routinely falsified corporate records knowing that it was wrong and that the
6 defendant's conduct caused a significant risk of violating the securities laws by misrepresenting
7 the true financial condition of the company to the public. The evidence is more than legally
8 sufficient on these core points.

9 By its questions at the July 6, 2007 hearing, the Court seemed to imply that the
10 government was required to go further and prove that the defendant knew that his wrongful
11 conduct had accounting implications for Brocade. Respectfully, we do not agree that the
12 government was required to prove that the defendant had knowledge of the accounting rules that
13 he violated. But even if we were required to prove this additional element, the proof is more than
14 legally sufficient to establish that the defendant knew the accounting implications of his fraud.

15 1. KPMG Representation Letters

16 There can be no doubt that the defendant knew the option grant minutes he routinely
17 falsified were relevant to disclosure requirements of a publicly-traded company like Brocade.

18 On November 18, 2002, defendant Reyes signed the nine (9) page management
19 representation letter to Brocade's auditors KPMG LLP. Ex. 44. Among other representations,
20 the defendant stated that "we have made available to you: ... [a]ll minutes of the meetings of ...
21 committees of directors." Ex. 44 at 1. The defendant further represented that "[t]here have been
22 no ... [i]nstances of fraud, whether material or not, involving management." Ex. 44 at 2. In the
23 first sentence of his letter, the defendant assured KPMG LLP that "[w]e are providing this letter
24 to you in connection with your audit of the consolidated balance sheets of Brocade
25 Communications Systems, Inc." Ex. 44 at 1.

26 The November 18, 2002 management representation letter leaves no question that
27 defendant Reyes knew Brocade's auditors would rely on the option grant minutes ("[a]ll minutes
28

1 of the meetings of ... committees of directors”) to prepare Brocade’s financial disclosures to its
2 shareholders and the public. The defendant also assured the auditors that the option grant
3 minutes were true and accurate (“no fraud, whether material or not”). Yet the evidence shows
4 that the grant minutes were false. Thus, the defendant lied to Brocade’s auditors.

5 The defendant falsified the grant minutes to deceive his finance personnel. Moore at 892,
6 896-98, 900-01 (testifying that, for employee grants, she believed the stock price was set on the
7 date Greg Reyes as the “committee” met to set the price, and nothing on the committee minutes
8 indicated otherwise to her). Like most frauds, the defendant engaged in a cover-up of his
9 wrongdoing. As a result, he lied to Brocade’s auditors in the management representation letter
10 and, as we will see, to Brocade’s shareholders in the SEC Form 10-K.

11 2. The 2002 SEC Form 10-K Certified by the Defendant

12 As the government tried to emphasize during oral argument, the defendant’s signature
13 and certification on Brocade’s 2002 SEC Form 10-K can be properly viewed as a statement by
14 the defendant. As such, it is one of the clearest and most direct forms of evidence that he knew
15 that his falsification of the option grant minutes would have direct accounting consequences that
16 would cause Brocade to under-report its compensation expenses and thus falsely inflate the
17 company’s bottom-line.

18 For example, Brocade’s SEC Form 10-K for fiscal year 2002 includes the following
19 disclosure under “Summary of Significant Accounting Policies” (Ex. 27 at 50):

20 *Stock-Based Compensation*

21 The Company accounts for its stock option plans ... in accordance
22 with the provisions of Accounting Principles Board Opinion 25,
23 “Accounting for Stock Issued to Employees,” (APB 25), *whereby
the difference between the exercise price and the fair market value
at the date of grant is recognized as compensation expense.*

24 Ex. 27 at 54 (emphasis added). Even if he had no understanding of APB 25, the defendant
25 clearly understood that if you granted options at a price below the fair market value then you had
26 a compensation expense. That options granted below the market price (or in the money) have a
27 expense associated with them is not a complicated or esoteric concept. June Weaver understood

1 it. Weaver at 556-58. Similarly, the notion that expenses hurt the bottom-line is also not
2 complicated or esoteric. *See e.g. id.* at 547-48.

3 Even if these were sophisticated concepts, the defendant affirmatively represented that:

4 I have reviewed this annual report on Form 10-K of Brocade
5 Communications Systems, Inc.; ... Based on my knowledge, the
6 financial statements, and other financial information included in
7 the annual report, fairly present in all material respects the financial
8 condition ... for the periods presented in this annual report;
9 ...[Brocade's] other certifying officer and I have disclosed ... to
10 [Brocade's] auditors ... any fraud, whether material or not, that
11 involves management ...

12 Ex. 27 at 80. The defendant asked Brocade's auditors and shareholders to rely on his specific
13 assurance that he understood what was in the 2002 SEC Form 10-K. It is not unreasonable for
14 the jurors also to rely on the defendant's assurances.

15 At this juncture, the government is entitled to the reasonable inference that the defendant
16 actually meant what he said when he insisted that he reviewed and understood the representations
17 in Brocade's Form 10-K for 2002. In our view, the reasonable inferences that may be drawn
18 from the defendant's representations that "*the difference between the exercise price and the fair
19 market value at the date of grant is recognized as compensation expense*" is dispositive as to his
20 actual understanding of the accounting consequences of his falsification of the option grant
21 minutes.⁵

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3. Other Evidence The Defendant Knew About The Accounting
Consequences of Falsifying The Option Grant Minutes

In addition to the management representation letters and the SEC Form 10-Ks, a juror
could reasonably rely on a variety of other evidence in the trial record to conclude that the

⁵ The government does not seek to hold the defendant strictly liable for any falsehood in Brocade's SEC Form 10-K. But the government does seek to hold him criminally responsible for his own willful and intentional falsification of corporate records that resulted in under-reported compensation expenses and thus falsely inflating the company's bottom line. CEO's that certify a company's SEC Form 10-K reports in good faith have nothing to fear from this case. CEO's, like Greg Reyes, who intentionally mislead their auditors and shareholders as part of a scheme to falsify inflate their bottom line, are properly held responsible for their criminal wrongdoing as they have been since the Securities and Exchange Act of 1934 was first enacted.

1 defendant understood there were accounting consequences that flowed from his deliberate
2 falsification of the option grant minutes.

3 First, Craig Martin testified that he specifically asked the defendant during their January
4 2005 meeting whether he understood the implications of granting in-the-money options and the
5 defendant responded that he did understand those implications sometime during his tenure as
6 Brocade CEO. Martin at 2157, 2201-03. A juror could reasonably infer that the defendant had
7 that understanding at least from the time when he signed the fiscal year 2001 Form 10-K (which
8 included the very same language as the 2002 10-K clearly stating that options granted at below
9 fair market price resulted in a compensation expense, Ex. 22 at 50). Mr. Martin's testimony is a
10 further corroboration that the defendant always understood the basic accounting rule that in-the-
11 money options require the company to record a compensation expense. Such an inference is
12 certainly more reasonable than the defense claim that the defendant first learned about the
13 implications of in-the-money options as a result of the internal investigation, which is
14 unsupported by the trial record.

15 Second, Stephanie Jensen sent an iQuantic PowerPoint to the defendant on June 9, 2003.
16 Ex. 187. June Weaver, who also received the iQuantic PowerPoint from Jensen, testified that
17 option expense issues were a key issue for Brocade that was being studied by a management
18 group that included the defendant. Weaver at 547-48. The iQuantic PowerPoint has a slide that
19 spells out the "current rules" for APB 25 in comparison to new rules proposed under SFAS 123.
20 Ex. 187 at 28. The slide has a succinct description of the "current rules" under APB 25:

21 » No charge to earnings for options granted at or above FMV

22 » Fixed accounting charge equal to "spread" for options granted at
23 a discount

24 Ex. 187 at 28. The contention that the defendant did not read his e-mail – like the contention that
25 he did not read the SEC Form 10sK when he said he did – goes to the weight of the evidence.
26 Indeed, the record shows that the defendant proactively reached out to the group to keep him
27 informed of its work in connection with the new rule, was kept apprised of the workings of the

1 group, and read the e-mails that were sent to him on this subject.⁶ At this point, the government
2 is entitled to the reasonable inference that the defendant read and understood this basic synopsis
3 of the accounting rules for stock option expenses that he received as part of this process.

4 Third, the defendant wrote James Bidzos an e-mail on October 8, 2004 in which he stated
5 unequivocally:

6 IT IS ILLEGAL TO BACK DATE OPTION GRANTS.

7 Ex. 648 (original emphasis). James Bidzos explained the context of this e-mail pertained to
8 efforts by Verisign's management to backdate an option grant from October 2004 to August
9 2004. Bidzos at 2076-79.

10 A fair reading of the e-mail leaves no doubt that the defendant understood that back-
11 dating options was illegal. It would be reasonable for a juror to infer that the defendant would
12 write such an e-mail in the context his service on the Audit Committee of another company even
13 as he continued to backdate employee options at Brocade while operating within the relative
14 secrecy of his exclusive authority to grant options to employees. The defense claim that this e-
15 mail pertained exclusively to the then-new Sarbanes-Oxley regulations was rejected by the
16 witness. Bidzos at 2118-20. These are all reasonable inferences based on the trial record to
17 which the government is entitled.

18 4. "It's Not Illegal If You Don't Get Caught"

19 Four witnesses testified that they felt uncomfortable enough about the defendant's
20 backdating scheme to discuss it with their supervisors or co-workers. *See e.g.* Devine at 120-22;

21
22

⁶ *See* Ex. 232 (email from Weaver to Reyes attaching draft of new accounting rule and
23 stating, "This change in stock option expensing will have a significant impact on our current
24 stock option practices . . . , " to which Reyes responds, "Thanks. Please keep us posted."); Ex.
25 243 (email from Weaver to Reyes describing the proposed change in accounting for employee
26 stock options, to which Reyes responds, "Thanks, June. When do you expect the analysis to be
27 complete?"); Ex. 177 (2003 email from Weaver stating that with respect to the "expensing of
options," "Greg has talked with a number of his colleagues, reads about this topic in newspapers
and articles, and is very interested in Brocade handling this properly").

1 Beyer at 267-68; Lee at 389-90; and Weaver at 746, 819-20. Mr. Beyer raised his concerns with
2 Stephanie Jensen, who told him that they “had been directed by Greg Reyes to complete the
3 process, and [they] were going to do so.” Beyer at 268. And June Weaver testified that, in the
4 context of delivering back-dated minutes to the defendant for his signature, he told her “It’s not
5 illegal if you don’t get caught.” Weaver at 567, 817. Whatever weight the jury may ultimately
6 give it, this evidence supports a reasonable inference that the defendant was talking about the
7 back-dating of option grants. For the moment, the Court must give the government all of the
8 reasonable inferences that flow from Weaver’s testimony about what the defendant said.

9 D. No Reason To Falsify Grant Dates Except To Hide Expenses

10 Finally, it is important to return to the internal logic of the fraud in the form of the grant
11 minutes themselves. The defense’s unsupported assertion that the backdating was done in full
12 view of the finance department fails to consider one critical detail. The HR department not only
13 looked for the low prices, but it then inserted the dates of those closing prices on the draft
14 minutes. *See e.g.* Weaver at 448-50.

15 Granting options at low prices to help your employees is fine if you account for it
16 properly and recognize the resulting compensation expenses. But compelling the HR personnel
17 to insert the date of the low price, the defendant’s scheme insured that the employees received
18 the benefit of the low prices while Brocade (illegally) avoided the cost of the resulting
19 compensation expense. There is absolutely no reason to use the date of the low price except to
20 avoid the compensation expense. None.

21 A careful study of the falsified option grant minutes reveals a scheme consistent with only
22 one thing: fraud. The logic of the falsified grant minutes themselves is consistent only with an
23 intentional and systematic effort to mislead those who would rely on them about one issue and
24 one issue only: whether there would be a compensation expense for the option grants. Nothing
25 else reasonably explains the totality of the trial evidence.

26 This crime was not an accident. This was not a case of reliance on bad accounting
27 advice. (Indeed, there is no evidence even to support such an inference.) This was an intentional

1 and routine effort to game the system to keep the company growing while avoiding compensation
2 expenses that would hurt the bottom line. It was undertaken by a powerful CEO who thought he
3 could operate with impunity within the murkiness of his committee of one. The only witnesses
4 who had any real insight into what the defendant did are those that testified, the handful of
5 comparatively powerless HR personnel who were cowed into carrying out the defendant's
6 scheme.

7 At least, that is the conclusion a juror drawing all the logical inferences favorable to the
8 government could reasonably reach. The motion therefore must be denied.

9 CONCLUSION

10 The Rule 29 motion should be denied and the case should go to the jury for their verdict.
11 Alternatively, the Court should defer a ruling on this motion until after the jury has rendered a
12 verdict.

13 DATED: July 8, 2007

Respectfully submitted,

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16 /S/

17 _____
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