EXHIBITS

EXHIBIT 1

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U.S. Department of Justice
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

October 26, 2020

By ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Centre Street
New York, New York 10007

Re: United States v. Mark Nordlicht
Appellate Docket No. 19-3209

Dear Ms. O'Hagan Wolfe:

The government submits this letter in response to Defendant-Appellee Mark Nordlicht's letter pursuant to Rule 28(j), drawing the Court's attention to United States v. Archer, 18-3727 (2d Cir.) ("Op.").[1]

[1] Quotations from Archer herein omit all internal quotation marks, alterations and citations.

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Archer confirms that the district court erred in granting Nordlicht's Rule 33 motion. It is frivolous to assert, as Nordlicht does, that Archer permits a district court to "weigh[] the evidence itself." To the contrary, in Archer, the Court reaffirmed the principle that "a district court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." (Op. 16 (emphasis added)). Indeed, this is the central premise of the Court's analysis. (Op. 22, 35, 39). Nordlicht's misinterpretation of Archer is effectively a concession that the district court usurped the role of the jury.

Nordlicht's assertion, in the alternative, that the case should be remanded so the district court can "apply the correct standard" is equally baseless. First, it has long been settled that district courts are not permitted to substitute their view of the evidence for the jury's. (Gov't Br. 87–93 (discussing United States v. Sanchez, 969 F.2d 1409 (2d Cir. 1992)). The district court's failure to abide by this principle is ground to reinstate the jury's verdict, not to prolong the injustice created by the error.

Moreover, remand would be futile. In Archer, the Court explained that a district court has discretion to grant a new trial only where "the evidence was patently incredible or defied physical realities, or where an evidentiary or instructional

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error compromised the reliability of the verdict." (Op. 16). But the district court rejected Nordlicht's argument, made in his Rule 29 motion, that one witness's testimony was "disingenuous," and the court declined to address Nordlicht's perfunctory claims of trial error. There is no principled basis upon which the district court could identify a purported "manifest injustice" that previously escaped its attention. (Op. 14 (emphasis added)). The verdict should be reinstated and the case remanded for sentencing.

Respectfully submitted,

SETH D. DUCHARME
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Eastern District of New York

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Acting United States Attorney

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EXHIBIT 2

20-842(L)

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 20-842(L), 20-1061(Con)
20-1084(Con)

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross Appellee,

-vs-

FREDERIC PIERUCCI, WILLIAM POMPONI,
Defendants,

LAWRENCE HOSKINS,
Defendant-Appellee-Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

RESPONSE AND REPLY BRIEF FOR THE UNITED STATES OF AMERICA

JOHN H. DURHAM
United States Attorney
District of Connecticut

DAVID E. NOVICK
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Fraud Section

was only working on International Network's behalf, not API's. Def. Br. 39-40. But the jury saw evidence that Hoskins acted on API's behalf in many non-approval-related consultant matters. Hoskins also claims that he could not be API's agent because his role was assigned by the corporation, not API. Def. Br. 38-39. But nothing in the law dictates that an agent must be assigned his role by the principal in the first instance, so long as the agent agrees to act under the control of the principal. Moreover, the jury need not have concluded that Hoskins's role was, in fact, assigned by the parent company. Rather, the jury could have logically concluded that API was delegated authority to initiate the agency relationship with Hoskins. Either way, that determination is appropriately left to the jury.

3. The district court abused its discretion in conditionally granting a new trial.

In its opening brief, the government argued that the district court erred in conditionally granting a new trial based solely on its conclusion that there was insufficient evidence of Hoskins's agency, and without any indication of error in the trial. Gov. Br. 64-66.

Since the government's opening brief, this Court has clarified the Rule 33 standard thus making pellucidly clear that the district court's

decision must be vacated. *See United States v. Archer*, 977 F.3d 181 (2d Cir. 2020). In *Archer*, this Court held that "a district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." 977 F.3d at 188. The Court explained:

> a district court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. To the contrary, absent a situation in which the evidence was patently incredible or defied physical realities, or where an evidentiary or instructional error compromised the reliability of the verdict, a district court must defer to the jury's resolution of conflicting evidence.

Id. at 188-189 (internal quotation marks, citations, and alterations omitted). Thus, the district court must "defer to the jury's resolution of the weight of the evidence," *id*. at 195 (citation omitted), and may not "elevate its own theory of the evidence above the jury's clear choice of a reasonable competing theory," *id*. at 197.

By its own admission, the district court here did exactly what this Court forbid in *Archer*, that is, it re-weighed the evidence for itself and found it lacking. GA773. The district court noted no "patently incredible" or reality-defying evidence, or

any "evidentiary or instructional error [that] compromised the reliability of the verdict." *Archer*, 977 F.3d at 188. Instead, the court expressed its "significant doubt" that the jury got the verdict right. GA773. This is insufficient to support a new trial order.

In his response, Hoskins pays lip service to the "preponderates heavily" standard, but still offers no "evidentiary or instructional error" that compromised the verdict. *Archer*, 977 F.3d at 188. Hoskins in fact commends the district court for *correctly* instructing the jury that the "undertaking consists of the acts or services which the agent performs on behalf of the principal." Def. Br. 44 (quoting GA559). Nor does Hoskins take issue on appeal with the district court's instruction that "the government must prove that the defendant was an agent of a domestic concern in connection with the specific events related to the Tarahan Project." GA559.

Rather, Hoskins claims, Def. Br. 44-45, that the Court should vacate the jury's verdict because of isolated arguments regarding the meaning of "undertaking" by the government in closing argument to which Hoskins did not object and that, when considered as a whole, followed the court's instructions. Indeed, the government closely hewed to the court's definition of undertaking, identifying it as "the services that [Hoskins] was providing on the Tarahan Project," including

helping with "sales efforts" and helping to "identify consultants," "vet and hire consultants," and "negotiate terms of payment." GA582. Just as on appeal, the government suggested the jury could infer API's control over those undertakings from evidence of API's instructions to Hoskins as well as API's overall control of Tarahan. GA582-GA583. Hoskins, who did not object, merely accused the government of "impl[ying]" that the "undertaking was the Tarahan Project," and restated the district court's definition. GA592-GA593. In rebuttal, the government likewise restated the court's undertaking instruction, arguing against Hoskins's contention that organizational charts should guide the jury's decision on agency. GA609. In short, the government did not misstate the legal standard for undertaking, but even if it had, the "preponderates heavily" standard cannot be met by stray comments in closing argument that were not objected to, that counsel responded to, and where the government correctly articulated the district court's instruction in rebuttal.

B. The Court should decline *amici*'s attempt to rewrite the definition of "agent."

Both *amici* suggest that the Court should redefine "agent" to apply only to third-party, bribe-paying intermediaries, and not to common-law