APPENDIX A

REVISED August 28, 2018

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-30104

UNITED STATES OF AMERICA,
Plaintiff - Appellee Cross-Appellant

v.

PETER M. HOFFMAN,
Defendant - Cross-Appellee

MICHAEL P. ARATA; SUSAN HOFFMAN,
Defendants - Appellants Cross-Appellees

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cons. w/ 16-30226

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

v.

PETER M. HOFFMAN,
Defendant - Appellant-Cross-Appellee

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cons. w/ 16-30013

UNITED STATES OF AMERICA,
Plaintiff - Appellant

v.

PETER M. HOFFMAN; MICHAEL P. ARATA,
Defendants - Appellees

cons. w/ 16-30527

UNITED STATES OF AMERICA,
Plaintiff - Appellee Cross-Appellant

v.

PETER M. HOFFMAN,
Defendant - Appellant Cross-Appellee

MICHAEL P. ARATA; SUSAN HOFFMAN,
Defendants - Cross Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

No. 16-30104

c/w 16-30226, 16-30013, 16-30527

Before KING, DENNIS, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

We withdraw the prior panel opinion and substitute the following:

With its colorful history and rich cultural stew, Louisiana has long been a popular setting for works of fiction, including movies. In recent years the state has also tried to become a place where films are made. That effort enjoyed considerable success. *The Curious Case of Benjamin Button*, *Django Unchained*, *Twelve Years a Slave*, *The Dallas Buyer's Club*, and *Dawn of the Planet of the Apes* are some recent films of note shot in New Orleans. Believe it or not, in one recent year (2013) Louisiana surpassed even California as the most popular locale for filming major-studio productions. Mike Scott, *Louisiana Outpaces Los Angeles, New York, and All Others in 2013 Film Production, Study Shows*, TIMES-PICAYUNE (Mar. 10, 2014). This development led some to call New Orleans "Hollywood South." *Id.*

State tax credits for the film industry spurred much of this growth. *Id.* ("[M]ake no mistake: The state's tax-credit program . . . is largely responsible for the surge in local productions."). They also provided an incentive for fraud. A jury found that to be the case for Peter Hoffman, Michael Arata, and Susan Hoffman. It credited the government's allegations that they submitted fraudulent claims for tax credits, mostly by (1) submitting false invoices for construction work and film equipment or (2) using "circular transactions" that made transfers of money between bank accounts look like expenditures related to movie production. Their principal challenge to those convictions is an argument that the tax credits are not property within the meaning of the mail and wire fraud statutes but are instead akin to the video poker licenses the Supreme Court rejected as a basis for federal prosecution in *Cleveland v. United States*, 531 U.S. 12 (2000). If we conclude that the credits are property subject to the federal fraud statutes, defendants also contend that the evidence was insufficient to convict because they made a good-faith effort to comply with a state program riddled with gray areas.

While the defendants seek to undo their convictions, the government is unhappy with the sentences of probation that all three received. So it too appeals, arguing that the substantial downward variances exceeded the district court's discretion. The government also contends that the district court improperly vacated a number of the jury's guilty verdicts.

I.

The Hoffmans and Arata owned and jointly operated Seven Arts Pictures Louisiana, LLC (Seven Arts). Each of them was also involved in several other film-related ventures. Through their companies, defendants purchased a "dilapidated mansion" at 807 Esplanade in New Orleans, intending to renovate the structure and turn it into a postproduction facility where films are edited and prepared for final release. To offset the cost of this project, Seven Arts applied for film infrastructure tax credits with the state.

A.

Louisiana enacted the Motion Picture Incentive Tax Credit in 1992 to encourage local development of the movie and television industry. La. Rev. Stat.

§ 47:6007. In its initial form, the law authorized investors to claim a credit for 50% to 70% of losses sustained during in-state film production. In other words, it was a "safety net" for bad film investments. John Grand, *Motion Picture Tax Incentives: There's No Business Like Show Business*, STATE TAX NOTES at 791 (Mar. 13, 2006). The state legislature extended the program in 2002, permitting investors to claim tax credits for money spent on profitable projects. La. Rev. Stat. § 47:6007(C)(1) (2002). The next year saw further amendment, this time allowing investors to sell or transfer the tax credits. *Id.* § 47:6007(C)(4) (2003). This was an important innovation because many investors—those like Peter Hoffman who resided in California—did not themselves owe Louisiana taxes. Nontransferable credits had been of little value to these numerous out-of-state producers.

The program was again amended in 2005 (and extended in 2007), when the legislature authorized income tax credits for state-certified infrastructure and production projects.[1] *See generally* La. Rev.

[1] The film infrastructure tax credits central to this case lapsed in 2009, though investors can still obtain credits for film production. *See* Loren C. Scott & Assocs., Inc., *The Economic Impact of Louisiana's Entertainment Tax Credit Programs* ii, 1–2 (Apr. 2013), https://louisianaentertainment.gov/assets/ENT/docs/2013_OEID_Program_Impact_Report%20_FINAL.pdf. But in June 2017 Louisiana lawmakers placed a long-term spending cap "on the tax breaks for Hollywood South" and imposed a 2025 sunset provision on the entire program. Associated Press, *Louisiana's Film Tax Credit Program to Continue, with a Cap*, TIMES-PICAYUNE (June 2, 2017).

Stat. § 47:6007(C) (2005). Projects with total base investment exceeding $300,000 could qualify for tax credits worth up to 40% of in-state expenditures. *Id.* § 47:6007(C)(1)(b)(i), (iii); *see also* Dep't of Revenue, Policy Servs. Div., *2005 Regular Legislative Session: Legislative Summaries* 5 (Jan. 13, 2006), http://www.rev.state.la.us/publications/lsls (2005).pdf.

Louisiana's Office of Entertainment Industry Development, a component of the Department of Economic Development, administered the program. Issuance of film tax credits was a two-step process. First, the applicant had to file an initial application for tax credits and obtain a precertification letter from the state agencies. *See Red Stick Studio Dev., L.L.C. v. Louisiana*, 56 So. 3d 181, 183–84 (La. 2011). After receiving that authorization, the applicant still had to submit a cost report tallying its expenditures, accompanied by an audit from an independent accountant. *Id.* at 183 n.4. After a review of those materials, the same state agencies determined whether the expenditures should be certified and tax credits issued.

For infrastructure projects, qualifying expenditures could include the purchase, construction, and use of tangible items directly related to Louisiana film production. The law defined "base investment" as the "actual investment made and expended," while "expended in the state" meant "property which is acquired from a source within the state and . . . services procured and performed in the state." La. Rev. Stat. § 47:6007(B)(1), (3) (2007). And the state could recapture tax credits if it found that "monies for which an investor received tax credits . . . [we]re not invested in and expended with respect to a state-certified production . . . and with respect to a state-certified infrastructure project." *Id.* § 47:6007(E)–(F) (2007).

B.

Such was the statutory and administrative landscape facing Peter, Arata, and Susan as they sought to develop 807 Esplanade.[2] A bank loaned them $3.7 million for the project, $1.7 million of which was earmarked to purchase the property while the remainder was placed in an account that could be drawn on to make payments for construction and renovation. From its inception, Seven Arts sought to lower the cost of the 807 Esplanade project via various tax credits. Beyond the film credits, for example, it sought "historic rehabilitation tax credits." In October 2007, Arata submitted the company's initial film credit application to the state, which included a cost estimate of $9 million, a business plan, and a contractor's agreement.

The state issued a precertification letter in May 2008. The letter contained a caveat that it did not guarantee any tax credits would be issued. But it did note that the project as described "appear[ed] to meet the criteria of a State-Certified Infrastructure Project," subject to administrative rules that may be released at a future date. The letter also placed certain restrictions on the tax credit certification.

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[2] We refer to Peter and Susan Hoffman by their first names to avoid confusion.

Namely, Seven Arts had until the end of 2008 to earn credits on the project, unless it spent \$4.5 million prior to that date (in which case future credits might be possible). It also mentioned that before any credits could be "certified and released" at least \$2.25 million (25%) in base investment must have been spent on film-related infrastructure. That 25% had to be used for "the creation of infrastructure specifically designed for motion picture production," not on the purchase of land or preexisting facilities. But tax credits could be earned on so-called "multiple-use facilities" once the production facility was complete.

C.

As the precertification letter emphasized, it did not authorize the issuance of tax credits. That could only occur based on the "actual amount expended by the project," verification of that amount by an independent auditor, and final approval by state authorities. To satisfy those critical final steps, the defendants submitted three cost reports and audits. Misrepresentations in those reports, the ones mentioned earlier that involved fake invoices and circular transactions, are what led to this prosecution.

In October 2008, two months prior to the expenditure deadline, Peter and Arata hired an auditing firm to review project expenditures. Katherine Dodge, the auditor, requested additional information, like bank transactions showing the company's transfers to vendors. Arata emailed Regions

Bank with a request to forward withdrawal and deposit slips to Dodge. But it was too late. The next day Dodge's firm withdrew based on her concerns.

Seven Arts soon replaced her with auditor Katie Davis of the Malcom Dienes firm. Peter and Arata provided Davis with the company's general ledger, which noted a $7.42 million capital contribution from the parent company—Seven Arts Pictures, Inc.—along with vendor invoices and receipt of payment confirmations signed by Damon Martin and Leo Duvernay. These documents made it appear as though the company had made payments out of the capital contribution to Martin, owner of Departure Studios, for film equipment and to Duvernay, the project's general contractor, for construction. But bank statements, which were not included just as they had not been sent to the first auditor, revealed that those transactions were in reality withdrawals and deposits of the same funds. They were, in other words, "circular transactions" that the government argued were intended to trick state authorities into believing that Martin and Duvernay had been paid when they had not.

In February 2009, Arata sent the first cost report, which claimed $6,531,202 in qualifying expenditures through October 2008, along with the auditor's statement verifying that amount, to the state. Lacking access to the bank records, the audit verified that $1,027,090 had been paid to Martin and $1,749,257 to Duvernay. The report also listed a $3.7 million payment to purchase and renovate 807 Esplanade, nearly the entire balance of the remaining expenditures claimed.

Louisiana authorities certified and "paid out" tax credits worth $1,132,480.80 in June 2009. That amount was substantially below 40% of the claimed expenditures because the $3.7 million building purchase was "deemed multiuse" and therefore ineligible for credits until the project was complete. After certification, Seven Arts "cashed in," to use the district court's words, by selling the credits to third-party taxpayers.

About two months after Louisiana issued the credits, concerns about Peter fabricating invoices led Arata to send a letter terminating his day-to-day participation in Seven Arts and other projects in which he acted as Peter's lawyer. Arata also reported his concerns about the invoices to the President and CFO of the Seven Arts parent company. He did not, however, report this to state authorities in accordance with ethics advice he received from a lawyer. Nor did he mention his concerns in his letter to Peter. Instead, he invoked the time-honored excuse of needing to devote more time to his family (his son), as well as to his other business interests. Because Arata retained an ownership stake in Seven Arts through his interest in Voodoo Studios, LLC, he stated in the letter to Peter that he would still "assist with the renovation and completion of 807 Esplanade as my time permits."

So Peter on his own submitted the company's second cost report to state authorities in January 2010. That report, audited by the Dienes firm, claimed almost $6 million in expenditures related to 807 Esplanade from November 2008 to September

2009, an amount in addition to that already certified in June 2009. The purported expenditures included $2,302,860 in construction costs paid to Duvernay, $807,202 for audio equipment, $705,587 for interest payments on a $10 million loan from Seven Arts Filmed Entertainment LA, LLC (SAFELA), $400,000 in project management fees to Leeway Properties, Inc. (a Susan Hoffman entity), $350,000 in legal and notary fees for Peter and Arata, $250,000 for construction finance supervision, and $150,000 for Leeway office space. For differing reasons, the government at trial challenged the legitimacy of these expenditures. For example, Seven Arts had supported the construction payments with a Duvernay-signed invoice that the company created only in anticipation of the Dienes audit. Duvernay testified that the fees were not actually paid to his company but that he signed the invoice anyway because Susan told him that the document "was just for [Peter's] own records." The request for legal fees shows that Arata was not completely out of the loop despite sending the letter. After receiving an invoice for the legal fees relating to 807 Esplanade, Arata sent one of his business partners an email saying, "[Peter] wants to submit this for tax credits. Ha!" He continued, "And since I was not his lawyer for the deal, it makes it even better. What he could submit and what is actual are the bills he got from Guy Smith, even the Jones Walker bills. But instead, he . . . puts me down as receiving $150K in fees! Love it."

After Peter submitted the second cost report, state officials asked forensic accountant Michael

Daigle to analyze both rounds. As part of his investigation, Daigle contacted the Dienes firm about concerns he had developed. As a result of that interaction, the firm took the "very unique" step of recalling its audits associated with both cost reports. It recalled the first audit over Peter's objection. Withdrawing the first audit, he thought, would be "extremely damaging to the purchasers for value of the credits already certified." Those fears were not unfounded. After the Dienes firm withdrew its audits, the state revoked the previously issued credits, declined to issue new credits for the second cost report, and conveyed the problems unearthed during Daigle's investigation to the state inspector general.

The company's attempts to earn film tax credits on 807 Esplanade were thus battered by the waves of the Daigle investigation, the audit withdrawal, and the tax credit revocation. Nevertheless, Seven Arts persisted. By June 2012, 807 Esplanade was complete and the site functioned as a film production and postproduction facility. The company retained a new firm, Silva Gurtner & Abney LLC, to conduct an audit for a third cost report, this one covering October 2007 to June 2012. In other words, Seven Arts wanted to claim tax credits not only for the period after September 2009 but also for the time covered in the first two (rejected) cost reports. Of the $11,945,184 in claimed expenditures, the Silva firm deemed $11,785,934 "qualified." It even certified a number of expenditures that were similar or identical to those the state had rejected in the second cost report.

At the state's request, Daigle also conducted a forensic review of the company's third cost report. After reviewing the Silva audit, Daigle concluded that the company's qualifying expenditures totaled $2,743,319.18 by the end of 2008, which would mean maximum allowable project expenditures of $5,486,638.36 for tax credit purposes, per the limitations outlined in the state's precertification letter. Daigle cast doubt on the $3,842,355 in related party transactions contained in the Silva audit. Even excluding that amount, however, the company's total qualifying infrastructure expenditures—based on the acquisition and construction costs for 807 Esplanade—exceeded that maximum allowable amount, making it eligible for up to $2,194,655.34 in tax credits.[3] Having apparently never faced a similar situation and relying on Daigle, the state decided to "reestablish" the tax credits issued after submission of the first cost report, thereby avoiding punishment of third-party purchasers of Seven Arts credits.

D.

The state inspector general enlisted the help of the FBI and began investigating the company's tax credits. This led the Silva firm to withdraw, revise, and then reissue its July 2012 audit in order to disclose uncertainties about the legitimacy of certain expenditures.

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[3] At trial, however, Daigle testified that his best estimate of qualifying expenditures for Seven Arts was roughly $4.2 million, which equates to allowable tax credits of about $1.6 million.

The joint state and federal investigation led to the filing of criminal charges. No model of restraint, the indictment contains 25 counts. It charges Peter with one count of conspiracy to commit mail and wire fraud, nineteen counts of wire fraud, and one count of mail fraud. It charges Arata with one count of conspiracy, nineteen counts of wire fraud, one count of mail fraud, and four counts of making false statements to the FBI. And it charges Susan with one count of conspiracy, fifteen counts of wire fraud, and one count of mail fraud.

During the two-week trial, the government sought to prove that the defendants fabricated invoices and shifted money in and out of accounts to make it appear as though Seven Arts had actually spent money on film infrastructure when it had not. The defendants countered that in the face of a difficult-to-interpret statutory regime they had made efforts to comply with state custom and practice as established by the acceptance of prior tax credit applications.

The jury did not buy that defense. It convicted Peter on all 21 counts. It convicted Arata of 13 counts—conspiracy, seven counts of wire fraud, one count of mail fraud, and four counts of making a false statement. Reflecting that Susan's name was "scarcely mentioned" during the trial, the jury found her guilty only of one count each of conspiracy, wire fraud, and mail fraud.

The defendants moved for judgments of acquittal. In a lengthy opinion, the district court granted Peter's motion with respect to five counts of wire fraud (Counts 2, 3, 4, 5, and 7) but denied the remainder; granted Arata's motion with respect to all but the conspiracy count (Count 1) and one count of wire fraud (Count 6); and denied Susan's motion. The district court then denied defendants' motions for new trial, both with respect to their remaining convictions and for all counts in the event that this court were to reverse the acquittals.

The district court imposed sentences far below those suggested by the Sentencing Guidelines. The Guidelines recommended sentences of roughly 14 to 17 years for Peter, 9 to 11 years for Arata, and 4 to 5 years for Susan. But the district court placed all of them on probation—five years for Peter,[4] four for Arata, and three for Susan.

The government also sought forfeiture of the issued tax credits and restitution on behalf of the state. The district court ordered forfeiture in the amount of $223,434.25. But in a ruling not challenged on appeal, it denied the government's motion for restitution because the state, in its view, ended up suffering no "actual, pecuniary loss." Even if it had initially suffered a loss in issuing tax credits due to fraud, the court concluded the state did not ultimately lose money because Seven Arts eventually made infrastructure expenditures on 807 Esplanade entitling the company to an amount of credits at least equal to those issued.

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[4] At the sentencing hearing, the district court sentenced Peter to six years' probation. The judgment shows a sentence of five years, which is the statutory maximum. 18 U.S.C. § 3561(c)(1).

II.

The parties raise numerous issues in their cross appeals. We begin with the one that would wipe away all the conspiracy and fraud counts: defendants' contention that the Louisiana tax credits are not "property" covered by the federal fraud statutes. Their vehicle for raising this issue was a motion to dismiss the indictment, *see* FED. R. CRIM. P. 12(b)(3), the denial of which we review de novo, *United States v. Cooper*, 714 F.3d 873, 876–77 (5th Cir. 2013).

The mail and wire fraud statutes, which have the same elements other than the jurisdictional hook of the mailing or interstate wire, criminalize schemes "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. Property, as ordinarily understood, extends to every kind of valuable right and interest. *See Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). Under the common law of fraud, and the even more venerable law of common sense, "[t]he right to be paid money has long been thought to be a species of property." *Id.* at 356 (citing BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 153–55 (1768)). Common law fraud encompassed both defrauding a victim of money and of her entitlement to that money because of the "economic equivalence between money in hand and money legally due." *Id.* That the victim happened to be the government, instead of a private party, did not negate that economic injury. *Id.*

The Supreme Court set forth these principles in considering whether a scheme to defraud Canada of excise tax revenue by smuggling liquor into the country violated the wire fraud statute. *Id.* at 353. By evading taxes that would have been due had the liquor imports been declared, the defendants inflicted a "straightforward" economic injury akin to "embezzl[ing] funds from the Canadian treasury." *Id.* at 356–57. Indeed, a country "could hardly have a more 'economic' interest than in the receipt of tax revenue." *Id.* at 357. Smuggling goods to deprive a government of tax revenue via a fraudulent scheme that used interstate wires was thus held to constitute wire fraud. *Id.* at 357. Although *Pasquantino* involved depriving a foreign government of tax revenue, prosecutors have also successfully used the mail and wire fraud statutes against schemes to defraud state and local governments of tax revenue. *See Fountain v. United States*, 357 F.3d 250, 260 (2d Cir. 2004) (deeming taxes owed to states and the federal government property within the meaning of the mail and wire fraud statutes); *see also United States v. Louper-Morris*, 672 F.3d 539, 557 (8th Cir. 2012); *United States v. Frederick*, 422 F. App'x 404, 405 (6th Cir. 2011) (both involving schemes to defraud states of tax revenue); Matthew D. Lee, *Chicago Restaurant Tax Case Highlights Broad DOJ Authority*, LAW360 (May 25, 2016), https://www.law360.com/articles/800503/chicago-restaurant-tax-case-highlights-broad-doj-authority (discussing case in which restaurant owner pleaded guilty to wire fraud for failing to pay state taxes on cash transactions); *cf. Hemi Grp., LLC v. City of*

New York, 559 U.S. 1, 4 (2010) (evaluating a suit in which New York City brought RICO charges, based on predicate acts of mail and wire fraud, because defendant allegedly caused the loss of "tens of millions of dollars in unrecovered cigarette taxes").

From *Pasquantino*'s holding that tax revenue is property under the fraud statutes, it follows that Louisiana's tax credits can also be the object of a scheme to defraud. As tax credits reduce the dollars otherwise owed to the state, lying to obtain them has the same effect as lying to evade taxes: the state collects less money. Indeed, the drain on Louisiana finances caused by the film tax credit regime—$282.6 million in just one year (2016)—led the state to curtail the program. Tyler Bridges, *New Study of Louisiana Film Tax Credit Program Again Finds Expensive, "Significant Hit" to Budget*, ADVOCATE (Apr. 10, 2017).[5] Fraud in connection with obtaining those tax credits can affect the state's books as much as fraud used to evade paying Louisiana income taxes. Either situation implicates the state's interest in taxes owed that *Pasquantino* recognizes as property.

Tax credits are also the functional equivalent of government spending programs. *See* Drew Desilver, *The Biggest U.S. Tax Breaks*, PEW RES. CTR. (Apr. 6, 2016), http://www.pewresearch.org/fact-

[5] Tax breaks on three projects alone—*The Green Lantern*, *The Twilight Saga: Breaking Dawn*, and HBO's *True Detective*—cost the state nearly $85 million. *Louisiana's Film Tax Credit Program to Continue, with a Cap*, *supra* note 1. At least the Louisiana season of *True Detective* was the good one.

tank/2016/04/06/the-biggest-u-s-tax-breaks/ ("[S]uch special-purpose breaks are effectively the same as directing spending"). That is why economists treat tax deductions and credits as "tax expenditures." *See* Tax Policy Center, *Briefing Book: A Citizen's Guide to the Fascinating (Though Often Complex) Elements of the Federal Tax System*, BROOKINGS INSTITUTION, http://www.taxpolicycenter.org/briefing-book/what-are-tax-expenditures-and-how-are-they-structured. Viewing tax credits in this light further highlights their economic impact. Consider one of the largest tax expenditures in the federal tax code, the home mortgage interest deduction which totaled $77 billion in 2016. Desilver, *supra*. The impact on the government's coffers would be the same if, instead of offering that deduction, it sent taxpayers $77 billion in grants to help them pay their home loans. As defendants conceded at oral argument, fraud in connection with obtaining a state government grant is undoubtedly subject to wire fraud prosecution. Because there is no bottom-line difference between a government spending program and a tax credit, there is no economic rationale for treating the former as property but not the latter. When it comes to depriving the government of revenue—property under *Pasquantino*—there thus is no meaningful distinction between fraudulently claiming a tax credit, fraudulently obtaining a public grant, or fraudulently failing to report income.

The congruity of these three situations involving the public fisc is further evident from looking to an example from the private sector. Everyone would recognize that plane tickets are property of an airline. That means obtaining them via deceit is fraud. *See United States v. Morris*, 348 F. App'x 2, 3–4 (5th Cir. 2009) (discussing wire fraud conviction of an airline employee who fraudulently issued 1,011 tickets and sold them for her benefit). But so too, we have recognized, is swindling reward miles that can be redeemed for free flights. *United States v. Loney*, 959 F.2d 1332, 1336 (5th Cir. 1992); *see also United States v. James*, 616 F. App'x 753, 755 (5th Cir. 2015) (affirming wire fraud conviction for "discount fraud" that allowed defendant to purchase less expensive computers). The reason is that revenue lawfully owed the airline is taken in both situations. *Loney*, 959 F.2d at 1336–37; *cf. Felder's Collision Parts, Inc. v. All Star Advertising Agency, Inc.*, 777 F.3d 756, 763 (5th Cir. 2015) (reducing a seller's revenue by the amount of a rebate in a predatory pricing case). A tax credit is the public sector equivalent of a coupon; it reduces the amount that is otherwise owed.

In an attempt to avoid these basic economic principles, the defendants invoke *Cleveland v. United States*, 531 U.S. 12 (2000). It does not give us much pause. Another federal fraud prosecution out of Louisiana, *Cleveland* involved misrepresentations on applications for state video poker licenses. The Court held that the license was not property in the regulator's hand. *Id.* at 20. It rejected the argument that a state's "intangible rights" to decide who is eligible to operate poker machines created a property interest; that interest "amount[ed] to no more and no less than Louisiana's sovereign power to regulate." *Id*. at 23. As for the government's attempt to fit the licenses into the traditional category of an economic property interest, it could not show any financial harm resulting from the effort to trick the state into issuing a license. *Id*. at 22 ("Tellingly . . . the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law."). Quite the opposite in fact: the company that misrepresented its eligibility for the license paid the state more than $1.2 million. *Id.* So unlike lies to obtain tax credits, Cleveland's lies to establish eligibility for the poker license generated revenue for Louisiana even though they resulted in the regulatory harm of allowing those deemed unworthy to operate the machines. *Cleveland*'s rejection of that regulatory harm as property does not undermine the conclusion that the drain on a state's treasury resulting from schemes to unlawfully obtain tax credits deprives the state of a classic property interest. *See, e.g.*, *Louper-Morris*, 672 F.3d at 557 (affirming mail and wire fraud convictions involving scheme to defraud Minnesota of education tax credits); *United States v. Lefkowitz*, 125 F.3d 608, 614, 617 (8th Cir. 1997) (affirming mail and wire fraud convictions for a scheme to falsely obtain tax credits for low-income housing); *Frederick*, 422 F. App'x at 405 (addressing mail fraud prosecution for scheme to obtain Michigan Homestead Property Tax Credits).

A case we decided after *Cleveland* does seem closer to this one at first blush because it involves tax credits. *See United States v. Griffin*, 324 F.3d

330, 354 (5th Cir. 2003). *Griffin* held that "unissued" federal tax credits were not property of a state agency under the mail and wire fraud statutes. *Id.* at 355. But the unique nature of the program it considered, in which the state merely allocated federal tax credits, means no state property was at risk. The state agency, the Texas Department of Housing and Community Affairs, did not have a property interest in the tax credits that offset *federal* income tax obligations. *Id*. at 338. Under that program, the federal government allotted a certain amount of tax credits to Texas; the state housing agency's job was to then assign those credits to low-income housing developments within the state. *Id*. at 338, 354. The fraud arose in connection with a preapplication to the state agency seeking an allocation of some of the credits. *Id.* at 352–54. The credits would not actually issue until years later, if and when the project was completed. *Id*. at 355. We emphasized this feature of the *Griffin* fraud—that it did not result in the issuance of any tax credits, only an allocation of them. *Id.* at 354–55. We also noted the more fundamental point that even if the credits had issued, their fraudulent issuance would not have caused economic harm to Texas because the credits "offset [] federal income tax obligations." *Id.* at 355.

Unraveling the cooperative federalism arrangement in *Griffin* shows that it follows directly from *Cleveland*. The state's role as an allocator of federal tax credits meant it was acting much like the licensor in *Cleveland*: deciding which applicants would best serve the state's regulatory interests, decisions that did not directly implicate the state's finances.

If anything, as in *Cleveland* the fraud in *Griffin* netted money for the state because the company receiving the allocation had to pay an application fee and a $40,000 commitment fee.[6] *Id.* at 340, 355. *Griffin* thus rightly recognized that the fraud to obtain an allocation of federal tax credits could not have deprived Texas of property.[7]

Griffin does not provide a defense against this prosecution because the film tax credits do reduce state coffers. And the scheme alleged here did not end with misrepresentations in connection with obtaining precertification for the credits. It continued with falsehoods in the three Seven Arts cost reports, which caused Louisiana authorities to certify and actually issue transferable credits. Because Louisiana was administering its own tax credits, the fraudulent issuance of those credits would deplete

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[6] As in *Cleveland*, prosecutors argued that Texas had a property interest because the conduct it was approving would provide economic benefits, such as the application fees, to the state. *Compare Griffin*, 324 F.3d at 355, *with Cleveland*, 531 U.S. at 21–22. This missed the fundamental point that the fraudulent conduct must *deprive* the victim of property, not provide it with property.

[7] *Griffin* addressed only whether the state housing agency had a property interest in the credits. 324 F.3d at 354–55. The better argument would have been that the federal government had a property interest in those credits. Indeed, *Griffin* did not disturb the conviction for conspiracy to steal federal funds under 18 U.S.C. § 666, which applies to theft of federal "property." *Id.* at 345–46. The indictment had also listed the United States as one of the victims of the mail fraud, *see id.* at 352, but for whatever reason the government only defended that conviction in our court on the ground that Texas had a property interest in the credits, *id.* at 353–55.

the state treasury.[8] That means Louisiana has a property interest in the tax credits. Stealing them via fraud has the same economic effect on the state as "embezzle[ing] funds from the [] treasury." *Pasquantino*, 544 U.S. at 356.

We also reject the defendants' argument that application of the wire and mail fraud statutes to Louisiana's film tax credit program raises unprecedented federalism or due process concerns. As to the federalism issue, defendants concede that these federal statutes can combat fraud in connection with evading state taxes or obtaining state benefits. We do not see how state tax credits raise any greater concerns about federal intrusion in state policymaking than those far more prevalent traditional state tax and spending programs. Regulatory complexity is not limited to tax credits. And recourse to federalism is not a great fit with this case. The state did not indicate that it thought the defendants' creation of false invoices and use of circular transactions was allowed under state law. To the contrary, it sought the assistance of federal law enforcement to investigate potential crimes, which made sense as complex interstate schemes (the Hoffmans resided in

[8] That Seven Arts completed the infrastructure work at a later date and might have been entitled to the credits then—the basis for awarding no restitution—does not provide a defense to mail fraud. The scheme to defraud need not result in loss to the victim. *United States v. McMillan*, 600 F.3d 434, 450 (5th Cir. 2010). That is because what is unlawful is engaging in the scheme to defraud, even if it turns out to "be absolutely ineffective." *Durland v. United States*, 161 U.S. 306, 315 (1896).

California) are one of the more strongly rooted bases for federal criminal law.

This prosecution also does not raise notice concerns under the Due Process Clause. The honest services aspect of mail fraud has given rise to vagueness challenges. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 367 (2010) (construing the honest-services statute beyond its "core meaning . . . would encounter a vagueness shoal"). But the classic property conception of fraud has not. *See* Daniel W. Hurson, Comment, *Mail Fraud, the Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 HOUS. L. REV. 297, 303–10 (2001) (contrasting prosecutions for schemes "whose purpose was to deprive another of money or property," a "basic purpose[]" of the mail fraud statute since its inception, with courts' long struggle to define schemes that deprive another of intangible rights); *cf. Skilling*, 561 U.S. at 412 ("As to fair notice, whatever the school of thought concerning the scope and meaning of [scheme or artifice to defraud], it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)) (cleaned up)). That is because lying to cheat another party of money has been a crime since long before Congress passed the first mail fraud statute making it a federal offense in 1872. Courtney Chetty Genco, Note, *What Happened to* Durland*?: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337, 345–47 (1992) (identifying the common law crime of "cheating" as a precursor to mail fraud). Although defendants focus on a lack of clarity in the administration of Louisiana's tax credit program, vagueness challenges look to whether the elements of the offense provide sufficient notice. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The government did not have to prove violations of state law. *United States v. Foshee*, 606 F.2d 111, 113 (5th Cir. 1979). The elements the jury had to find included terms like misrepresentations and property that have deep roots in both criminal and civil law. As we once stated, fraud "needs no definition; it is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941). Defendants point to no court that has held that the elements of property-based mail fraud are vague, and we see no basis for being the first to do so.

The district court correctly found the tax credits are property subject to prosecution under the mail and wire fraud statutes. This prosecution alleging the use of fabricated invoices and misleading bank transactions to obtain a financial benefit lies at the historic core of the federal fraud statutes and neither offends due process nor exceeds federal power.

III.

Having rejected the defendants' global challenge to the prosecution's theory, we consider their fact-based challenges to the specific counts of conviction. But our sufficiency review does not just entail the usual posture of a defendant seeking to set aside convictions. Because the district court granted judgment of acquittals on a number of counts—five for

Peter and eleven for Arata—the government also appeals, seeking reinstatement of those convictions that it believes the evidence supported.[9] Whether we are looking at the verdicts the district court sustained or those it threw out, our standard of review is the same. We conduct a de novo review of the evidence in determining whether it was sufficient to convict. *See United States v. Danhach*, 815 F.3d 228, 235 (5th Cir. 2016). In conducting that review, we weigh the evidence "in a light most deferential" to the jury verdict and give the party that convinced the jury the benefit of all reasonable inferences. *United States v. Lucio*, 428 F.3d 519, 522 (5th Cir. 2005); *see United States v. Ingles*, 445 F.3d 830, 834–35 (5th Cir. 2006). Consequently, we "must affirm the verdict unless no rational juror could have

[9] We perform our duty and review all of the acquitted counts the government appeals. We note, however, that a successful appeal will have no practical effect for most of the counts. This is especially true when it comes to Peter. Because his Guidelines range already captured the full amount of intended loss in this scheme and any other conceivable enhancements, reinstating some convictions would not change Peter's range. So what is the point of trying to convict him of 21 counts? Doing so is inconsistent with DOJ policy. The U.S. Attorneys' Manual counsels that to "promote the fair administration of justice, as well as the perception of justice" prosecutors should charge "as few separate counts as are reasonably necessary"—it sets a default ceiling of 15—so long as that does not jeopardize a successful prosecution or prevent the court from fully capturing a defendant's sentencing exposure. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 215 (1997). A single count of wire fraud encompasses Peter's Guideline range in allowing a sentence up to 20 years in prison. 18 U.S.C. § 1343.

found guilt beyond a reasonable doubt." *United States v. Sanjar*, 876 F.3d 725, 744 (5th Cir. 2017).

A.

In assessing the sufficiency of the evidence, we first discuss conspiracy, then mail and wire fraud, and finally false statements.

Count 1: The jury convicted all three defendants of conspiracy to commit mail and wire fraud. As this offense was charged under the general conspiracy statute (18 U.S.C. § 371) rather than the one specific to fraud offenses (18 U.S.C. § 1349),[10] the government had to prove an agreement to commit the fraud offense, the defendants' knowledge of the unlawful objective and willful agreement to join the conspiracy, and an overt act by a member of that conspiracy to further the unlawful goal. *United States v. Mauskar*, 557 F.3d 219, 229 (5th Cir. 2009). The district court upheld the conspiracy convictions. We too are of the opinion that the direct and circumstantial evidence was sufficient to prove the existence of an agreement to defraud the state of film infrastructure tax credits, the commission of overt acts meant to further that scheme, and the willful involvement of each defendant.

[10] The substantive difference is that the section 1349 conspiracy does not require an overt act. *Sanjar*, 876 F.3d at 737. It also carries a punishment of twenty years as opposed to the five years of the general conspiracy statute. *Compare* 18 U.S.C. § 1343, *with* 18 U.S.C. § 371.

Peter's contribution is the most straightforward as he was involved in the creation and dissemination of all three Seven Arts cost reports. Emblematic of that involvement is his role in substantiating Seven Arts' expenditures related to construction and equipment. As one example, Peter and Arata opened bank accounts for Duvernay (construction) and Martin (equipment) into which Seven Arts supposedly made "payments." But bank records indicate that those payments were almost immediately returned to Seven Arts—that is, they were not really payments at all. To memorialize the "payments," Peter created invoices showing about $2 million in construction and just over $1 million in equipment costs, and he convinced Duvernay and Martin to sign them even though they had not been paid anything close to the listed amounts. Duvernay signed the invoice because Peter "convinced [him] to sign it, saying it was just for his records," while Martin testified that the equipment described in his invoice was just a "dream list" created at the behest of Seven Arts. Another example of Peter's steering of the scheme comes from the confusion over legal fees during the preparation of the second cost report. The company's auditor, after conferring with Arata, told Peter that she was removing over $200,000 in unsupported legal fees. Peter objected and sent Arata an email urging him to send the auditor the SAFELA operating agreement as proof of the fees so she would not "get any more suspicious." The agreement supposedly showed that Arata was paid for his legal work by giving his company Voodoo an equity interest in SAFELA. But as the jury knew and we have already mentioned, Arata told his business partner that he "was not the lawyer for the deal" and laughed at the notion that Peter wanted to submit his legal fees for tax credits. This is just a sampling of the abundant evidence that allowed the jury to conclude that Peter was part of, indeed the leader of, the fraud conspiracy.

Arata's case is more complicated, in part because as we discuss below the district court concluded he withdrew from the conspiracy after the submission of the company's first cost report. But as support for the jury's conclusion that he joined the conspiracy, Arata's fingerprints are all over that first report. In anticipation of the submission, Arata and Peter opened the Duvernay and Martin bank accounts. To facilitate circular transactions using those accounts, Arata took out a $400,000 loan through another of his businesses and put that money into the Seven Arts account; that money then was bounced between the Seven Arts and Duvernay/Martin accounts to make it appear as though the company had made payments for construction and equipment costs when it had not. The Seven Arts bank statements make clear that these circular transactions constituted "both withdrawals and deposits," but that was not reflected in the company's general ledger, which would form "the building block of an audit." The ledger instead showed the deposits as capital contributions from the parent company of Seven Arts. Arata and Peter provided that ledger, along with Seven Arts-generated invoices and confirmation of the supposed capital contribution, to an auditor. This is enough—and there is more—to support the jury's view that Arata was part of the conspiracy.

As suggested by her conviction on just one count of wire fraud and one of mail fraud, Susan's involvement in the tax credit scheme is less apparent. Although witnesses did not focus on her, some evidence of her knowing participation comes from a December 2009 certification she signed in her capacity as president of Leeway Properties. It says that Seven Arts paid her company $700,000 for, among other things, management fees and office space. The jury was entitled to view the $400,000 of that labelled a project management fee as a fiction. The state's forensic auditor Michael Daigle asked Susan a series of questions about her scheduling and budgeting responsibilities on the project—responsibilities that could justify the management fee—but she could not provide answers. As far as he could tell, her duties were limited to "interior design decisions on painting and carpeting and things like that." Though Daigle acknowledged that $400,000 may under some circumstances be a reasonable management fee "that was clearly not the case here." Yet Susan signed an affidavit in 2009 in which she claimed to have spent in excess of 1,000 hours supervising construction at 807 Esplanade.[11] The same inflated billing can be seen for the $150,000 that Seven Arts supposedly paid Leeway for office space. Peter said

[11] Even that affidavit somewhat contradicted a 2011 email in which Susan listed, albeit from memory, a "very rough account" of time spent on the project that amounted to about 500 hours.

that the space, which rented for $4,250 a month, included an office for Duvernay and a courtyard that was roughly three times the size of the office, where construction materials were kept. But Duvernay testified that he worked for Susan on her 900 Royal Street property, renovating its upper levels, and used a space at that location as an office. He described it as a "12-by-12 room. That was it." By the time of his testimony, Duvernay had rented a 300 or 350 square foot office—as opposed to the roughly 150 square foot office at 900 Royal—from Susan at 906 Royal Street for $600 per month. Daigle thought the office space rental "transaction lacked economic substance." And given her later rental arrangement with Duvernay, Susan should have recognized that as well. A rational juror could infer that $400,000 and $150,000 were not reasonable sums for management fees and office space, respectively, and that Susan knew as much when she certified these expenses.

We therefore uphold defendants' conspiracy convictions. This decision has ramifications for the fraud counts we are about to discuss. As the district court recognized, this evidence showing willful participation in the conspiracy to commit wire and mail fraud also establishes the intent to defraud necessary for the substantive fraud offenses. That intent does not evaporate because the project might have later spent money that made it eligible for the tax credits at a subsequent point in time. If the defendants intended to submit false cost reports to obtain property they were not then entitled to—and they did—then they engaged in fraud. To illustrate this point, consider a teller who embezzles from the bank. If the teller plans to pay the money back a year later, that does not mean there was not intent in the first place to deprive the bank of its property. Contingencies are just that; future plans to make a victim whole do not mean a crime was not committed (later conduct that makes the victim whole can be a mitigating factor at sentencing as we later discuss).

An even more significant consequence of upholding the conspiracy convictions is *Pinkerton* liability. Because the court gave a co-conspirator liability instruction, any of the three conspirators is liable for any acts of mail and wire fraud committed during the conspiracy that were foreseeable and that furthered the agreement. *Sanjar*, 876 F.3d at 743 (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)). Those two conditions of *Pinkerton* liability do not add much if anything to what the conspiracy and fraud offenses already require. With an established agreement to commit mail and wire fraud, it is going to be foreseeable that mail and wire fraud might occur. *Id.* at 743–44 (explaining that foreseeability is usually not disputed when "*Pinkerton* liability is extending only to the substantive offense that is the object of the conspiracy"). As for the requirement that the substantive offense further the conspiracy, mail and wire fraud have a built-in element requiring that the specific act charged furthered the scheme. 18 U.S.C. §§ 1341, 1343.

The district court relied on this co-conspirator liability to uphold some of the fraud convictions. But it relied on another principle of conspiracy law—

that a conspirator can withdraw from the enterprise—in refusing to do so for Arata on the counts occurring in the later stages of the conspiracy. This ruling arose in an unusual, perhaps even novel, posture. Withdrawal from a conspiracy is an affirmative defense on which the defendant bears the burden of proof (by a preponderance). *Smith v. United States*, 568 U.S. 106, 112–13 & n.5 (2013); *United States v. Heard*, 709 F.3d 413, 427–28 (5th Cir. 2013). The defendant typically, if not always, puts this issue before the jury by requesting an instruction on withdrawal. This is done often enough to warrant a pattern charge in our circuit. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) § 2.18. Arata did not request that instruction or otherwise argue withdrawal at trial. He did not even argue it in his post-trial motion for acquittal. There was a suggestion of withdrawal by Arata's counsel at the hearing on that motion, but even that was not an express claim of withdrawal. Despite the argument not being raised at trial or in post-trial motions, the district court ruled that Arata withdrew when he sent the August 6, 2009 letter to Peter ending his day-to-day involvement in the project. Notably, the district court treated itself as the factfinder on withdrawal, framing the issue as whether "[t]he preponderance at trial proved that Mr. Arata terminated his relationship with Mr. Hoffman after suspecting him of fabricating invoices in July or August 2009."

At a minimum, the district court should have evaluated the withdrawal defense with the deference that would have been required had the jury rejected it, which its verdict implicitly did. There is an argument that Arata's failure to seek a withdrawal instruction or otherwise raise the issue at trial forfeited his ability to use the theory to limit his conspiracy offense found by the jury. That is what typically happens when an affirmative defense is not timely asserted. *See Biddinger v. Comm'r of Police of New York*, 245 U.S. 128, 135 (1917) ("The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases . . . ."); *United States v. Bey*, 725 F.3d 643, 646 (7th Cir. 2013) (finding that defendant waived entrapment for appellate review after he withdrew his proposed jury instruction on it); *United States v. Haney*, 318 F.3d 1161, 1163 (10th Cir. 2003) (finding that defendant waived any claim that his conviction should be overturned for lack of a duress instruction because, in part, he did not raise that defense during trial). As withdrawal from a conspiracy is an affirmative defense, it is typically governed by the procedural rules governing such defenses. *Smith*, 568 U.S. at 113 (relying in the withdrawal context on the common-law rule that the defendant bears the burden of proving an affirmative defense). But we need not decide whether Arata forfeited the withdrawal defense. Even if he did not, his failure to ask for a withdrawal instruction cannot put him in a better position to undo the jury's verdict than he would be in had he requested it. Given the absence of any jury determination that Arata left the conspiracy, we can overrule part of the verdict and find withdrawal only if Arata can show that is the only reasonable view of the evidence. *Cf. United States v. Barton*, 992 F.2d 66, 70 (5th Cir. 1993) (emphasizing, for a case in which insanity was raised as a defense, the deference a reviewing court gives "where the jury has found against a party having the burden of proof by clear and convincing evidence").

It is not. Withdrawal requires a deliberate attempt to disassociate from the unlawful enterprise. *Heard*, 709 F.3d at 428. Perhaps a factfinder could have found that intent and action in the letter Arata sent Peter. But that is not the only reasonable way to view it. Although Arata sent the letter and reduced his participation after that point, he did not completely abandon ship. He did not even cease all direct involvement in the fraudulent aspects of the business. Sending the letter did not stop Arata five months later from helping Peter at a critical stage. Arata complied with Peter's request and sent an email to the auditor attaching the SAFELA operating agreement showing Voodoo's 40% stake to verify the supposed fees he had been paid for legal work. From this a factfinder was free to conclude that Arata had not left the conspiracy by "disavow[ing] or defeat[ing]" its purpose but was instead continuing to help it along even if only from the sidelines. *Smith*, 568 U.S. at 113 (quoting *Hyde v. United States*, 225 U.S. 347, 369 (1912)); *see also id.* at 112–13 (noting that even "[p]assive participation in the continuing scheme is not enough to sever the meeting of the minds that constitutes conspiracy"). Because the evidence did not compel a finding that Arata withdrew, there was no basis to disrupt the jury's verdict that he was a full-fledged conspirator.

The jury verdicts against him on the fraud counts can thus be sustained under *Pinkerton* if one conspirator committed the individual offense.

B.

To prove those fraud offenses, the government had to show (1) a scheme to defraud that employed false material representations, (2) the use of mail or interstate wires in furtherance of the scheme, and (3) the specific intent to defraud. *See United States v. Kuhrt*, 788 F.3d 403, 413–14 (5th Cir. 2015); *United States v. Brooks*, 681 F.3d 678, 700 (5th Cir. 2012). One aspect of these elements is the basis for a number of our rulings below, so it is worth explaining now. The mailing or wire need not contain a falsehood. That act, which serves as the unit of prosecution, just needs to further the fraudulent scheme. Judge Brown explained the point this way six decades ago:

> The thing sent through the mails need not, as impliedly urged, be a cunning deceptive appeal which causes another to give up money or property. It can be, and frequently is, a wholly innocent thing or innocuous in itself, such as the deposit of a check, transmission of a check from a collecting to a drawee bank, or the like. The thing which is condemned is (1) the forming of the scheme to defraud, however and in whatever form it may take, and (2) a use of the mails in its furtherance. If that is satisfied, more is not required.

Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); *accord United States v. Martin*, 228 F.3d 1, 16 (1st Cir. 2000); *United States v. Green*, 786 F.2d 247, 249 (7th Cir. 1986). So while the mailing or wire must promote the scheme in some manner, it need not contain a falsehood. *See United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir. 1997) ("Even a routine or innocent mailing may supply the mailing element as long as it contributes to the execution of the scheme."). An interstate email that says "Meet me at the bowling alley tonight" can serve as the necessary wire if the parties planned the fraud while bowling a few frames that evening.[12]

With this understanding of the limited role of the "in furtherance" requirement, we consider the specific counts.

Counts 2, 4, and 7 (wire fraud): The jury convicted Peter and Arata of wire fraud on Counts 2, 4, and 7. Each count concerns an email Arata sent from a Yahoo account either to auditors at the Dienes firm or to state officials in support of the company's first cost report. Both the senders and recipients resided in Louisiana. The district court

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[12] This principle means not much is needed to multiply wire fraud counts once the government has proven the scheme to defraud with its requisite intent. With today's rampant use of email and other technology that often crosses state lines, it will usually not be hard to identify scores of wires that further a scheme. Then again, adding all these counts packs little additional punishment punch—one count of wire fraud already allows a sentence up to 20 years—so there will rarely be a reason to go overboard. *See* supra note 9.

overturned these convictions because it did not believe there was evidence to establish that the emails travelled outside the state. We disagree.

To prove that the email crossed state lines, the government called Yahoo paralegal Sherry Hoyt. When Hoyt was asked whether Yahoo had any email servers in Louisiana between 2008 and the present, she responded "No." When asked whether an email would have to leave the state if it was sent from someone in Louisiana using a Yahoo account to someone else in Louisiana, she responded "Yes." Defense counsel did an effective job on cross of showing the limits of Hoyt's technical knowledge. For example, when Peter's counsel asked whether Hoyt had any training in email message routing, she responded "No." And when Arata's counsel asked whether an email from a Yahoo account to a non-Yahoo account *could* be routed through a non-Yahoo server located in Louisiana, Hoyt responded "I don't know."

This impeachment could have led jurors to conclude the government did not prove the interstate nexus. But that did not happen, and we cannot displace the jury's contrary credibility determination. That is what the finding of an interstate email amounted to. The jury heard direct testimony that Yahoo emails had to leave the state. If they believed Hoyt, the wire element was established because the testimony of a single witness is sufficient proof of a fact. *United States v. Bowen*, 818 F.3d 179, 186 (5th Cir. 2016). That is true even when that testimony is from an accomplice testifying in exchange for a benefit, testimony the jury is told must be viewed with "caution" and "great care." *Id.*; *see* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) § 1.14. Hoyt had no comparable incentive to lie, and the gaps in her knowledge did not make it "incredible" to believe her testimony, especially when no contrary evidence was presented at trial (an attorney's unadopted question is not evidence, so there was no evidence that the email could have been routed intrastate). *Bowen*, 818 F.3d at 186 (explaining that a jury's acceptance of a cooperator's testimony should be rejected only if it was "incredible"). The verdicts on these three counts will be reinstated.[13]

Count 3 (wire fraud): The jury convicted Peter and Arata of wire fraud on Count 3, which is a February 25, 2009 email sent by Arata to Peter attaching the Seven Arts general ledger. There was no interstate problem with this wire; it was sent from Arata in Louisiana to Peter in California. The district court instead saw a problem with the "in furtherance" requirement. Because the ledger had previously been sent to the Dienes firm and Peter already had it in his possession, it concluded the email "in no way sought to further the scheme." Review of this count thus involves the "in furtherance of" requirement that we have already explained is what connects the jurisdictional act of sending a wire to

[13] These emails also clearly furthered the scheme to defraud Louisiana. Count 2 is an email to the company's auditor containing a payment certification related to construction costs, Count 4 sent the company's first cost report to Louisiana, and Count 7 is the subsequent tender to the state of documentation supporting claimed equipment expenditures.

the fraud. The use of the wires "need not be an essential element" of the scheme; it can further the fraud as long as it is "incident to an essential part of the scheme, or a step in the plot." *United States v. Dowl*, 619 F.3d 494, 499 (5th Cir. 2010) (quoting *Schmuck v. United States*, 489 U.S. 705, 710–11 (1989)).

To achieve this scheme's goal of swindling the tax credits, the defendants had to submit cost reports, audit information, and supporting documents to state authorities. Those submissions were thus an essential part of the scheme even though that is not what the law requires for the wire. The email that is the subject of Count 3 was a step in verifying those critical submissions before they were sent. In it, Arata wrote Peter, "We should go through [the Seven Arts ledger] carefully and make sure they are capturing all of the expenses." Of course, the more expenses that were captured, the larger the tax credit. The cost report was not submitted until the next day, February 26. Because this email was sent to guarantee that Arata and Peter maximized the expenditures that would be submitted to the state, the jury's finding of guilt on Count 3 was proper.

Count 5 (wire fraud): Count 5 concerns an email Arata sent to auditor Davis and Peter, attaching the "executed SAFELA Operating Agreement evidencing Voodoo's 40% interest in this entity." Arata closed the email by saying he hoped the operating agreement "helps you and Peter wrap up the [Seven Arts] audit" for the second cost report. The district court acquitted Arata of this count on the ground that there was no actual evidence, only speculation, of his intent to defraud in sending the operating agreement. Regarding Peter, it held that the government produced no evidence that the legal fees were actually improper, which implies there was no "material falsehood."

The district court again put more weight on the "in furtherance" requirement than it has to carry. There need not be intent to defraud particular to each wire but only with respect to the overall scheme. *See Tencer*, 107 F.3d at 1125; *Gregory*, 253 F.2d at 109. The district court found that required intent for both Arata and Peter in refusing to acquit them on at least some of the fraud counts as well as the conspiracy count. But it imposed an unnecessary element in requiring that the particular attachment to the email evince fraud. To illustrate this point, an email with no attachment that only said "Please finish your review of the operating agreement so we can wrap up the audit" would be one that furthered the scheme, as it would be a step toward filing the cost report. As this is all that the law requires for the wire, this email that also had an attachment was a step in the successful execution of the scheme because it put the conspirators one step closer to completing the audit. The government did not have to prove that the legal fees standing alone were false or fraudulent.[14] Because the email in Count 5 furthered the fraud scheme, we reverse the postverdict acquittal.

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[14] In any event, we note there was evidence to that effect. *See supra* page 10 and *infra* page 39–40.

Count 6 (wire fraud): We now arrive at a fraud count on which the district court upheld a guilty verdict. It is an email from Seven Arts employee Mark Halvorson to a state official that contained construction and film equipment invoices related to the company's first cost report.[15] The district court concluded that the expenditures claimed in the email revealed an intent to defraud. We agree as there was evidence of circular transactions between accounts that had no legitimate business purpose yet made it look like "payments" for construction work had been made. But the bigger point is the one we are repeating: the wire need not be independently fraudulent to further the overall fraud. We affirm the district court's refusal to acquit Peter and Arata on this count.

Counts 8, 10, & 12 (wire fraud): The jury convicted only Peter on these counts. Each concerns emails either he or Seven Arts Vice President Marcia Matthew sent to auditor Davis, with attachments showing proof of expenditures related to the second cost report. The district court upheld the

[15] Another part of the law on mailings and wires is that the government need not prove that defendants personally used or intended the use of those communications. It is enough that they knew the use would follow in the "ordinary course of business" or could reasonably be foreseen. *United States v. Ingles*, 445 F.3d 830, 835 (5th Cir. 2006). The attachments in Halvorson's email supported the company's position on the first cost report, which was the subject of a chain of earlier emails between Peter and Stelly (with Arata carbon copied). Peter and Arata knew or at the very least could reasonably foresee that this email would be sent.

convictions. Peter again argues a lack of fraud specific to these expenditures but, as we have explained, that showing is not necessary. As long as the scheme to defraud employed misrepresentations, a truthful email that helped advance the scheme can be the basis for a wire fraud conviction. It turns out the jury could have viewed these claimed expenditures as fraudulent—for example, the invoice that is the subject of Count 12 was supposedly for construction expenses yet includes $350,000 in legal and notary fees and $250,000 for auditors—but that was not necessary. We affirm these three convictions.

Count 9 (wire fraud): The wire in Peter's Count 9 conviction is an email Davis sent to Peter about payment confirmation letters and film equipment purchases that were necessary to complete the Dienes firm audit for the second cost report. Peter argued below that his communication with Davis was part of the normal "give and take" of the audit, that he made no material falsehoods, and that the email was not in furtherance of a scheme to defraud. The district court disagreed, finding the jury entitled to determine that he employed false representations to the auditors so that fake equipment purchases would be included in the report. Again, this finding was not necessary though it is supportable as there was testimony from two witnesses—Richard Conway and Simon Ellson—that the claimed purchase of film equipment from a British company never happened. Regardless, the email was a step in completing the audit, which was itself a step in gaining approval for the second cost report. Because the email furthered the scheme to fraudulently obtain tax credits, the conviction will be upheld.

Count 11 (wire fraud): The jury convicted both Peter and Susan on Count 11. This count concerns a December 2009 certification, created by Seven Arts and signed by Susan. It lists payments for office space, consulting fees, and project management fees totaling $700,000. Matthew sent the payment confirmation to Davis. The district court upheld the conviction. As is the case with the communications we have already discussed, sending this certification to the company's auditor furthered the scheme to obtain tax credits. We will not disturb the district court's denial of the motions for acquittal on this count.

Count 13 (wire fraud): The jury convicted Peter and Arata on Count 13. It is a December 2009 email from Matthew to Davis that included invoices for roughly $350,000 in legal work allegedly done by Peter and Arata on 807 Esplanade as well as a loan agreement between Seven Arts and Susan's New Moon Pictures. The district court overturned Arata's conviction on this count but upheld Peter's.

The district court found that Peter was not entitled to acquittal because a rational juror could have concluded that the evidence supported a finding that he created a nonexistent $10 million loan from New Moon and fake draws on that loan, supported by circular transactions, in order to claim interest expenditures. But that finding of fraud specific to this email was not necessary for the reasons we have discussed. Emailing the invoices and loan agreement furthered the scheme to obtain tax credits. Peter's conviction will stand. The district court granted an acquittal as to Arata because (1) the evidence was insufficient to show he provided support for the legal fees and (2) he withdrew from the conspiracy before the loan agreement was sent to the auditor. Our earlier rejection of the withdrawal rationale takes care of both of these concerns. As Peter caused those documents to be sent in furtherance of the scheme, *Pinkerton* means Arata is also liable for that foreseeable act that furthered the conspiracy he was still part of.

Counts 14–20 (wire fraud): The jury convicted Peter of wire fraud on these seven counts. They are emails discussing material related to the company's second or third cost reports. Counts 14 through 18 concern documentation for expenditures eventually included in the second cost report submission. Counts 19 and 20 relate to the same for the third cost report. The district court, noting that Peter merely raised factual disputes that the jury was entitled to resolve in the government's favor, denied his motion for acquittal on these counts. As finalizing the expenditures submitted to the state was a core part of the fraud, these wires easily furthered Peter's efforts to defraud Louisiana of tax credits. We affirm the district court's denial of the motions to acquit on these counts.

Count 21 (mail fraud): The jury convicted all three defendants on Count 21. The mailing was a package Peter sent to forensic auditor Michael Daigle containing materials supporting the second cost report. The district court upheld the convictions of

Peter and Susan, and so do we. As should be apparent by now, this type of communication furthered the fraud because it was an attempt to convince the auditor to approve the expenses. Because Arata was still a member of the conspiracy at this time, the verdict against him should also stand.

C.

In Counts 22 through 25, the jury convicted Arata of making false statements to the FBI during an interview in January 2014. The district court disagreed with those verdicts and acquitted Arata on all of them. The findings of guilt should be reinstated if there was sufficient evidence to show that Arata (1) knowingly and willfully (2) made a statement (3) that was false, (4) material, (5) and within the jurisdiction of the FBI. *United States v. Hoover*, 467 F.3d 496, 499 (5th Cir. 2006). The viability of these jury verdicts turns largely on the "knowing" and "falsity" elements.

Count 22: Essentially for the reasons the district court provided in granting the Rule 29 motion, we affirm its ruling on this count. The jury found Arata lied when he said he "terminated his relationship" with Peter in the summer of 2009. Arata had sent a letter ending the attorney-client relationship and his day-to-day involvement in 807 Esplanade, so to support the verdict the government has to advance a broad theory of "relationship" that includes Arata's limited involvement in the second cost report and other business ventures that continued after that point. But the termination letter, which Arata provided to the FBI, contemplates a number of ways in which his relationship with Peter would continue outside the attorney-client context. In light of these circumstances, there was not evidence to support a finding that Arata knowingly provided a false statement in saying he terminated his relationship with Peter.

Count 23: The jury convicted Arata on this count for saying he was "not aware" of the legal fee expenses the company claimed in the second cost report. The district court's acquittal relied heavily on the FBI agent's acknowledgment that there was no evidence Arata *saw* the second cost report before its submission. But the government correctly points out that one need not see a document to be aware of it. There was certainly evidence that Arata knew Peter intended to submit the legal fees in the second report. As we noted, Arata told his business partner that "[Peter] wants to submit [the legal fees] for tax credits. Ha! . . . [S]ince I was not his lawyer for the deal, it makes it even better. What he could submit and what is actual are the bills he got from [other attorneys]. But instead, he . . . puts me down as receiving $150K in fees! Love it." And there is evidence to show that Arata knew Peter went through with it as he helped conceal this fraud. The auditor Davis testified that Arata sent her the operating agreement showing his company Voodoo received a stake in SAFELA; that verified the fees as Voodoo's equity interest was how Arata was paid for the supposed legal work. How can a person verify something they are not aware of? This evidence is sufficient to support the jury's view that Arata lied when he said he was not aware of the legal fees claimed in the second report.

Counts 24: This count concerned Arata's statement that the film equipment listed in the company's first cost report "had been 'acquired' in that [it] would be contributed to 807 Esplanade by the vendor as a business partner." The equipment had neither been acquired nor contributed. Yet the district court determined no evidence existed to support a finding that Arata lied in voicing his belief that the Departure equipment deal "would be" completed.

There is evidence to support the district court's negative view of this count. The equipment-for-ownership deal with Martin's Departure Studios fell through only after the first cost report was submitted. Departure sent Seven Arts a list of film equipment valued at over $1 million in September 2008. Peter signed an affidavit in November of that year attesting to the fact that Seven Arts "acquired" film equipment that "w[ould] be delivered" upon completion of 807 Esplanade. Martin also testified to his understanding that equipment would be delivered to 807 Esplanade and that Departure would be paid for it. In fact, Martin was under the impression that he would be a 25% partner in the business, though he admitted that the arrangement "was not formalized." When asked at trial whether he believed the film equipment transaction was "a real deal," Martin responded "Yes."

But there is also evidence in the other direction, and that is enough to require deference to the jury's finding the inculpatory evidence more compelling. Most powerfully, evidence showed that Arata was a party to the creation of fake equipment purchase invoices and payment certifications that he then forwarded to the company's auditors. Why engage in this fraud if Arata believed that Department Studios would in fact contribute the equipment and that Seven Arts had already "acquired" it? If that were the case, legitimate documentation would exist. Further support for the jury's finding is found in Arata's indication in January 2009, before the first cost report submission, that Seven Arts was already storing in its California office sound mixing and editing equipment purchased from Departure Studios. That was not true. We reverse the acquittal on Count 24.

Count 25: The final alleged false statement is Arata's saying that he "thought he fully disclosed both sides of the transactions for construction and equipment expenditures to the auditors." The government argued, and the jury agreed, that Arata instead had purposely concealed those transactions. The district court vacated the conviction because of its view that there was insufficient evidence to support Arata's intentional concealment of the circular transactions.

There was sufficient support for the jury's contrary view that Arata fully disclosed only part of the transactions—the "first half" consisting of the outgoing payments but not the money coming back into the accounts. In an email to himself, for example, Arata attached invoices documenting both sides of multiple circular transactions between Seven Arts and Departure, which were routed through Regions Bank. He did the same for the Duvernay transactions. But documentation showing credits to the company's account, as opposed to debits from it, was stripped from the emails provided to auditor Katherine Dodge. The government admits that Arata did disclose the "second halves" of these transactions to the auditor, albeit in the illegible form of carbon copies of handwritten bank tickets. This stark contrast between the clean documents showing the outgoing money and the barely discernible ones showing that money coming back is not consistent with "fully disclos[ing]" the circular transactions. And Arata never stated in the body of the emails to the auditor that the money cycled through the accounts. This is enough to get the government past the low hurdle of sufficiency review, with "fully" doing a lot of the work to show the falsity of the statement. We also reinstate this conviction.

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This is how things stand after the sufficiency review. Peter is convicted of all 21 counts, which includes one count of conspiracy (Count 1), nineteen counts of wire fraud (Counts 2–20), and one count of mail fraud (Count 21). Arata is convicted of one count of conspiracy (Count 1), seven counts of wire fraud (Counts 2–7, 13), one count of mail fraud (Count 21), and three counts of making a false statement (Counts 23–25). Susan is convicted of one count of conspiracy (Count 1), one count of wire fraud (Count 11), and one count of mail fraud (Count 21).

IV.

We next address defendants' motions for a new trial. The district court denied defendants the "exceptional remedy of a new trial," even on the contingency—now realized—that we were to reverse its acquittals.

Unlike the sufficiency review we just conducted, which evaluates a jury's findings and thus gives no deference to the trial judge, the decision on a new trial motion is entrusted to the discretion of the district court so we will reverse it only on an abuse of that leeway. *United States v. Piazza*, 647 F.3d 559, 564 (5th Cir. 2011). The trial court may grant a new trial "if the interest of justice so requires." FED. R. CRIM. P. 33(a). New trial requests generally take two forms. The first, like sufficiency review, focuses on the evidentiary support for the verdict, with the movant having to show that the verdict is so strongly against the weight of the evidence that it affects the defendant's substantial rights. *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011). A new trial request can also be based on procedural problems with the trial if they caused a miscarriage of justice. *Id.* The defendants pursued both avenues in the trial court but only appeal the ruling as to the alleged procedural defects.

A.

Defendants raise four grounds for a new trial. Arata argues that the government repeatedly used improper trial tactics, leading to an unjust verdict.[16] When a new trial is sought for prosecutorial misconduct, any improper remark must impact the defendant's substantial rights. *United States v. Rice*, 607 F.3d 133, 138 (5th Cir. 2010).

In its opening statement, the government said the defendants "utterly abused the Louisiana film tax credit program, and in the process they took advantage of and exploited every human being that they could." The district court called this "[f]alse theater." But such theater was not so far afield from the theory and evidence the government presented throughout trial; evidence that it turns out was sufficient to sustain multiple convictions against Arata. As such, the district court acted within its discretion in deciding that any hyperbole did not re-

[16] In their reply, Peter and Susan advanced arguments of retroactive misjoinder, admission of privileged communications, and prosecutorial misconduct that were only "noticed" in the table of contents of their opening brief. Failure on appeal to adequately brief an issue waives it. *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004). Citing an issue in the table of contents but then not addressing it in the body of the brief obviously does not constitute adequate briefing. *See* FED. R. APP. P. 28(a)(8)(A) (noting that an appellant's argument must contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). The reason we do not allow new arguments in a reply is that the other side does not have a chance to respond. That problem exists when all the opening brief does is provide one sentence on an issue in the table of contents. Trying to raise an argument only by listing it in the table of contents is also an end run around page limits.

quire a new trial. The same is true for Arata's complaints about how the government framed questions to witnesses. For example, it asked Arata's business partner whether Arata said he "called Katie Davis and told her that the operating agreement was substantiation for the legal fees?" Davis had not testified to that fact, though she speculated that Arata submitted the operating agreement to support payment of the disputed legal fees. Though the district court deemed these questions "utterly inappropriate," it determined that Arata could not show that they "caused any prejudice" in the scope of a trial that lasted two weeks. We agree.

B.

The Hoffmans point to three trial court rulings in seeking a new trial. They first contend that the instruction telling the jury it is "not necessary that the government prove that the defendants violated, or intended to violate a Louisiana state legal duty, law rule or regulation" amended the indictment. Improper constructive amendment occurs when the jury is allowed "to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Cooper*, 714 F.3d 873, 878 (5th Cir. 2013) (quoting *United States v. Gonzalez*, 436 F.3d 560, 577 (5th Cir. 2006)). That did not happen. Contrary to the Hoffmans' contention, the indictment did not charge them with violating state law. It charged them with making various misrepresentations—lies about the company's expenditures, the creation of purchase invoices, and the purpose of circular transactions.

Using such lies in furtherance of a scheme to defraud violates federal law regardless whether they independently violate state law. *See United States v. Dotson*, 407 F.3d 387, 393 (5th Cir. 2005).

C.

The Hoffmans also argue they are entitled to a new trial because the district court rejected their proposed jury instructions, including one on the meaning of the tax credit statute. As long as the instructions it gives accurately state the law, a district court is given "substantial latitude" in the particulars of how it instructs the jury. *United States v. Richardson*, 676 F.3d 491, 506–07 (5th Cir. 2012). On top of that is the discretion it receives here because this issue is being raised in a challenge to the denial of a new trial motion. That deference is not pierced by the failure to instruct on details about the tax credit law given that the instruction accurately informed the jury of the elements of mail and wire fraud. *United States v. Cessa*, 856 F.3d 370, 376 (5th Cir. 2017) (finding no abuse of discretion when the court gave the correct instruction even if defendant's requested addition was also legally accurate).

D.

The Hoffmans' final basis for a new trial is the district court's decision to exclude expert testimony about the film tax credits. They contend the testimony would have highlighted the confusing nature of the regulations and thus shed light on their intent to defraud (that is, their lack thereof). Deference to trial court rulings in this area again poses a significant hurdle. *Cf. United States v. Guerrero*, 768 F.3d 351, 365 (5th Cir. 2014) (acknowledging that *Daubert* decisions are reviewed for abuse of discretion and should not be disturbed unless "manifestly erroneous" (quoting *United States v. Norris*, 217 F.3d 262, 268 (5th Cir. 2000))). It appears the district court could have allowed this testimony so long as it was focused on descriptions of the tax credit regime and not opinions about the defendants' mindsets. *Compare United States v. Calvin*, 39 F.3d 1299, 1309 (5th Cir. 1994) ("By disallowing that testimony the district court deprived [the defendant] of an opportunity to present critical evidence that he lacked fraudulent intent in assisting with the transactions."), *and United States v. Davis*, 471 F.3d 783, 789 (7th Cir. 2006) ("Experts are permitted to testify regarding how their government agency applies rules as long as the testimony does not incorrectly state the law or opine on certain ultimate legal issues in the case."), *with* FED. R. EVID. 704 (noting that an expert witness testifying in a criminal case "must not state an opinion about whether the defendant did or did not have a mental state . . . that constitutes an element of the crime charged or of a defense," even though opinion testimony embracing "an ultimate issue" is not generally objectionable).

But we need not determine whether the district court exceeded the bounds of its discretion in excluding the testimony because the byzantine nature of the tax credit program was otherwise conveyed to the jury. As the district court noted, "evidence at trial showed that [the] then-newly passed film infrastructure tax law was implemented haphazardly and in a manner rife with disorder." Plenty of witnesses involved in the creation and evaluation of the cost reports—including Seven Arts employees, auditors, state officials, and business partners (actual and contemplated)—made this point that the Hoffmans contend undermines a finding of fraudulent intent. What is more, Peter, a self-professed tax lawyer, testified at length about his understanding of the statute's language and purpose. So did Arata, also a lawyer, who noted that the state did not even pass rules interpreting the statute until 2010. Thus any error in not allowing the expert to testify did not cause substantial prejudice.

No ruling during the trial caused a miscarriage of justice. There is no basis for redoing it.

V.

Having upheld the jury's verdict in large part, we now consider sentencing. The government argues the probation sentences are unreasonable in light of the much greater sentences recommended by the Guidelines. Appellate review of the substantive reasonableness of a sentence is "highly deferential." *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). It is not enough that "the appellate court might reasonably have concluded that a different sentence was appropriate." *Gall v. United States*, 552 U.S. 38, 51 (2007). An abuse of discretion must be shown to undo the decision of the trial judge who is in the best position to weigh the sentencing factors. *Id.* at 51–53. Even sentences like these that are outside the Guidelines range are reviewed with deference, though they are not entitled to the presumption of reasonableness that a within-Guidelines sentence may be afforded on appellate review. *Id.* at 51.

The dissenting opinion emphasizes this discretion. But while considerable deference is due the sentencing court given the bespoke nature of criminal punishment, the Supreme Court preserved a role for appellate review when it ruled that the Guidelines were only advisory. *See United States v. Booker*, 543 U.S. 220, 261–265 (2005). Rather than reverting to the pre-Guidelines situation when there was essentially no reasonableness review of a sentence, *Koon v. United States*, 518 U.S. 81, 96 (1996), the Court concluded that appellate review would assist in "avoid[ing] excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary," *Booker*, 543 U.S. at 264–65. Consistent with that concern about disparities, appellate courts "may consider the extent of the deviation" from the Guidelines when performing their limited function as a check on extreme ones. *Gall*, 552 U.S. at 51.

A.

For Peter, the gap is colossal between the custodial sentence the Guidelines recommended, a range 168 to 210 months,[17] and the 60 months of probation

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[17] There is some suggestion that the district court did not determine a final Guidelines range. But the Statement of Reasons it signed after the sentencing hearing confirms that the district

he received.[18] His counsel acknowledged that he was not aware of our court's considering any challenge to a sentence in which the downward variance was so great. This chasm between the Guidelines' view of the appropriate sentence and the district court's, with its ramifications for the sentencing disparities that Congress instructs courts to avoid, *see* 18 U.S.C. § 3553(a)(6), is an important factor in considering whether the district court exceeded its discretion. *Gall*, 552 U.S. at 49–50 (noting it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one"). But what ultimately matters is whether

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court adopted the Presentence Report's recommended range of 168 to 210 months.

[18] Our reinstatement of five guilty verdicts on which the district court had acquitted Peter does not pose an obstacle to our review of the sentences for the counts on which the court did enter judgment. The reversals turned on issues like whether there was sufficient evidence that particular emails crossed state lines or furthered the scheme. None of these questions affect Peter's overall culpability. His Guidelines calculation captured the loss attributable to the entire scheme, so the reinstated counts will not affect that. It is for this reason that we voiced skepticism about the need to charge and convict Peter of all 21 counts. *See supra* note 9. As the reinstatement of the additional counts does not alter the Guidelines or change any other sentencing consideration, we will review the reasonableness of the sentences that were entered. *Cf. United States v. Weingarten*, 713 F.3d 704, 712 (2d Cir. 2013) ("[I]f the vacatur of a count of conviction has altered the 'factual mosaic related to' the remaining counts, on remand 'the court must reconsider the sentence imposed on the count or counts affected by the vacatur . . . as well as on the aggregate sentence.'" (quoting *United States v. Rigas*, 583 F.3d 108, 118–19 (2d Cir. 2009))).

its assessment of the statutory sentencing factors was reasonable, so we consider both the reasons why the district court thought probation was warranted and the reasons why the Guidelines and government think prison time is necessary.

Why was Peter's Guidelines range so high? To the base offense level for fraud offenses, the Guidelines added enhancements because the intended loss exceeded $3.5 million, the scheme was sophisticated, Peter led it, he abused his position of trust as a lawyer to facilitate the fraud, and he obstructed justice by lying at trial. These facts are relevant to numerous statutory factors courts must consider, including the "nature and circumstances of the offense," "history and characteristics of the defendant," and "need for the sentence imposed to reflect the seriousness of the offense." 18 U.S.C. § 3553(a)(1), (a)(2)(A). It is also noteworthy that this was not Peter's first brush with the law as is often true in white-collar cases;[19] he has a 1997 federal conviction, albeit a misdemeanor, for delivering a false tax return.

So why did the district court believe probation was appropriate? The main reason seems to have been what it described as a "serious dispute" that the project may have eventually been entitled to even more tax credits than were fraudulently obtained with the first cost report. When pronouncing

[19] Federal fraud defendants are less likely to have criminal history than any other category of offenders except those convicted of child pornography. UNITED STATES SENTENCING COMMISSION, THE CRIMINAL HISTORY OF FEDERAL OFFENDERS 4–6 (2018).

sentence it also noted a related concern about inconsistency in the state's view about how much it lost, as well as Peter's "health issues," the fact that his prior federal conviction was a misdemeanor, and its view that a sentence of probation "is sufficient to deter other criminal conduct."

We disagree with that final assessment about the deterrent value of Peter's sentence. Giving probation to the leader of a sophisticated, multimillion dollar fraud scheme—particularly a defendant undeterred by a previous term of probation for a federal economic crime and who also lied at trial—perpetuates one of the problems Congress sought to eliminate in creating the Sentencing Commission: that sentencing white-collar criminals to "little or no imprisonment . . . creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (quoting S. Rep. No. 98-225, at 76 (1983)); *see also Mistretta v. United States*, 488 U.S. 361, 375 n.9 (1989) (noting the Senate Report's view that sentencing had been too lenient for white-collar criminals); Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 315 & n.29 (2016) (reciting the extensive legislative history showing that Congress intended for many white-collar defendants to receive prison time).[20] This ineffective deterrence is especially concerning given

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[20] The Guidelines recognize this history:

> Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage

that scholars believe there is a greater connection in white collar cases between sentencing and future as financial crimes are "more rational, cool, and calculated than sudden crimes of passion or opportunity." *Martin*, 455 F.3d at 1240 (quoting Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 724 (2005)). Another problem with probation in multimillion dollar fraud cases is that it undermines public confidence in whether the justice system is "do[ing] equal right to the poor and to the rich" as our oath requires. 28 U.S.C. § 453. For these reasons, we have repeatedly expressed a "distaste for sentencing that reflects different standards of justice being applied to white and blue collar criminals," *United States v. Saleh*, 257 F. App'x 740, 745 (5th Cir. 2007) (citing *United States v. Andrews*, 390 F.3d 840, 848 (5th Cir. 2004)); *see also United States*

> of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."
>
> The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

U.S.S.G. ch. 1, pt. A(4)(d).

v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006) (noting the need to minimize "discrepancies between white- and blue-collar offenses").

Peter's second sentence of probation in the federal system does not deter large-scale fraud or reflect the serious nature of either this offense or economic crimes generally. 18 U.S.C. § 3553(a)(1), (a)(2)(A)–(B). It also results in significant and unwarranted sentencing disparities with others engaged in frauds of similar magnitude who receive sentences at least in the ballpark of what the Guidelines recommend. *Id.* § 3553(a)(6). Some of the reasons the district court gave for its sentence, especially the uncertainty about whether Louisiana ultimately suffered any loss, are sound reasons for a downward variance, even a substantial one. But this is not a case in which the court went 50%, or even 75%, below the Guidelines range.[21] It went from roughly 15 years in prison to zero. In reviewing the reasonableness of a *Booker* sentence, the Supreme Court recognized that "custodial sentences are qualitatively more severe than probationary

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[21] The dissenting opinion treats the sentence as a 72% variance. Dissenting Op. at 7. It does this by equating 60 months of probation with 60 months in custody (so 60 is a 72% reduction from the 168 low end of the Guidelines). That notion is easily dispelled almost every day in this circuit when defendants plea for probation at sentencing hearings. And as discussed above, treating sentences of probation and custody as equivalent is also at odds with the views of Congress and the Supreme Court. Finally, even ignoring the qualitative differences, a 72% variance is much more substantial than many cases in which courts have found downward variances in white-collar cases to be unreasonable. *See infra* note 22.

sentences of equivalent terms." *Gall*, 552 U.S. at 43, 48, 59–60. Here the substantial qualitative difference between custody and probation is combined with a drastic reduction in the length of the punishment—168 months to 60 months. Other courts of appeals have vacated variances of much lesser degree that benefitted white-collar defendants.[22] What is

[22] *See, e.g.*, *United States v. Morgan*, 635 F. App'x 423, 448–52 (10th Cir. 2015) (finding that the case "cries out for appellate intervention" and requiring resentencing because a noncustodial sentence, in the face of a 41 to 51 month guidelines range, would not deter public officials from soliciting bribes); *United States v. Hayes*, 762 F.3d 1300, 1307–10 (11th Cir. 2014) (finding sentence of three years of probation unreasonable when Guidelines range was 41 to 51 months even though defendant had cooperated); *United States v. Musgrave*, 761 F.3d 602, 609 (6th Cir. 2014) (noting, in vacating the district court's one-day prison sentence in the face of a 57 to 71 months guidelines range, that "Congress understood white-collar criminals to be deserving of some period of incarceration, as evidenced by its prohibition on probationary sentences in this context"); *United States v. Kuhlman*, 711 F.3d 1321, 1325, 1328–29 (11th Cir. 2013) (finding probation sentence unreasonable when Guidelines range was 57 to 71 months); *United States v. Peppel*, 707 F.3d 627, 635 (6th Cir. 2013) (finding seven days plus three years supervised release unreasonable when Guidelines range was 97 to 121 months); *United States v. Engle*, 592 F.3d 495, 497–98, 501–04 (4th Cir. 2010) (vacating a sentence of 48 months' probation for tax evasion when the Guidelines range was 24 to 30 months in prison); *United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) (vacating a sentence of 60 months' probation in light of defendant's 78 to 97 months Guidelines range and holding that "*any* sentence of probation would be unreasonable given the magnitude and seriousness" of his conduct); *Martin*, 455 F.3d at 1230, 1241–42 (vacating, when defendant's Guidelines range was 108 to 135 months imprisonment, a seven-day sentence after the court of appeals had previously rejected a sentence of 60 months' probation).

more, none of those defendants had a prior white-collar conviction and most of them accepted responsibility by pleading guilty. *See supra* note 22.

The dissenting opinion ignores Peter's criminal history as well as other factors favoring a meaningful sentence such as Peter's lying in court, using his position as a lawyer to facilitate the fraud, and leading a sophisticated conspiracy. 18 U.S.C. § 3553(a)(1) (listing "history and characteristics of the defendant" and "nature and circumstances of the offense" as factors to consider in imposing a sentence). It instead focuses on the district court's later conclusion in its restitution order that Louisiana did not end up suffering a loss as a justification for the extreme variance. No doubt loss is a key—often the key—factor in sentencing a fraud defendant. But it is not the exclusive concern. Congress and the Sentencing Commission have commanded that courts conduct a holistic evaluation that includes the troubling features of Peter's conduct and history we have just mentioned. *Id.* § 3553(a); U.S.S.G. § 2B1.1.

Even just considering loss, Peter is not the Chamber of Commerce hero the dissenting opinion makes him out to be. In talking only about the state's actual loss, it neglects that Peter would have stolen millions from the state if it had not detected his scheme. Dissenting Op. at 3–5. The Guidelines say to use intended loss when that is greater than actual loss, U.S.S.G. § 2B1.1 app. note 3(A) & 3(A)(ii), the reason being that a fraudster's intent reflects his culpability, ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 275 (2002) (explaining that "intended loss is a direct measurement of culpable mental state"); Frank O. Bowman, *Coping With "Loss": A Reexamination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 558–60 (1998) (explaining that a focus on intended loss makes sense for "moral and utilitarian considerations"). Indeed, that is why it has long been against the law to attempt a crime even if one does not succeed. *Id.* at 559 ("The Sentencing Commission provided an increase in offense level for 'intended loss' for the same reasons that substantive criminal liability is imposed for inchoate crimes like attempt and conspiracy."); *see also* Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 822–837 (1928) (tracing the criminalization of attempts back to the Star Chamber and treatise of Sir Edward Coke).

Judged by this telling measure of culpability, Peter tried to steal $2 million from Louisiana beyond what his project earned when all was said and done. The district court credited testimony from a state auditor indicating that expenditures on the project would have ended up qualifying Seven Arts for about $1.6 million in tax credits even though the claims were false when submitted. That figure exceeds the roughly $1.1 million issued and later revoked, which is what the dissenting opinion emphasizes.[23] But it neglects that Peter submitted false

[23] Notably, for the first application which is the only one the state approved, the project did not end up earning the all the credits it received. It was entitled to only $860,000 according to the state auditor the district court credited. That is why in calculating for-

claims totaling more than $9.1 million, 40% of which would have resulted in over $3.6 million in credits. Only the state's vigilance in discovering the circular transactions and phony expenditures kept it from being cheated out of the additional millions.[24]

That this fortuity of having been caught should not fully excuse Peter's complex scheme can be shown with an analogy to a "blue collar" theft. Consider a thief who steals $2 million dollars of jewelry from a store. If police catch him leaving the store and recover the stolen goods, is it likely that a no-harm-no-foul argument would result in a sentence of probation? Of course not. Looking only at actual loss in fraud cases where the fraudster is caught in

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feiture the court used $272,480.80 as the amount Seven Arts received above what it ended up earning on the first application. So looking just at the first application, the state did lose money.

The district court found that state did not ultimately lose money on the entire project because it would have qualified for $1.6 million in credits. As discussed above, however, that is far less than the $3.6 million in credits that Peter sought and would have fraudulently received had the state not detected his fraud.

[24] Even if the project ended up receiving all the credits that Peter sought, submitting false claims to obtain the credits before they were earned ran a significant risk that Louisiana would not be made whole. As is the case for any business enterprise, it was far from a guarantee that the facility would end up being built. Any number of economic, personal, regulatory, or—this being New Orleans—weather-related hardships could have prevented the completion of the project. Part of why intended loss is relevant to a sentencing court is that it captures "the degree of risk the defendant's behavior posed." Bowman*, supra*, at 560.

the act is thus another implicit way in which "different standards of justice [may be] applied to white and blue collar criminals." *Saleh*, 257 F. App'x at 745. The victim being made whole can certainly be a mitigating factor at sentencing, but it does not justify the degree of leniency afforded Peter given his attempt to receive millions more in tax credits than the project ever earned. *See Bowman*, *supra*, at 559 (explaining that the law punishes attempts in part because luck plays a role in whether people engaging in equally blameworthy conduct succeeds).

Determining the outer boundaries of a sentencing judge's discretion is admittedly a judgment call. But looking at the entire sentencing landscape, we readily conclude that this sentence exceeded those bounds. Peter's scheme was a serious one that involved creating bogus financial transactions in an effort to mislead a state agency into issuing almost $4 million in tax credits. One only needs to have read this opinion to see the tangled web of financial maneuvers Peter wove. Add to that his criminal history, perjury, and use of his position as a lawyer to further the crime. The result is that giving Peter probation was a variance too far.

We vacate the sentences of probation and remand for resentencing on those counts, along with the ones we reinstated, consistent with the principles we have just discussed.

B.

If our review of Peter's sentence shows the limits of a district court's sentencing discretion, our review of Susan's demonstrates its extent. She too received a sentence of probation (three years). But her Guidelines range was much lower than Peter's; it recommended a prison term of 46 to 57 months. This reflects her far less substantial role in the offense. As the district court observed, witnesses "scarcely mentioned" her during the trial. Whereas Peter dove head first into the fraud, Susan just dipped her toes in it. That is enough to sustain her convictions for the reasons we have explained. But a person's role in the offense is a critical factor in sentencing. In addition to not being a leader of the fraud, Susan does not have any criminal history, did not commit perjury, and did not abuse a position of trust. To be sure, even if not nearly as great as Peter's, the downward variance she received was substantial. It is of similar scope to some we just cited that other courts have vacated. *See Engle*, 592 F.3d at 495. But the extent of a variance is just one consideration in reviewing the substantive reasonableness of a sentence. That review is highly factbound, so one can also find decisions affirming downward variances similar to the one Susan received. *See, e.g.*, *United States v. Rowan*, 530 F.3d 379, 380–81 (5th Cir. 2008) (affirming a sentence of 60 months supervised release on child pornography charges despite a guidelines range of 46 to 57 months). And on the flip side, we have upheld a number of upward variances of similar and sometimes much greater magnitude. *See, e.g.*, *United States v. Hebert*, 813 F.3d 551, 561–63 (5th Cir. 2015) (upholding a variance of 1214% from the high end of the Guidelines range); *United States v. Urbina*, 542 F. App'x 398, 398–99 (5th Cir. 2013) (affirming a 60-month sentence that was

329% higher than the Guidelines range maximum); *United States v. Brantley*, 537 F.3d 347, 349–50 (5th Cir. 2008) (upholding a 180-month sentence that was 253% higher than the maximum end of the Guidelines range); *United States v. Mejia-Huerta*, 480 F.3d 713, 717–18, 723 (5th Cir. 2007) (affirming a 120-month sentence that exceeded the high end of the Guidelines range by 344%). *Booker* discretion is not a one-way street. We defer to both upward and downward variances so long as the district court provides an explanation tailored to the statutory sentencing factors that is not outside the bounds of reasonableness. It did so in sentencing Susan to probation.[25]

C.

Arata's Guidelines range was, at 108 to 135 months, higher than Susan's but lower than Peter's. That is consistent with his relative role in the scheme. We do not address the substantive reasonableness of his probation sentence, however, because the reinstatement of certain counts may influence sentencing. *Cf. Weingarten*, 713 F.3d at 712 (explaining how an altered "factual mosaic" may affect resentencing). For at least one thing, our reversal of some of the false statement counts means that Arata lied to the FBI in connection with the investigation. Obstruction of justice is a relevant sentencing consideration. We thus vacate his probation

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[25] The government also alleges the district court committed procedural error in deciding Susan's sentence, but we reject that claim.

sentences without opining on their propriety to allow the district court to sentence him in the first instance under the new landscape resulting from our sufficiency review.

VI.

The final issue is forfeiture. Arata and the government challenge the district court's $223,434.25 award.[26] As opposed to restitution which is remedial, forfeiture is punitive. The aim of a forfeiture award is to take any ill-gotten gains from a defendant. *See United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009).

Arata contends no forfeiture should have been awarded based on his view that the project ultimately qualified for more tax credits than it received. The government argues the award should have reflected the full $1,132,480.80 in issued credits without any reduction for amounts the project ultimately earned or the street value of the credits. In calculating forfeiture, the district court started

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[26] The Hoffmans brief forfeiture only in their reply, when they challenge the amount awarded and also a couple procedural aspects of the order. As with some of their new trial arguments, *see supra* note 16, they only include these issues in the table of contents of their opening brief. That is not sufficient. *Id.* In any event, we note that there is no problem with the timing of the forfeiture, and the Hoffmans cannot establish plain error with respect to the district court's failure to ask whether the parties wanted a jury to decide forfeiture. *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) (noting that the failure to inquire whether parties wanted the jury to decide forfeiture did not meet the third and fourth requirements for plain-error correction when evidence supported the court's award).

with that $1,132.480.80 in issued credits. It then subtracted the $860,000 in tax credits a state accountant testified Seven Arts was entitled to. This put the amount at $272,480.80. The court then valued the tax credits in light of the 82 cents on the dollar the company received when it sold them. Applying that ratio to the illegal credits received resulted in the award of $223,434.25 (272,480.80 x .82).

We find no clear error in this calculation. The district court was entitled to offset the forfeiture with the amount of credits Seven Arts ultimately earned according to the state accountant, a number Arata says was too low and the government too high. Using that figure and the adjustment for the market value of the credits was a reasonable means of ascertaining what the defendants gained from their fraud, which is the measure of forfeiture.[27] We affirm the forfeiture award.

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To recap our many rulings: We AFFIRM the district court's denial of defendants' motions to dismiss the indictment. We AFFIRM the district court's de-

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[27] *Honeycutt v. United States* held that defendants could not be held jointly and severally liable for proceeds derived from narcotics offenses that the defendants did not themselves acquire. 137 S. Ct. 1626, 1630 (2017). We have since applied that holding to forfeiture for health care fraud. *See Sanjar*, 876 F.3d at 748–50. The defendants do not invoke *Honeycutt*, however, perhaps because all three were Seven Arts co-owners and therefore "acquired" the ill-gotten tax credits.

nial of defendants' motions for judgment of acquittal, and AFFIRM in part and REVERSE in part the district court's grant of defendants' motions for judgment of acquittal. We AFFIRM the district court's denial of defendants' motions for new trial. We AFFIRM the district court's forfeiture award. Finally, we VACATE Peter Hoffman's sentence and REMAND for resentencing. We AFFIRM Susan Hoffman's sentence. And we VACATE Arata's sentence and REMAND for resentencing.

JAMES L. DENNIS, Circuit Judge, concurring in part and dissenting in part:

Though I concur in most of the majority's opinion, I respectfully disagree with the conclusion that the district court abused its discretion by sentencing Peter Hoffman to five years of probation and a $40,000 fine. Because I would affirm Peter's sentence, I respectfully dissent as to part V(A).

1. The Importance of Sentencing Judges' Discretion

As the Supreme Court explained in *Gall v. United States*: "the sentencing judge is in a superior position to find facts and judge their import under [18 U.S.C.] § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts, and gains insights not conveyed by the record." 552 U.S. 38, 51–52 (2007) (citations and quotation marks omitted). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 52 (citations and quotation marks omitted). Accordingly, "the Court of Appeals should . . . give[] due deference to [a] District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59–60. These § 3553(a) factors include "the nature and circumstances of the offense" and "the history and characteristics of the defendant," as well as the need "to reflect the seriousness of the offense" and "provide just punishment." 18 U.S.C. § 3553(a). The statute prescribes that district courts "shall impose a sentence sufficient, but not greater than necessary, to comply with [these] purposes." *Id.*

2. The District Court Did Not Abuse Its Discretion

As the majority acknowledges, the district court in this case committed no procedural error: it correctly calculated the applicable Guidelines range, allowed both parties to present argument on what they believed to be an appropriate sentence, considered the § 3553(a) factors, and explained its reasoning before issuing Peter's sentence. The remaining question for this Court is thus whether the resulting sentence was substantively reasonable—i.e., whether the district court abused its discretion in determining that the § 3553(a) factors supported a sentence of probation and a considerable variance from the Guidelines range. After only briefly addressing the uniquely unusual facts of this case (which I detail below), the majority decrees that the sentence of five years of probation and a fine of $40,000 effectively reduced the sentence to "zero" and was "a variance too far." Maj. Op. at 51, 55. Respectfully, I must conclude the majority is mistaken, as its analysis fails to apply the requisite deference to the district court's decision. Notably, we "must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41.

This case features all the hallmarks the Supreme Court has indicated require appellate courts to grant considerable deference to district courts' determination of sentences. As the district court explicitly stated at Peter's sentencing, it was "intimately familiar" with the circumstances of this case: it oversaw a lengthy jury trial and subsequently issued a detailed, 124-page ruling on defendants' motions for acquittal. In this order, the district court noted that the defendants "spent more than $5 million turning the dilapidated mansion at 807 Esplanade Avenue into a state-of-the-art post-production film studio (a studio that is in operation today and has serviced post-production needs for movies and television series)." Not only did this studio ultimately earn the tax credits the defendants received, the credits received were ultimately *less* than what the defendants were entitled to.[1] At sentencing, the district court appeared to accept the defense's related assertion that the state was not a victim, and instead "got exactly what [it] asked for:" a completed, multimillion-dollar post-production studio. Recognizing these unusual circumstances, the district court reached a critical conclusion: "This is not an ordinary fraud case."

[1] These determinations were further supported in Peter's PSR, which stated that a downward variance may be appropriate because, among other reasons, "The infrastructure project involved in the instant offense was actually completed and audits confirmed the tax credits released to the project were ultimately earned and were in fact less than the credits the project actually earned when it was later completed."

The majority, in contrast, gives short shrift to these unique extenuating circumstances. The majority acknowledges in its brief introduction that, thanks to newly developed post-production infrastructure funded through its tax credit incentive program, Louisiana has "enjoyed considerable success" in its efforts to "become a place where films are made." Maj. Op. at 3. However, when evaluating the seriousness of Peter's conduct, it then fails to take into account how Louisiana has benefited, and continues to benefit from, completed film infrastructure projects like this one. Completed post-production studios like 807 Esplanade were precisely what Louisiana elected to invest in when it codified its intention "to encourage development in Louisiana of a strong capital and infrastructure base for motion pictures[s] . . . in order to achieve an independent, self-supporting [film post-production] industry." LA. REV. STAT. § 47:6007. Ultimately, in Peter's case, the state not only got what it bargained for: it got it at a discount. The majority glosses over these critical, mitigating facts, instead reweighing Peter's sentencing factors to emphasize aggravating circumstances. *See United States v. McElwee*, 646 F.3d 328, 343 (5th Cir. 2011) (appellate court not entitled to reweigh sentencing factors (citing *Gall*, 552 U.S. at 51)); *see also Gall*, 552 U.S. at 51, 59 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court. . . . [Iit is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable.").

That the state ultimately suffered no loss is all the more significant because Peter's Guidelines range was only as high as it was because of an 18-level enhancement for the $3.6 million "intended loss" calculated in the PSR, a loss the state did not actually incur. In arriving at this figure, however, the PSR did not acknowledge that it included in this loss amount expenditures the defendants had not timely made, but did ultimately make, in order to complete the promised post-production studio. The district court was entitled to, and did, consider that the economic reality differed greatly from the PSR's high loss calculation. Indeed, the district court relied on the PSR itself in doing so. The PSR cautioned that the loss figure it proposed "does not accurately reflect, and appears to over-estimate, the damage caused to the victim in the instant offense." Consistent with the PSR's suggestion that this lack of actual harm could reasonably warrant a downward variance, the district court determined that a Guidelines range based in part on this questionably relevant "intended loss" figure significantly overstated the seriousness of Peter's conduct. *Cf. United States v. Huber*, 462 F.3d 945, 950–51 (8th Cir. 2006) (holding, where district court departed downward in light of defendant's small "net profit," that "[t]he district court did not clearly err in its factual determination that the high value of the laundered funds led to a base offense level that substantially overstated the seriousness of the offense").

Therefore, though I share the majority's concerns about preferential treatment for white-collar criminals, I disagree with its implication that this is a classic example of letting a white-collar criminal off easy. I conclude instead, that in light of these extenuating circumstances that rendered this a no-loss, victimless crime, the district court was within its discretion to treat Peter differently than it ordinarily would the leader of a large-scale fraud scheme. *See United States v. Williams*, 517 F.3d 801, 810 (5th Cir. 2008) (noting that a variance deserves "greatest respect" when the facts of a case are out of the ordinary). This case, in which neither the state nor any other institutions or individuals suffered any loss, but in fact received the benefit of a completed, state-of-the-art post-production facility, is not at all like a case such as *United States v. Martin*, in which the Eleventh Circuit found a downward departure unreasonable because the defendant's crimes "resulted in over a billion dollars of loss harming thousands of victims;" were "major economic crimes that harmed not only individual victims but also many institutions and companies;" and were "peculiarly corrosive to the economic life of the community, as demonstrated by the deleterious effects the large-scale fraud in this case had on the healthcare industries and securities markets." 455 F.3d 1227, 1239 (11th Cir. 2006).

Finally, though the majority does acknowledge that this case presents "sound reasons for a downward variance, even a substantial one," it then proceeds to imply that any non-custodial sentence is a "variance too far" that effectively reduces the sentence to "zero." Maj. Op. at 51, 55. However, *Gall* specifically rejected this argument, declaring that viewing a probation sentence as a "100% departure" inappropriately "gives no weight to the substantial restriction of freedom involved in a term of supervised release or probation." 552 U.S. at 48. As *Gall* further notes:

> Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. . . . Probationers may not leave the judicial district, move, or change jobs without notifying, or in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking.

Id. Accordingly, I reject the majority's implication that Peter's five-year probation sentence is insubstantial.

The unusual circumstances of this no-loss, victimless case, combined with Peter's age, health conditions, and non-felonious criminal history, justified the court's decision to impose the variance that it did.[2] Without reweighing the sentencing factors, which it is well-established we may not do, I cannot

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[2] The PSR also noted that Peter's personal characteristics could justify a downward variance: "The defendant is 66 years old and has never been convicted of any felonious criminal conduct and has a significant history of gainful employment . . . . The likelihood that he will commit further crimes is minimal."

conclude that the district court abused its discretion.

3. The Majority Fails to Give Downward Variances the Deference Our Circuit Consistently Gives Upward Variances

As a final but not insignificant note: this court consistently upholds sentences that vary *upwardly* from defendants' Guidelines ranges, citing district courts' considerable discretion in weighing the 18 U.S.C. § 3553 factors and determining appropriate sentences. *See, e.g.*, *United States v. Nguyen*, 854 F.3d 276, 284 (5th Cir. 2017) (noting our court's "'highly deferential' review for substantive reasonableness"); *United States v. Brantley*, 537 F.3d 347, 349–50 (5th Cir. 2008); *United States v. Williams*, 517 F.3d 801, 808–13 (5th Cir. 2008); *see also United States v. Guadian,* 724 F. App'x 329 (5th Cir. 2018) (upholding a 180-month sentence imposed for a nonviolent, no weapons involved marijuana trafficking offense with a Guidelines calculation of 63–78 months). The majority states that we should accord equal deference to downward variances, noting correctly that "*Booker* discretion is not a one-way street." Maj. Op. at 56. Consistent with this principle, the majority affirms Susan Hoffman's downward variance, reasoning that "we have upheld a number of upward variances of similar and sometimes much greater magnitude." Maj. Op. at 56 (citing *United States v. Hebert*, 813 F.3d 551, 561–63 (5th Cir. 2015) (affirming 1214% upward variance); *United States v. Urbina*, 542 F. App'x 398, 398–99 (5th Cir. 2013) (329% upward variance); *Brantley*, 537 F.3d at 349–50 (253% upwards); *United States* *v. Mejia-Huerta*, 480 F.3d 713, 717–18 (5th Cir. 2007) (344% upwards)). However, applying the same formula to determine the percentage decrease here as the majority used to determine the percentage increase in the cases that it cites, it becomes clear that each upward variance also significantly outstrips the 72% decrease the district court applied when sentencing *Peter* to five years of probation with a $40,000 fine.[3] Though Peter's variance was admittedly more considerable than Susan's, the majority's own calculations demonstrate that it is still considerably less extreme than the upward variances we have consistently upheld.

The fact is, it is only the exceptionally rare case in which this court finds an upward variance substantively unreasonable. *See United States v. Gerezano-Rosales*, 692 F.3d 393, 401 (5th Cir. 2012) (finding a 108-month sentence substantively unreasonable because the district court increased the within-Guidelines sentence it had just imposed by three years based on its belief that defendant responded "disrespectfully" to the sentence). If our court is to continue to accord great deference to district courts' decisions to impose upward variances,

[3] To calculate the percentage increase or decrease between two numbers, as the majority does, the numerical increase or decrease is divided by the original number, then multiplied by 100. Thus: Percentage Increase = (New Number - Original Number) / Original Number x 100; Percentage Decrease = (Original Number - New Number) / Original Number x 100. *Relative change and difference*, WIKIPEDIA, https://en.wikipedia.org/wiki/Relative_change_and_difference (last updated Apr. 14, 2018).

we must certainly also do so when reviewing downward variances.

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For these reasons, though I agree with most of the majority's diligent and well-thought opinion, I respectfully dissent as to Part V(A) vacating Peter Hoffman's sentence as unreasonable.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA v. PETER M. HOFFMAN, MICHAEL P. ARATA, SUSAN HOFFMAN	CRIMINAL ACTION NO. 14-022 SECTION F

ORDER AND REASONS

Before the Court are six motions: (1) Susan Hoffman's motion for judgment of acquittal; (2) Susan Hoffman's motion for new trial; (3) Michael Arata's motion for judgment of acquittal; (4) Michael Arata's motion for new trial; (5) Peter Hoffman's motion for judgment of acquittal; and (6) Peter Hoffman's motion for new trial. For the reasons that follow, (1) Susan Hoffman's motion for judgment of acquittal and (2) motion for new trial are DENIED; (3) Michael Arata's motion for judgment of acquittal is GRANTED in part and DENIED in part, but (4) Michael Arata's motion for new trial is DENIED; (5) Peter Hoffman's motion for judgment of acquittal is GRANTED in part and DENIED in part; but (6) Peter Hoffman's motion for new trial is DENIED.

<u>Background</u>

A. Introduction

This is not an ordinary fraud case.[1]

The government charged, and all three defendants, Peter Hoffman, Susan Hoffman, and Michael Arata, stand convicted of conspiracy to defraud and actually defrauding a State-administered tax credit program of more than $1 million in ill-gotten tax

[1] Certain features that make this federal white collar fraud case unusual are worth noting at the outset. First, the defendants essentially concede the government's evidence. For example, as for the first tax credit application, Mr. Hoffman and Mr. Arata concede that they used circular bank transactions and submitted payment confirmations to show payment for equipment and construction. But the defendants submit that they presented these transactions this way consistent with their good faith reliance on the custom and practice of the film tax credit world where, to underscore another unusual feature of this case, there were few if any guiding rules as to how one must document an expenditure under the murky State regime. In other words, the defendants advanced good faith defense theories that what they did and how they did it was fully consistent with the custom and practice undergirding the less than clear State tax credit regime such that they believed they were acting in compliance with the law. A third feature of this fraud case that makes it unusual is that there is no dispute that the infrastructure project -- a multi-million dollar post-production film studio for which the defendants applied for tax credits from the State-administered tax program -- was actually completed and after-the-fact forensic audits confirm that tax credits released to the project were, in fact, ultimately earned. The $1.1 million in tax credits issued by the State of Louisiana based on the first tax credit application was ultimately less than the project earned once it was completed years later.

credits. The property located at 807 Esplanade Avenue in New Orleans -- the film infrastructure project for which the defendants applied and received tax credits -- is an up and running post-production film studio and the project ultimately earned at least the amount in tax credits that it received.[2]

There is no dispute about much of the evidence presented at trial. The State program that the defendants are convicted of defrauding entitled applicants who made expenditures on film infrastructure in Louisiana to receive an amount equal to 40% of their qualified and audited infrastructure expenditures. Although the program required "expenditures," what qualified as such was at best confusing under the newly-enacted infrastructure part of the law. Mr. Hoffman and Mr. Arata, both lawyers and businessmen, worked together on the first of three tax credit applications submitted for the project. Relative to the first application submitted on February 26, 2009, they represented in an independently audited cost report that certain expenditures for construction and film equipment qualified for tax credits. As presented, State administrators agreed. Several months after submitting the first application, the State of Louisiana issued $1,132,480.80 in tax credits. After suspecting that Mr. Hoffman was fabricating invoices on a different

[2] Developers spent more than $5 million turning the dilapidated mansion at 807 Esplanade Avenue into a state-of-the-art post-production film studio (a studio that is in operation today and has serviced post-production needs for movies and television series).

project, Mr. Arata withdrew from the 807 project and his representation of Mr. Hoffman in the summer of 2009. Thereafter, Mr. Hoffman worked with auditors to prepare two additional tax credit applications for the project, the second was submitted on January 20, 2010 and the third on July 3, 2012.[3] Mr. Hoffman also responded to an inquiry by a forensic auditor hired by the State to investigate the first two tax credit applications, sending his responses regarding the second application to Michael Daigle on February 3, 2010.

The Government's Theory

According to the government's theory of prosecution, the defendants schemed to defraud the State by misleading independent auditors into including in cost reports, and misleading State administrators to accept as expenditures, certain transactions that did not qualify as expenditures under the State law. The government's presentation indicated that, in the first application, Mr. Hoffman and Mr. Arata submitted to the auditors and the State payments for equipment and construction services when, in reality, there were only promises to pay, or intended contributions that lacked economic substance; and that transactions were presented to the auditors and to the State as cash disbursements for equipment or construction expenses when, in fact, money had not been expended, rather, only transferred

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[3] The State did not issue tax credits relative to these latter submissions.

around various Seven Arts-controlled[4] bank accounts to make it appear as if it had been spent. The government submitted that the defendants participated in a scheme to defraud that involved, for example, lying about related parties and capital contributions and presenting false invoices and misleading payment confirmations. Likewise, the government submitted at trial that the scheme continued when Mr. Hoffman claimed as qualified expenditures in the second and third applications (and in defense of the second application in response to the State forensic auditor's inquiries) transactions that did not qualify as expenditures or that were otherwise grossly inflated, including an attempt to characterize as an expenditure draws on a non-existent loan in order to claim phony interest payments as expenditures.

The Defense Case

In stark contrast to the government's black-and-white fraud theory, the State regime the defendants stand convicted of defrauding was at best gray; it would not be a stretch to note implementation under State scrutiny at best lacked coherent acumen.

[4] Peter Hoffman owned and operated several Seven Arts entitles: Seven Arts Entertainment, Inc., Seven Arts Pictures, Inc., Seven Arts Pictures Louisiana, LLC, Seven Arts Filmed Entertainment Louisiana, LLC, and Seven Arts Post, LLC. Michael Arata and Susan Hoffman operated or were affiliated with Seven Arts Pictures Louisiana, LLC, which was the entity directly associated with the 807 Esplanade infrastructure project also called Seven Arts Post.

Infrastructure transactions involve complex financial events, not simple cash transactions like buying a t-shirt at Wal-Mart. Indeed, the defendants were informed by the State that "the administrative rules implementing the procedures and guidelines on the tax credit program for State-certified infrastructure projects are in the process of promulgation in accordance with law." In fact, no rules were implemented until 2010. The evidence at trial showed that then-newly passed film infrastructure tax law was implemented haphazardly and in a manner rife with disorder. Whatever it might have forbidden in terms of qualifying "expenditures," the State program did not plainly require cash transactions; indeed, if it had, the requirement for an audited cost report likely would have been unnecessary.[5]

In defense of the charges, Mr. Hoffman and Mr. Arata, both lawyers experienced in tax and entertainment law, testified that they believed that the project's applications complied with the custom and practice of what the State film office accepted from other applicants and, at the very least, reasonable people can debate about whether or not certain of

[5] The evidence at trial showed that in generating the cost report, the auditors must rely on documents, not what the applicants told them. The government, if not the State, expected the defendants to alert the professional auditors to what was disclosed in the supporting documents they submitted for the audited cost report to be prepared by the independent auditor. The testimony of one auditor in particular, Katie Kuchler, the auditor working on the first and second applications, seemed, in some ways, self-interested.

the submissions qualified as a permissible expenditure.

Susan Hoffman was scarcely mentioned during the trial and, although the government apparently had assumed in its investigation that she had signed all the documents that contained her purported signature, that did not bear out at trial. Mrs. Hoffman's theory of defense aligned with that of her co-defendants and there was some evidence that she relied on her husband, Mr. Hoffman, and would often sign whatever documents he asked her to sign.

B. The State Regime

Central to this fraud case is a State-administered Louisiana film infrastructure tax credit program. Louisiana's Motion Picture Incentive Act was originally adopted in 2005 and extended in 2007, but it sunset at the end of 2008. The purpose of the infrastructure component was to encourage development, to incentivize film infrastructure to be built to support the motion picture industry in the State. Under the law, every dollar spent in Louisiana on film infrastructure earned the investor 40 cents in film infrastructure tax credits.

With respect to the film infrastructure tax credit program, two departments must jointly agree that certain submissions qualify for issuance of tax credits: the Louisiana Department of Economic Development and the Louisiana Division of Administration.[6] The administrative review and approval process commences with an applicant filing an application seeking an initial certification letter from the State approving a project as a State-certified infrastructure project; the pre-certification letter set forth conditions, such as deadlines and minimum spending requirements, for the earning and disbursement of credits. After an initial certification letter is issued, and accepted by the applicant, the applicant must then submit to those same agencies a cost report of infrastructure expenditures; the report must be audited and certified by an independent certified public accountant. Based on the applicant's submission, the relevant State agencies determine whether those infrastructure expenditures qualify for tax credits; if so, those agencies will certify the tax credits based upon the approved infrastructure expenditures. Once certified, tax credits could be applied to offset against the Louisiana taxpayer's income tax liability, or sold for cash.

Consistent with the statute, the mission of the State agencies implementing the infrastructure provision was to promote the film business and infrastructure projects in the State of Louisiana. The only guidance in implementing the infrastructure tax program in 2007 and 2008 was the statute itself;

[6] A third State agency plays a role as well: the Louisiana Department of Revenue collects taxes and accepts the credits to offset tax liability. The State law authorized the "recapture" of ill-gotten tax credits, but the State did not seek to recapture the tax credits issued in this case.

no rules or regulations were promulgated until 2010. Concerning the contours of the infrastructure tax law, witnesses at trial agreed that the law, particularly at the beginning, was “confusing”, “not so clear”, had a lot of “gray areas”, that it was “complicated enough to where it required an applicant to get an audit by a Louisiana CPA firm;” and that applicants, auditors, and administrators alike “struggled” with it. Applicants and auditors simply did their best to try to understand what was acceptable. Absent binding rules, which State administrators failed to timely adopt, applicants often relied on what State administrators had accepted as valid expenditures in other projects.

C. Custom and Practice

To help develop the film industry the system encouraged infrastructure to be built, and it was the practice of the State administrators to be flexible to allow various types of expenditures so as to bring in more projects, and to incentivize infrastructure to create an in-state self-sufficient film industry. State administrators reviewed applications, cost reports, and supporting documentation; as “champions for the [film] industry,” the administrators were “applicant-friendly” and therefore had “an open door policy” in which they worked with applicants to allow changes or substitutions of expenditures, or requested more information from the applicants to support submissions. Along with what was gleaned from public records requests from other film infrastructure projects, applicants for infrastructure tax credits sometimes relied on the give-and-take and advice of the State administrators to glean an understanding of what the State might accept as an expenditure that would qualify for tax credits.[7]

One of those State administrators was Chris Stelly, executive director of the Office of Entertainment Industry Development, an office within the Department of Economic Development. Stelly reviewed audited cost reports to make sure that the expenditures submitted by applicants in support for their application for tax credits qualified as expenditures under the State law. Government witnesses, including Stelly, testified that qualifying expenditures were not limited to cash-based transactions.[8]

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[7] It was customary for applicants to consult administrators within the Department of Economic Development to seek out permissible interpretations of the Act. Sometimes, if the Department of Economic Development told the applicant "no", the applicant would then take up the issue with the Division of Administration in an effort to get the "no" changed to a "yes."

[8] In its opening statement, the government conceded that "you could get tax credits for things other than spending cash."

During his direct examination, Stelly explained that the pre-certification letter's requirements "must actually be expended" and "actual amount expended by the project" meant that "state law required that the money actually be spent. It just couldn't be a promise to spend or anything like that. It had to actually be spent. And that was a statutory provision that we wanted to reflect . . . to repeat in the particular letter." Stelly Tr. 205-06. When the prosecutor showed Stelly the 807 Esplanade film equipment (Departure Studios) and construction (Leo Duvernay) transactions, Stelly said his office would not have approved these if Departure and Duvernay had not received payment, "if the money wasn't actually spent." Stelly Tr. 217.

And that the State administrators allowed applicants to amend and even withdraw cost reports.

D. The 807 Esplanade Infrastructure Project

Peter Hoffman, a tax attorney, was the Chief Executive Officer of Seven Arts Entertainment, Inc., a company involved in the motion picture and entertainment industry in Los Angeles, California. He also owned, operated, and controlled other companies affiliated with Seven Arts Entertainment, Inc., including Seven Arts Pictures, Inc., Seven Arts Pictures Louisiana, LLC, Seven Arts Filmed Entertainment Louisiana, LLC, and Seven Arts Post, LLC.

Michael Arata, a Louisiana businessman, attorney, and actor, was one of a small circle of lawyers

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During cross-examination, when confronted with evidence that the State agencies administering the Act accepted non-cash expenditures (such as a note in the Stage West Project) as qualifying expenditures, Stelly admitted that the film office "accepted expenditures in forms other than cash." Stelly Tr. 291. Stelly admitted that the law never defined expenditure; the words "cash" or "spend", Stelly's definition of expenditure, were nowhere in the pre-certification form prepared by the State. Stelly Tr. 265. Stelly was also "aware that the Louisiana legislature unanimously passed a resolution [in 2008] which indicated that tax credits for infrastructure projects should include property acquired by means of cash, bonds, exchange or by loans from a lender, regardless of who holds the promissory note." Stelly Tr.285; Arata Ex. 231.

Other witnesses, like Rebecca Hammond, confirmed that more than the typical cash sale was considered an expenditure under the program. Hammond Tr. 62.

who worked on film applications in Louisiana.[9] He also owned and operated companies involved in the movie and entertainment industry, including Voodoo Production Services, LLC, Voodoo Studios, LLC, Seven Arts Pictures Louisiana, LLC, and LEAP Film Fund II, LLC.

Susan Hoffman, a Louisiana businesswoman, is Peter Hoffman's wife. Though they are legally separated, they have remained best friends and business partners. Mrs. Hoffman owned and operated several companies including Leeway Properties, New Moon Pictures, LLC, and Seven Arts Pictures Louisiana, LLC.

Through their respective companies, Peter and Susan Hoffman and Michael Arata were partners in several movie-related ventures. Renovating 807 Esplanade Avenue into a post-production film studio was one of them. 807 Esplanade was a dilapidated mansion that the defendants through their companies purchased in early October 2007 so that they could renovate it into a post-production film studio. Financing came from different sources. The initial investment in the property, through a loan from Advantage Capital, was \$3.7 million; \$1.7 million of which was the purchase price of the property and the remaining \$2 million was placed in escrow to be

[9] So much work he did on film tax credit applications that even the government concedes he was an expert in this niche field.

drawn down for construction costs.[10] Seeking another source of funding, applications for film infrastructure tax credits were submitted.[11]

Seven Arts' pre-certification letter laid out deadlines and spending threshold limits. If the project failed to spend $4,500,000 by December 31, 2008, any spending after that date would be ineligible for tax credits. No tax credits would be released until the project spent $2,250,000 on infrastructure. Purchase of real estate did not qualify towards the $2,250,000 requirement.

An applicant such as Seven Arts first submits to the State an application (with supporting documents) for film infrastructure tax credits. Arata Exhibit 234 is the application for the 807 project, submitted by Mr. Arata, both an attorney and investor in the project. The application included such things as estimates, act of sale, business plan, contractor's agreement; the application also indicates that

[10] At a later date, when the project was at a stand-still due to dwindling funds, another lender called Palm Finance took over from Advantage Capital.

[11] During a meeting with his board of directors in September 2007, Mr. Hoffman suggested a plan to build 807 Esplanade "with government tax credits" and "with no cash cost to the company." Gov't Ex. 426. According to the government, this demonstrates Mr. Hoffman's intention to inflate the costs of the project: given that the State program only permitted a return on 40% in tax credits on legitimate expenditures, the remaining 60% would have to be fabricated by inflating costs.

It was not disputed at trial, however, that the project sought and obtained other government tax credits known as historic rehabilitation tax credits, which are not at issue in this criminal case.

Seven Arts joined forces with Departure Studios to bring its expertise to New Orleans. The Act required that the State issue an initial certification letter upon receipt of a qualifying project application; one that the State considered had met certain minimum standards. Once the pre-certification letter is issued, the project goes forward; once it meets the minimum expenditure threshold, the applicant presents an audit to the State, which reviews the cost report to certify the credits.

On May 29, 2008, the State of Louisiana, Department of Economic Development, mailed to Michael Arata, as agent for Seven Arts Post, an Infrastructure Project Pre-Certification Letter concerning the 807 Esplanade film infrastructure project. The pre-certification letter states:

> The purpose of this letter is to provide you with general guidelines based upon an initial application received from you for ultimate certification of expenses and receipt of tax credits, when earned, in accordance with statutory law. It does not constitute an assessment of the viability of the project nor does it constitute a belief that the amount claimed for the credit in your submittal ($9,000,000) will be spent in a manner resulting in receipt of tax credits as provided by law.
>
> In the opinion of the Department of Economic Development (DED) and the Office of Entertainment Industries Development (OEID), as

approved by the Louisiana Division of Administration (DOA), certain descriptions of the project outlined in your submission, dated October 10, 2007, referenced above as supplemented by additional information provided by you, appear to meet the criteria of an infrastructure project under the Louisiana Motion Picture Incentive Act. You may proceed as a "State-Certified Infrastructure Project" in the meaning of R.S. 47:6007(B)(12) as of the effective-date of the statute, July 1, 2005, provided that expenditures are made for "infrastructure" as provided by law and determined by the State.

Although your project appears to meet the criteria of a State-Certified Infrastructure Project, you should be aware that *the administrative rules implementing the procedures and guidelines on the tax credit program for state-certified infrastructure projects are in the process of promulgation in accordance with law*. Application of these rules will govern the expenditures that are qualifying "investment" and may ultimately limit or apportion the amount of your proposed investments that will qualify for the tax credits authorized by the Act. Subject to this limitation, to the extent that the actual expenditures are in conformance with the rules, then the expenditures for the infrastructure project you describe qualify for the following credits described in RS 47:6007C(2), as follows:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of forty (40%) of the base investment made by that investor.

(ii) Since the application was filed after August 1, 2007, the applicant shall have until December 31, 2008, to earn tax credits on this project, unless fifty (50%) percent of the total base investment provided for in this pre-certification letter has been expended prior to December 31, 2008. This project must expend at least $4,500,000 prior to December 31, 2008.

(iii) Before any tax credits can be certified and released, a minimum of twenty-five percent (25%) of the base investment shall be expended on infrastructure that is unique to film production. $2,250,000 shall be expended on infrastructure that is unique to motion picture production or post production before any credits can be certified. This does NOT include the purchase of land, pre-existing facilities or any other expenses that are not directly related to the creation of infrastructure specifically designed for motion picture production or post production.

(iv) No tax credits shall be earned on multiple-use facilities until the production or postproduction facility is complete.

As a general rule, "infrastructure" only includes the purchase, construction and use of tangible items in one location that are directly related to and utilized by motion picture production in Louisiana. The burden of establishing the relationship between items that do not fit this definition will be on the project seeking certification of such items. . . .

In order to qualify for these credits, all funds invested must actually be expended on the state-certified infrastructure project with accounting certification in accordance with Departmental guidelines for the claimed expenditures included. Again, as noted above, while your project indicates an anticipated total of $9,000,000, final certification and granting of tax credits under these provisions will be based on the following: the actual amount expended by the project, verification in the form of an audit conducted by an independent Louisiana Certified Public Accountant that these expenditures were made and meet the requirements of applicable law, and approved by DED, OEID and DOA.

Additionally, the applicant hereby agrees to the following structured release of the credits. *After the first disbursement (referenced in the chart as Year 1), the remaining credits will be eligible for release on or after the anniversary date of this pre-certification letter (as shown in the chart as Year's 2 et al):

Project Costs	Credit Total	Building Renov/ Land (Credits)	Eqpt. (Credits)	Credit Spread	Year 1	Year 2*	Year 3*	Year 4*
$9,000,000	$3,600,000	$3,800,000 ($1,520,000)	$5,200,000 ($2,080,000)	4 years on bldg renov[.] and 2 years on equipment	$380,000 (b) $1,040,000 (e) TOTAL: $1,420,000	$380,000(b) $1,040,000 (e) TOTAL: $1420,000	$380,000 (b) TOTAL: $380,000	$380, 000 (b) TOTAL $380, 000

While the application in its present form appears to meet the statutory criteria of a film infrastructure project, the state of Louisiana has made no evaluation of the applicant's ability to successfully complete the project or actually make the proposed expenditures reflected in the application. As a result, this letter is not to be construed as an official endorsement of this project by the state of Louisiana.

Upon receipt of the request for certification of expenditures and the audit, the Department of Economic Development, the Office of Entertainment Industry Development and the Louisiana Division of Administration reserves the right to request additional documentation to validate the claimed expenditures. This may include, without limitation, invoices, cancelled checks, bank records, etc.

The authorized representatives of INF:0032 Seven Arts Post shall sign this letter where indicated below and return of the signed original to the Department of Economic Development, the Office of Entertainment Industry Development and the Louisiana Division of Administration.

> The terms of this letter apply exclusively to this infrastructure project numbered INF:0032.

Gov't Ex. 1. The pre-certification letter is signed by the Secretary of the Department of Economic Development, Stephen Moret; the Commissioner of the Division of Administration, Angele Davis; the Director of Film & TV Entertainment Industry Development; and accepted and agreed to by Michael Arata, agent for the project.

Ultimately, three applications seeking tax credits were submitted by Seven Arts. Leading up to the first tax credit application, Mr. Hoffman and Mr. Arata opened up bank accounts in the name of Damon Martin and Leo Duvernay. Damon Martin, a film post-production engineer who had worked with Mr. Hoffman previously doing post-production sound work for independent films, owned Departure Studios in Los Angeles where he owned and rented post-production equipment. Leo Duvernay, who had done contracting work for Mr. and Mrs. Hoffman, was the general contractor for the 807 Esplanade project. In early October 2008, money was circled in and out of the newly-opened accounts. To accomplish this, Mr. Arata took out a $400,000 loan through his business, LEAP Film Fund II, and placed it into the Seven Arts Pictures Louisiana (SAPLA) bank account. Seven Arts accountant Erik Smith was instructed to bounce the proceeds of this loan back and forth five times between the SAPLA account and the Damon Martin account, which made it appear as if Seven Arts had actually deposited $1,027,090 in Departure's account to pay for film equipment. With the same loan, a similar circling was done with the Duvernay account to make it appear as if Duvernay had been paid $1,499,257 for construction. The next day, the money was withdrawn to pay off Mr. Arata's loan. The government's theory is that this was accomplished to convince the auditors and the State that these independent Louisiana third-party vendors had actually been paid; the defense put on evidence that this was done for the purpose of (i) documenting a proper defeasance transaction as to Duvernay, or otherwise as part of a prepay from the Advantage Capital escrow account set up for construction draws, and (ii) documenting a capital contribution of equipment as to Departure Studios/Damon Martin.

The SAPLA bank statement showed these transactions as both withdrawals and deposits. But the general ledger of SAPLA -- the building block of an audit -- reflected that the deposits were capital contributions from parent company Seven Arts Pictures, Inc. This made it appear to the auditors and the State that the parent company transferred money for equipment and construction into the SAPLA operating account that was then used to pay independent Louisiana third-party vendors.

In late October 2008, two months before the December 31, 2008 deadline to show $4,500,000 in expenditures pursuant to the pre-certification letter, Mr. Hoffman and Mr. Arata hired Katherine Dodge's auditing firm to conduct the audit as required by the pre-certification letter and the film tax credit law. Mr. Hoffman and Mr. Arata sent Ms. Dodge what they represented to be expenditures for film and construction, as well as confirmation of $7,415,000 in capital contributions from Seven Arts Pictures, Inc. to SAPLA. Ms. Dodge complained that she needed more information to do proper audit testing; Ms. Dodge requested bank confirmations showing the transfers from the parent company to SAPLA and then transfers from SAPLA to the equipment vendor and contractor. On December 8, 2008, Mr. Arata emailed Melissa Oelking at Regions Bank, copied Ms. Dodge, and asked "[i]s there any chance of getting the original withdrawal slips and deposit slips for SAPL, LLC and Departure and Leo Duvernay? We got the copies you sent to us, but our auditor would like to see originals." The next day, the audit firm Ms. Dodge worked for withdrew from representing SAPLA.

The same day Dodge's firm withdrew, Mr. Hoffman and Mr. Arata contacted Katie Davis Kuchler of the Malcolm Dienes auditing firm. Mr. Hoffman and Mr. Arata sent Kuchler the SAPLA general ledger listing the same capital contributions, continued to represent that Martin and Duvernay had been paid as third parties from the capital contributions. They also sent her construction and equipment invoices and receipt confirmations of payment from Duvernay and Departure.

On February 26, 2009, Mr. Arata sent the first application to the State with the audited cost report. The audit listed $1,027,090 in equipment expenditures to Martin at Departure Studios and also listed $1,749,257 in construction expenditures to Leo Duvernay. The report also listed $3.7 million for the building, which was purchased for $1.7 million.[12] On June 19, 2009, the State paid out $1,132,480.80 in tax credits.

In July 2009, after being alerted that invoices were being fabricated by Mr. Hoffman, Mr. Arata decided to withdraw from his representation of Mr. Hoffman, and he terminated his relationship with Mr. Hoffman in connection with the 807 Esplanade project and others. Every witness that testified recalled that Mr. Arata left the project in 2009 and some could even pinpoint the summer of 2009. After consulting with an ethics attorney,[13] Mr. Arata sent Mr. Hoffman a letter on August 6, 2009 in which he officially resigned from the 807 Esplanade project; he also advised Mr. Hoffman as to the status of at least six other, ongoing matters.

Meanwhile, in November 2009, the project ran out of money and was boarded up for a few months. In preparation for the second tax credit submission, Mr. Hoffman decided to include as expenditures in the second Dienes audit various "wish list" items to see if they would be deemed acceptable expenditures. Mr. Hoffman sent an updated general ledger

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[12] The remaining $2 million in the building cost was the construction loan provided on top of the purchase price by Advantage Capital. Kuchler was provided with the loan documents.

[13] He was advised by an ethics attorney, Dane Ciolino, who testified at trial, that his professional obligations as an attorney allow that he may report "up but not out" any misconduct he learned during the course of a confidential relationship, and that Mr. Arata was ethically obliged to assist in the client's transition.

to Kuchler and also sent bank statements with corresponding invoices to justify expenditures for equipment from the United Kingdom, additional construction expenses, interest payments, legal fees, construction finance supervision, rent for office space provided to Duvernay, and management fees. The second cost report, audited by the Dienes firm, was submitted to the State on January 20, 2010 at Mr. Hoffman's direction.

In late 2009 or early 2010, the State's forensic accountant, Michael Daigle, was asked by the State to audit 807 project submissions. After receiving some documents from Malcolm Dienes, Mr. Daigle, by letter to Mr. Hoffman dated January 29, 2010, requested additional documents. In response to Daigle's letter, on February 2, 2010, Mr. Hoffman Fed Ex'ed materials responsive to Mr. Daigle's inquiry, except that he did not include materials relating to the first audit, which Mr. Hoffman considered a closed matter that should not be reopened. In reviewing the first and second audited cost reports, Mr. Daigle found irregularities in claimed expenditures. This led the Malcolm Dienes firm to withdraw the first and second audit reports.

Seven Arts then retained a third auditor, Becky Hammond of Silva Gurtner & Abney, LLC, certified public accountants, to audit all expenditures originally claimed in the first and second audit reports and to generate a third audit report. The third audit report was sought to replace the two recalled Dienes audit reports (and, thus, to support previously issued certified tax credits), as well as to support additional tax credits earned by 807 Esplanade. In seeking additional tax credits by way of submissions to the third auditor, Mr. Hoffman continued to claim $7.4 million in capital contributions; that equipment had been purchased from a company in the United Kingdom; that Duvernay had been paid more than Ms. Hammond was able to confirm through payments Duvernay actually received; that Susan Hoffman's company, Leeway Properties, received a $400,000 fee for her project management services; that Lou Sandoz received a $250,000 fee for construction finance supervision; that Duvernay was using certain office space rent-free; that interest had been paid on a $10 million inter-company loan; that he and Mr. Arata had been paid legal fees for work on the project; and that the project incurred 20 percent in developer's fees.

In performing the third audit, the Silva firm took what it considered to be a conservative approach in requiring strictly cash expenditures for inclusion in the cost report.[14] After the Silva audit was issued in late June or early July 2012, the previously-issued tax credits were re-certified. By letter dated August 13, 2012, Michael Daigle advised Chris Stelly of the Department of Economic Development and Lesia Warren of the Division of Administration:

> Based on a 40% tax credit provided by statute, the maximum allowable "qualifying expenditures" of $5,486,638.36

[14] Although Mr. Silva's firm used this conservative approach, Mr. Silva himself described the program rules as "vague" and identified non-cash expenditures that would qualify for tax credits, such as the donation of property and interest expenses.

> has earned tax credits of $2,194,655.34. I understand that LED previously issued tax credits of $1,232,480.80 related to these "qualifying expenditures", indicating that the applicant has earned $962,174.54 in additional tax credits. However, LED has also issued tax credits to this applicant for film production credits based on other Dienes firm audit reports which have been recalled for material errors. Unless and until the applicant presents acceptable audit reports supporting these previously issued film production tax credit, I recommend that no action be taken to release any of the additional tax credits earned above.[15]

Gov't Ex. 453. Shortly thereafter on September 4, 2012, Stelly and Warren wrote Peter Hoffman that, based on the replacement audit by the Silva firm, "Please be advised that tax credits previously disallowed for this project are hereby reinstated [and] are no longer subject to . . . recapture." Arata Ex. 147.

After being contacted by the FBI and State regulators, the Silva firm withdrew its audit report, but later re-issued it; in the re-issued audit, the Silva firm included a paragraph alerting readers of

[15] Mr. Daigle concluded that sufficient work was ultimately done and paid for, along with the $1.7 million purchase price of the building, to certify the maximum amount of the cap at the time he completed his review.

the financial statement that accusations had been made, but that those accusations regarding allowable costs were disputed by management. At trial, Michael Daigle testified that, based on the most recent cost report he saw, his "best estimate of this number right now is more like $4.2 million in qualifying expenditures and tax credits of about $1.6 million" or "around $1.6 to $1.7 million in tax credits." Daigle Tr. 131-32. Thus, Mr. Daigle agreed that, assuming the project had in effect an audited cost report, the project had been issued less in tax credits than the project ultimately had earned.

Meanwhile, the post-production film studio at 807 Esplanade Avenue was completed in June 2012 and it is an up-and-running facility serving the film industry.

E. Criminal Charges and Trial

In a second superseding indictment, the government charged Peter and Susan Hoffman and Michael Arata with participating in a tax credit fraud scheme; each was charged with wire fraud, mail fraud, conspiracy, aiding and abetting, and, Mr. Arata alone was also charged with making false statements to federal agents. These charges stemmed from the film infrastructure tax credit project in which the defendants through a company called Seven Arts applied for and received film infrastructure tax credits[16] as part of their participation in what the trial revealed to be a murky (and

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[16] On June 19, 2009, the State paid out $1,132,480.80 in tax credits based on Seven Arts' February 26, 2009 application; this application included $1,027,090 for equipment from Departure

haphazardly-administered) State infrastructure tax credit regime. Ultimately, the film infrastructure project, a dilapidated building at 807 Esplanade Avenue in New Orleans, was transformed into a post-production film studio.

At the conclusion of an 11-day jury trial, Peter Hoffman was convicted on all 21 charges against him: conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371 (Count 1); wire fraud, in violation of 18 U.S.C. § 1343 (Counts 2 through 20); and mail fraud, in violation of 18 U.S.C. § 1341 (Count 21). Michael Arata was convicted of a total of 13 charges: conspiracy to commit mail and wire fraud (Count 1); seven substantive wire fraud counts (Counts 2, 3, 4, 5, 6, 7 and 13); mail fraud (Count 21); and false statements, in violation of 18 U.S.C. § 1001 (Counts 22, 23, 24, and 25). Michael Arata was acquitted of 12 wire fraud charges in Counts 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20. Finally, Susan Hoffman was convicted of conspiracy (Count 1), wire fraud (Count 11), and mail fraud (Count 21), but she was acquitted of 14 wire fraud charges in Counts 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, and 20. Each of the defendants now challenge the guilty verdicts on the ground that the evidence was insufficient to convict; in the alternative,

Studios and $1,749,257 for payments for construction to Leo Duvernay. That application represented that Seven Arts had over $4,500,000 in expenditures by the December 31, 2008 deadline. The email transmitting the first audit to the State represented: "As you can see, the project has exceeded the 50% requirement for spending, and has surpassed the 25% requirement related to 'film production infrastructure' expenditures."

each defendant urges the Court to grant a new trial due to prosecutorial misconduct or because the evidence preponderates heavily against the guilty verdicts.

I.

A.

Rule 29 of the Federal Rules of Criminal Procedure governs motions for judgment of acquittal. Such motions "challenge the sufficiency of the evidence to convict." United States v. Hope, 487 F.3d 224, 227 (5th Cir. 2007)(quoting United States v. Lucio, 428 F.3d 519, 522 (5th Cir. 2005)). Rule 29 obliges the Court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction" either on its own, or on the defendant's motion at the close of the government's evidence; the Court may reserve decision on the defendant's motion after the jury returns a verdict. Fed. R. Crim. P. 29(a), (b). After the jury verdict, a defendant may move for, or renew, a motion for judgment of acquittal. Fed. R. Crim. P. 29(c). If the Court enters a judgment of acquittal, the Court "must also conditionally determine whether any motion for new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1).[17]

[17] If a judgment of acquittal is entered, the Court applies Rule 33's more expansive "interest of justice" standard -- summarized infra -- in conditionally determining whether a new trial should be granted.

Rule 29 relief actualizes the Due Process Clause of the Fourteenth Amendment, which forbids conviction "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.'" See Jackson v. Virginia, 443 U.S. 307, 315 (1979)(citation omitted); see also In re Winship, 397 U.S. 358, 363 (1970)("The [reasonable doubt] standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"). Jackson v. Virginia fashioned the standard applicable to a defendant's challenge to the sufficiency of the evidence:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

443 U.S. 307, 318-19 and 319 n.13 (1979)(noting that "this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilty beyond a reasonable doubt'"; importantly, this "standard . . . does not permit a court to make its own subjective determination of guilt or innocence"; this "criterion . . . impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law.")(citation omitted, emphasis in original); see also United States v. Vargas-Ocampo, 747 F.3d 299, 301 (5th Cir.

2014)(*en banc*)(citing Jackson, 443 U.S. at 319);[18] see also United States v. Uvalle-Patricio, 478 F.3d 699, 701 (5th Cir. 2007)("the evidence presented must allow the jury 'to find every element of the offense beyond a reasonable doubt.'")(citation omitted). The Court determines "only whether the jury made a rational decision, not whether its verdict was correct on the issue of guilt or innocence." See United States v. Dean, 59 F.3d 1479, 1484 (5th Cir. 1995)(citation omitted); see also United States v. Isgar, 739 F.3d 829, 835 (5th Cir. 2014)(citation omitted). In assessing rationality, the Court considers all evidence, all reasonable inferences drawn therefrom, and all credibility determinations in the light

[18] In Vargas-Ocampo, the Fifth Circuit abandoned as "ambiguous" the equipoise rule in favor of Jackson's "deferential" and "straightforward" rule. Id. at 301-02. The equipoise rule stated that the Court "must reverse a conviction if the evidence construed in favor of the verdict 'gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged.'" Id. (citing United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir. 1995)(citations omitted)). In abandoning the equipoise formulation, the Fifth Circuit underscored that:

> [W]e do not render the Jackson standard toothless. On the contrary, courts remain empowered to consider, for instance, whether the inferences drawn by a jury were rational, as opposed to being speculative or insupportable, and whether the evidence is sufficient to establish every element of the crime.

Id. at 302 (citation omitted). That the equipoise formula was abandoned is of some consequence in this case, where the evidence on the defendants' intent as to certain fraud charges gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence.

most favorable to the prosecution. United States v. Ramos-Cardenas, 524 F.3d 600, 605 (5th Cir. 2008); United States v. Loe, 262 F.3d 427, 432 (5th Cir. 2001)(The jury "retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses.").[19]

Notwithstanding this deferential, insulating standard, the Fifth Circuit instructs the Court to "consider the countervailing evidence as well as the evidence that supports the verdict" and credit "only 'reasonable inferences from the evidence[.]'" See United States v. Moreland, 665 F.3d 137, 149 (5th Cir. 2011) (The Court "cannot 'credit inferences within the realm of possibility when those inferences are unreasonable[.]'")(citations omitted); but see United States v. Mendoza, 522 F.3d 482, 488 (5th Cir. 2008)("The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence."). The Court also scrutinizes the verdict to ensure that it is not based "on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference." Moreland, 665 F.3d at 149 (quoting United States v. Rojas Alvarez, 451 F.3d 320, 333 (5th Cir. 2006)). Nevertheless, "[c]ircumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially

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[19] The same test applies whether the government's case depends on direct or circumstantial evidence. United States v. Thomas, 627 F.3d 146, 151 (5th Cir. 2010)(citation omitted).

when corroborated by moral coincidences, be sufficient to constitute conclusive proof." United States v. Vasquez, 677 F.3d 685, 692 (5th Cir. 2012)(citations, emphasis omitted). Simply put, although not so simply applied in a case like this, the "verdict must be upheld . . . if the fact finder was presented with sufficient evidence to support the verdict reached." Lucio, 428 F.3d at 522.

B.

Whether the evidence was sufficient to convict is assessed by reference to the substantive elements of the applicable criminal offenses. Moreland, 665 F.3d at 149 (citing Jackson, 443 U.S. at 324 n.16)). To place the defendants' sufficiency-of-the-evidence challenges in context, the Court here summarizes, but does not reproduce in full, the essential elements of each count of conviction as it did in its instructions to the jury.[20]

1. Conspiracy, 18 U.S.C. § 371

To find the defendants guilty of Count 1, conspiracy in violation of 18 U.S.C. § 371, the government had to prove the following beyond a reasonable doubt:

> *First*: that the defendant and at least one other person made an agreement to commit

[20] The Court does not now reproduce in their entirety the jury instructions, but, rather, merely references the essential elements. The Court assumes familiarity with the intricacies of the law as articulated in the complete jury instructions of record.

the crimes of mail fraud and wire fraud, as charged in the indictment;

Second: that the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him or her for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.[21]

2. Wire Fraud, 18 U.S.C. § 1343

Section 1343 makes it a crime for anyone to use interstate or foreign wire communications in carrying out a scheme to defraud. For [the jury] to find one or more of the defendants guilty of this crime, [the jury] must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: that a defendant knowingly devised or intended to devise any scheme to defraud,

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[21] The Court also instructed the jury on a conspirator's liability for substantive counts:

> A conspirator is responsible for offenses committed by another conspirator if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.
>
> Therefore, if you have first found a defendant guilty of the conspiracy charged in Count 1 and if you find beyond a reasonable doubt that during the time a defendant was a member of the conspiracy, other conspirators committed the offenses in Counts 2 through 21 in furtherance of and as a foreseeable consequence of that conspiracy, then you may find that defendant guilty of Counts 2 through 21, even though the defendant may not have participated in any of the acts which constitute the offenses described in Counts 2 through 21.

that is by submitting and causing to be submitted materially false, misleading and fraudulent information to the auditors or to the state of Louisiana for the purpose of obtaining film infrastructure tax credits relative to 807 Esplanade;

Second: that the scheme to defraud employed false material representations;

Third: that a defendant transmitted or caused to be transmitted by way of wire communications, in interstate or foreign commerce, any writing or picture for the purpose of executing such scheme; and

Fourth: that a defendant acted with a specific intent to defraud.

A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property.

A "specific intent to defraud" means a conscious, knowing intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A representation is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.[22]

3. Mail Fraud, 18 U.S.C. § 1341

Section 1341 makes it a crime for anyone to use the mails or any private or commercial interstate carrier in carrying out a scheme to defraud. For you to find one or more of the defendants guilty of this crime, you must be convinced beyond a reasonable doubt:

First: that a defendant knowingly devised or intended to devise a scheme to defraud, that is by submitting and causing to be submitted materially false, misleading and fraudulent information to the auditors or to

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[22] The jury instructions continued:

...

It is also not necessary that the government prove that the material transmitted by wire communications was itself false or fraudulent, or that the use of the interstate or foreign wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the interstate or foreign wire communications facilities was closely related to the scheme because a defendant either wired something or caused it to be wired in interstate or foreign commerce in an attempt to execute or carry out the scheme.

The alleged scheme need not actually succeed in defrauding anyone.

Each separate use of the interstate or foreign wire communications facilities in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

> the state of Louisiana for the purpose of obtaining film infrastructure tax credits relative to 807 Esplanade;
>
> *Second*: that the scheme to defraud employed false material representations;
>
> *Third*: that a defendant mailed something or caused something to be sent through a private or commercial interstate carrier for the purpose of executing such scheme or attempting so to do; and
>
> *Fourth*: that a defendant acted with a specific intent to defraud.

4. Aiding and Abetting, 18 U.S.C. § 2

Because Counts 2 through 21 charged the defendants with a violation of 18 U.S.C. § 2, the jury was also instructed on aiding and abetting:

> This provision makes it a crime for anyone to "aid and abet" the commission of an offense against the United States. Thus, in addition to being charged with actually committing the wire fraud and mail fraud violations in Counts 2 through 21, the defendants identified in those counts are also charged with aiding and abetting these violations.
>
> The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him

through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself or herself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated

> in its commission with the intent to violate the law.
>
> For you to find a defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First*: that some person committed the underlying offenses of wire or mail fraud charged in Counts 2 through 21;
>
> *Second*: that the defendant associated with the criminal venture;
>
> *Third*: that the defendant purposefully participated in the criminal venture; and
>
> *Fourth*: that the defendant sought by action to make that venture successful.

5. False Statements, 18 U.S.C. § 1001

Finally, the jury was instructed on the law to apply to the false statement charges against Michael Arata:

> In Counts 22 through 25 of the indictment, Michael Arata only is charged with making false statements to a special agent of the FBI. Title 18, United States Code, Section 1001, makes it a crime for anyone to knowingly and willfully make a false or fraudulent statement in any matter within the jurisdiction of the executive, legislative,

or judicial branch of the government of the United States.

For you to find Mr. Arata guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: that the defendant made a false statement to the FBI regarding a matter within its jurisdiction;

Second: that the defendant made the statement intentionally, knowing that it was false;

Third: that the statement was material; and

Fourth: that the defendant made the false statement for the purpose of misleading the FBI.

...

A statement is material if it has a natural tendency to influence, or is capable of influencing, a decision of the FBI.

It is not necessary to show that the FBI was in fact misled.

The word "willfully" means that the defendant committed the act voluntarily and purposely, and with knowledge that his conduct was, in a general sense, unlawful. That is, the defendant must have acted with a bad purpose to disobey or disregard the law.

II.

Each defendant moved for a judgment of acquittal at the close of the government's evidence, after the close of all the evidence,[23] and, now, after the judgment. In the alternative to the Rule 29 post-judgment acquittal motions, each defendant also moves for a new trial pursuant to Rule 33.[24] The Court first takes up the post-verdict motions for judgments of acquittal.

A. Interstate Commerce (Counts 2, 4, and 7)

Mr. Hoffman and Mr. Arata contend that the government failed to prove beyond a reasonable doubt that emails forming the basis of certain wire fraud convictions crossed state lines. To prove wire fraud, the government must prove: (1) a scheme or artifice to defraud; (2) material falsehoods; and (3) the use of interstate wires in furtherance of the scheme. United States v. Brooks, 681 F.3d 678, 700 (5th Cir. 2012). As to the interstate requirement, this Court instructed the jury, "If you conclude that the government has proven that emails sent or caused to be sent by the defendants crossed state lines during their transmissions, then you may also conclude that the defendants transmitted or caused

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[23] The Court reserved decision on the defendants' motions for judgment of acquittal advanced after the close of the government's evidence and, again, after the submission of all evidence.

[24] As previously noted, if the Court enters a judgment of acquittal, the Court "must also conditionally determine whether any motion for new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Civ. P. 29(d)(1). Rule 33 applies to the conditional new trial determination.

to be transmitted wire communications in interstate commerce even if the sender and receiver of the emails were in the same state."

Count 2. Count 2 of the second superseding indictment charges Mr. Arata and Mr. Hoffman with wire fraud for Mr. Arata's sending an email to Malcolm Dienes auditors Katie Kuchler Davis and Steve Turner that included a certification for $2,002,480 in construction costs. Both Mr. Arata and the auditors were located in the State of Louisiana; thus, absent evidence beyond a reasonable doubt that the email in question traveled an interstate path to reach its intrastate destination, this wire communication cannot support federal wire fraud convictions. In an attempt to show that Mr. Arata's email left the State, the government called a paralegal employed by Yahoo!, Mr. Arata's email carrier. Ms. Hoyt's unhelpful brief testimony on direct examination by the government is telling:

> Q: Good afternoon, Ms. Hoyt. My name is Dall Kammer. I would like just to ask you a couple questions. Who do you work for?
>
> A: Yahoo.
>
> Q: How long have you worked for Yahoo?
>
> A: 3 ½ years
>
> Q: What does Yahoo do?
>
> A: It's an Internet company that has products and services such as mail, messenger, search, and other kinds of products and services, like Flickr.

Q: Email?

A: Yes.

Q: Between 2008 and the present, did Yahoo have any email servers in the State of Louisiana?

A: No.

Q: One other question or two more questions. The domain name michaelarata.com, is that a Yahoo business address?

A: It's a domain that Yahoo has hosted.

Q: If somebody in Louisiana–if Yahoo does not have a server in the State of Louisiana during that time period we talked about, if there's a resident in Louisiana that sends an email–that's a Yahoo client, sends an email from their Yahoo account in Louisiana to somebody else in Louisiana, does that email have to go out of the state in order to be transmitted?

A: Yes.

Q: Can you explain why that is?

A: No, I can't explain it.

Q: Does it have to go through the server and back?

A: Yes. It's just that I'm a paralegal custodian of records. You are asking me some technical question that I can't provide.

> Q: Yes ma'am I understand. No further questions, Your Honor.

Hoyt Tr. 1-2. On cross examination, Hoyt repeatedly stated that she did not know whether an email sent from a Yahoo user in Louisiana to a non-Yahoo user in Louisiana would have to travel through an out-of-state server. Hoyt Tr. 3. She stated that she did not know whether heavy Internet traffic would divert an email from an interstate route. Hoyt Tr. 4. She stated that she did not understand dynamic routing or other technical features of Internet communications. Hoyt Tr. 6-7. The evidence the government put forth was plainly insufficient to support a finding that the email traveled interstate.[25]

The single question from the jury during deliberations concerned the interstate commerce requirement. They wrote to the Court, "Have they every [sic] had a [sic] internet server in Louisiana? Like Yahoo[?] If so what year?" The Court responded, "All the evidence that was admitted during trial is now before you for your consideration. Your verdict must

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[25] But see United States v. Siembida, 604 F. Supp. 2d 589, 596-97 (S.D.N.Y. 2008) *aff'd sub nom*. United States v. Price, 374 F. App'x 189 (2d Cir. 2010) (finding sufficient evidence that an email to and from persons in New York passed in interstate commerce where it was stipulated that a Time Warner Cable engineer who was familiar with the email system would testify that: (i) the servers were located in Pennsylvania; (ii) any email sent via the defendant's email address would have been routed through Pennsylvania; and (iii) the engineer examined an email sent by the defendant four days after the email at issue and concluded that the defendant had configured his email system to route through the Pennsylvania servers).

be based solely and only on the evidence and my instructions on the law, and nothing more. Thank you." The jury, seemingly unsure whether any email necessarily had to leave the State, nonetheless found that the government offered evidence that proved beyond a reasonable doubt that the email from Mr. Arata in Louisiana to auditors in Louisiana crossed state lines. The guilty verdicts on Count 2 cannot stand.

The government, in response to a challenge to its evidence, submits that the defendants knew Ms. Hoyt would be testifying on behalf of Yahoo, knew that she did not have technical expertise, and yet failed to offer a countervailing expert who could show that the email traveled through a server in Louisiana. This incendiary and petulant suggestion as to how the defendants could have strengthened their case fundamentally perverts the American criminal justice system and would destroy the very foundation of constitutional due process. This Court reminded the jury throughout the trial, and the government is reminded now, that the defense has no burden to disprove guilt; the burden rests entirely with the government to prove each element of each offense beyond a reasonable doubt. That the government resorts to an attempt to shift the burden of proof to the defense further underscores the insufficiency of their evidence as to Count 2. A judgment of acquittal must be entered.

<u>Counts 4 and 7</u>. Mr. Hoffman and Mr. Arata submit that Counts 4 and 7 fail to satisfy the interstate commerce requirement as well because they are emails from Mr. Arata in Louisiana to Stelly (and

Kuchler in Count 7) in Louisiana, and, out-of-state, Mr. Hoffman is merely copied on the emails. The parties stipulated at trial that the servers for @7artspictures.com, Mr. Hoffman's email domain, were located in California and the United Kingdom at all times. The only evidence that the government offered to support its charge that these emails sending materials to the State of Louisiana left the State was thus: (i) the testimony of Ms. Hoyt that emails from and to intrastate persons may leave the State; and (ii) the stipulation that the Seven Arts servers were located out of state. The jury was presented with no evidence as to the locations of the State's and Malcolm Dienes's servers and with no evidence as to how an email to two different email addresses on two different domains travels. Does the email in its entirety travel to an out-of-state server to reach its intrastate and interstate destinations? Or does the communication split to take two separate paths: one intrastate to Stelly (and Kuchler) in Louisiana and another interstate to Peter Hoffman in California? Unfortunately, the law has not kept up with technology, and the Court has before it no instructive case literature on the subject at hand. The Court, much like the jury, is left only to guess whether the transmissions to Stelly and Kuchler left the State of Louisiana on their way to them. To find that they did with the information available would require not just impermissibly "piling inference upon inference," but fabricating pivotal factual conclusions from whole cloth. Unbridled conjecture cannot support guilty verdicts.

The government, in an effort to save these counts from their jurisdictional defects, contends that Mr. Arata's communication to Mr. Hoffman was in and of itself in furtherance of the scheme to defraud. But in Count 4, Mr. Arata and Mr. Hoffman are charged with sending to the State the first application for tax credits and the supporting documents. The submission includes the Malcolm Dienes report and a letter from Mr. Hoffman himself. In Count 7, they are charged with sending to the State invoices and vendor payment certifications for the $2 million in construction and $1 million in film equipment. This Court cannot fathom how sending to Mr. Hoffman documents that he already had in his possession (and that he had helped to prepare) could somehow further the scheme, and no such evidence was presented at trial. See United States v. Evans, 148 F.3d 477, 483 (5th Cir. 1998)(distinguishing communications that were "for the purpose of executing the scheme" from those that were "entirely incidental to the scheme"). The Court must enter judgments of acquittal on Counts 4 and 7.

B. In Furtherance of Scheme to Defraud? (Wire Fraud Count 3)

Count 3. In Count 3, Mr. Hoffman and Mr. Arata are charged with wire fraud for an email on February 25, 2009, from Mr. Arata to Mr. Hoffman, attaching the General Ledger of Seven Arts Pictures Louisiana, LLC, a document that Mr. Hoffman already had (and undoubtedly helped to prepare as it is SAPLA's General Ledger). Mr. Arata writes, "Peter, This is what was sent to them [Malcolm Dienes]. We should go through this carefully and make sure they are capturing all of the expenses." In an email several weeks earlier, Mr. Arata had indeed sent the same General Ledger to Kuchler and copied Mr. Hoffman. See Gov't Ex. 88. There is thus no doubt that Mr. Hoffman already had the General Ledger before this February 25, 2009, email and that he already knew that it had been sent to the Malcolm Dienes firm. By the time of the February 25 email, the audit was complete, and the first film infrastructure tax credit application was submitted to the State the following day. The government offered no evidence as to how an email from Mr. Arata to Mr. Hoffman sending for his review a document he already had was sent for the purpose of furthering the scheme to defraud. In opposition to the motions for judgment of acquittal, the government offers the conclusory statement that "[t]his wiring was for the purpose of executing the scheme in that Arata provided Hoffman a copy of the Seven Arts general ledger that Arata had given Davis," adding that the General Ledger contained the Departure and Duvernay payments that form the basis of several wire fraud counts. But Mr. Hoffman already had the ledger and was no doubt familiar with its purpose and thus sending it to him again in no way sought to further the scheme. No rational juror could have found that there was sufficient evidence to support guilty verdicts on Count 3.

C. Legal Fees (Wire Fraud Counts 5 and 13; False Statement Counts 22 and 23)

It is clear from the evidence at trial that Mr. Arata, an attorney, spent many hours working on the 807 Esplanade project. Likewise, Mr. Hoffman, a tax attorney, spent many hours on the project. Mr. Hoffman's inclusion of legal fees for this work resulted in two guilty verdicts for himself and four guilty verdicts for Mr. Arata: (i) in Count 5, Mr. Arata and Mr. Hoffman are found guilty of wire fraud for Mr. Arata's sending to Kuchler and Mr. Hoffman, copying Jerry Daigle, an amended SAFELA Operating Agreement that was allegedly sent to justify the inclusion of fabricated legal fees; (ii) in Count 13, Mr. Arata and Mr. Hoffman are found guilty of wire fraud for an email sent by Seven Arts employee Marcia Matthew to Kuchler, copying Mr. Hoffman, in which she attaches invoices for legal work provided by Mr. Hoffman and Mr. Arata; (iii) in Count 23, Mr. Arata is found guilty of giving a false statement to the FBI when he said that he "was not aware" that the legal fees were submitted to the State in the 2010 tax credit application; and (iv) in Count 22, Mr. Arata is found guilty of giving a false statement to the FBI when he said that he "terminated his relationship with defendant Peter Hoffman in or about July 2009" in large part because of the subsequent legal fees communications.

<u>Counts 5 and 13</u>. On December 21, 2009, Marcia Matthew sent Kuchler an email with several attachments, including invoices for legal work performed by Mr. Hoffman and Mr. Arata.[26] This email is the

[26] Also attached to this email is a Seven Arts Filmed Entertainment Louisiana LLC Limited Liability Operating Agreement, a Loan and Security Agreement between New Moon Pictures, LLC (as lender) Seven Arts Pictures Louisiana LLC (as debtor), and as Exhibit A to the Loan and Security Agreement a spreadsheet

subject of Count 13. An invoice dated November 25, 2008 stated that Mr. Arata worked 425 hours and Mr. Hoffman worked 177.8 hours; a second dated April 20, 2009 stated that Mr. Arata worked 75.5 hours and Mr. Hoffman worked 34.97 hours; and a third dated June 30, 2009 stated that Mr. Arata worked 240 hours and Mr. Hoffman worked 212.8 hours totaling, among the three, just over $350,000: 740.5 hours at a rate of $275 per hour, or $203,637.50, for Mr. Arata; and 425.57 hours at a rate of $350 per hour, or $148,949.50, for Mr. Hoffman.[27] The invoices were from SAFELA billing SAPLA. That same day, December 21, Stephanie Dillon, who worked at Seven Arts Pictures in Los Angeles, emailed to Mr. Arata an invoice for 807 Esplanade legal fees. Arata Ex. 121. Six minutes after receiving the invoice, Mr. Arata forwarded it to Jerry Daigle and wrote, "He wants to submit this for tax credits. Ha!" Arata Ex. 121. Daigle joked back, "It's a nice round number ... like all legal fees!" Arata Ex. 123. Mr. Arata responded, "And since I was not his lawyer for the deal, it makes it even better. What he could submit and what is actual are the bills he got from Guy Smith, even the Jones Walker bills. But instead, he claims to he [sic] a Louisiana lawyer and puts me down as receiving $150K in fees! Love it. Is there any way that I let

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entitled SAFE LOUISIANA Interest calculation based on actual draws.

[27] Count 23 charging Mr. Arata for giving a false statement to the FBI about the legal fees states the relevant figure as $350,000. Agent Blythe testified that he was confused about the dollar amount.

this go through?" Daigle suggested, "Maybe you should respond with the suggestion of including Guy Smith and Jones Walker rather than you?" And finally, Mr. Arata wrote, "Good call!" Arata Ex. 123.

In the course of auditing these invoices, Kuchler emailed Mr. Hoffman and Ms. Matthew on December 28, 2009, seeking "third party verification" and asked whether Mr. Hoffman and Mr. Arata were paid the hours billed. Mr. Hoffman answered that "[t]he company was paid, not us. We both have equity in the company." Gov't Ex. 123. Kuchler then reached out to Mr. Arata to corroborate that Mr. Arata worked the hours reflected on the invoices; she emailed Mr. Arata a copy of the invoices on December 28, 2010, asking whether he "approve[s] the hours on those invoices for Seven Arts?" In response, Mr. Arata jokes about how the invoices contain a city called New Orleans, California. Gov't. Ex. 121.

Kuchler testified that she called Mr. Arata at some point, and he told her that he did provide many more than 740.5 hours of legal work on the 807 Esplanade project, but that he was never paid for that work. Her billing entries confirm that on January 6, she "met with Michael to go over attorney fees." Arata Ex. 1. Kuchler then wrote to Mr. Hoffman the next day on January 7, 2010: "Michael stated that he did not receive the money for which you are billing a company he has no interest in, so I am taking out his hours and fees of $203,637.50."[28] Gov't Ex. 135. Mr. Hoffman responds to her email:

> Michael did not receive this money because he is an equity owner as I thought he proved to you. He acknowledges that the value for his services is the increase in value of his equity in the project, which is what he told me he told you. He will confirm that and this also can be included in the rep letter. Please reconsider.

Kuchler testified that *Mr. Hoffman* told her that cash was paid to SAFELA for the fees. She stated at trial, "So the cash was paid to a related entity that first Michael said he didn't have an equity interest in and then I got a document that showed he did have an equity interest in, and he confirmed that he did have an equity interest in that company." Kuchler Tr. 62.

On January 8, 2010, Mr. Hoffman, in response to Kuchler's statement that she would be removing the $203,637.50 in legal fees paid to Mr. Arata, wrote, "Michael will be here momentarily. He told me he had sent you a note as well as a copy of the SAFELA

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[28] Through its witnesses and evidence, the government offered two alternative theories as to how an alleged scheme to defraud regarding the legal fees was accomplished. Kuchler gave two versions of how Mr. Arata was supposedly paid for his work: either cash was paid to SAFELA, and Mr. Arata had an interest in that company, and thus it was as if he himself had been paid; or, no cash was paid to anyone, and Mr. Arata was granted an interest in SAFELA in exchange for the work he had done. The government presented no evidence as to the payment scheme.

operating agreement reflecting Voodoo's interest."[29] Gov't Ex. 137. Kuchler responded:

> Michael did not send me a note. He send [sic] me the operating agreement for the company he does have interest in, not in the company that was invoiced. I told you what he said. He does NOT agree with the invoices produced by Marcia from the company that he stated he has no equity in.

Mr. Hoffman replied,

> Michael told me the exact opposite yesterday. We will call and write to you together to eliminate the confusion caused by him. We had four conversations yesterday, confirmed with Jerry Daigle and made me revise the SAFELA operating agreement twice to their benefit, just so you understand my dizziness.

Kuchler responds, "I understand your dizziness all right! I don't understand why he would tell me one thing and you another. I did not receive those docs. Once, [sic] I get, that is fine. We will include the legal fees." The conversation then shifts to other topics.

Five days later on January 12, 2010, Kuchler had a conversation with Mr. Arata, his Voodoo Studios business partner Jerry Daigle, and Mr. Hoffman "concerning SAFELA's amended operating agreement and members of the company." Arata Ex.

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[29] To be clear, there are two email chains between Kuchler and Mr. Hoffman that begin with her saying she will exclude the legal fees because Mr. Arata said he did not receive payment.

1. Mr. Arata then emails her that amended operating agreement, which is amended to add Voodoo's ownership interest, writing, "As we mentioned on the phone, attached is the executed SAFELA Operating Agreement evidencing Voodoo's 40% interest in this entity. We hope this helps you and Peter wrap up the SAPL audit." This email is the subject of Count 5. Jerry Daigle, Mr. Arata's partner in Voodoo, was copied on this email. He testified at trial as to why Kuchler was sent the SAFELA operating agreement: Voodoo Studios already had a 40% interest in SAPLA, but SAFELA was to be the entity that would operate the facility, so "for Voodoo to get the same economics it had been promised by Seven Arts, it needed to have the same ownership interest in SAFELA as it had in SAPLA." Daigle Tr. 30. He testified that that was the subject matter of the January 12, 2010, phone call with Kuchler; legal fees were never mentioned. Mr. Daigle explained that "Ms. Kuchler was trying to determine who were all the related parties in the Seven Arts Pictures Louisiana transaction. And she just wanted to know the ownership of the companies and the structure." Daigle Tr. 16. Notably, it is undisputed that the auditor needs to be advised as to related parties and must include, in the Notes to the Cost Report, a description of all related party transactions.

The government contends that, contrary to Jerry Daigle's testimony, which is supported by other record evidence,[30] Mr. Arata sent the SAFELA operating agreement to support Mr. Hoffman's claim that

[30] Jerry Daigle's explanation as to why Kuchler was sent the amended SAFELA operating agreement is corroborated by other evidence at trial. Mr. Arata transmitted operating agreements to auditors, and was consulted in his capacity as a member of Voodoo, which had an ownership interest in the project, on more than one occasion. For example, during this same time period on December 31, 2009, Mr. Arata, by email, sent the SAPLA operating agreement to Kuchler, copying Jerry Daigle, stating:

> I am attaching the following:
>
> Copy of the Operating Agreement of Seven Arts Pictures Louisiana showing the ownership of Voodoo Studios, LLC as 40% of that entity.
>
> Certificate of Ownership setting forth evidence of the various ownership interests in Voodoo Studios, LLC.

Arata Ex. 164. Mr. Daigle testified that he was not aware that transmission of this operating agreement had anything to do with legal fees; rather, it was Daigle's understanding that Kuchler needed both the SAPLA operating agreement as well as the amended SAFELA operating agreement "[s]o that she could have that information for related parties." Daigle Tr. 20. Also around this same time, on January 7, 2010, Mr. Hoffman sent Mr. Arata (in his capacity as member of Voodoo) a request that he "countersign for Voodoo and send this on to Katie Kuchler" apparently relating to work other attorneys were performing in order to structure the project to qualify for a different type of tax credits, historical tax credits. Mr. Arata replied that he would sign a corrected version once his suggested changes are made to the circulated agreement and once Mr. Hoffman explains the structure of the proposed transaction. Mr. Hoffman responded to Mr. Arata:

> Linda is sending it back now. SAPLA will enter into a lease agreement with a new LLC call 807 Esplanade

he was paid in some way for his legal work. In support, the government relies on two pieces of evidence: Kuchler's testimony that she believes that is why she received the operating agreement, and an email from Mr. Hoffman to Mr. Arata on January 12, 2010, in which he says, "I just talked to Jerry who said everything is ok. Please send the email to Katie ASAP so that she doesn't get any more suspicious than she already is. Calhouns?" Gov't Ex. 143. On direct examination, Kuchler was asked what the "suspicious" email had to do with. She answered, "I can only **speculate** the legal fees." Kuchler Tr. 74 (emphasis added). Kuchler then explained her understanding that when Mr. Arata sent her the amended SAFELA operating agreement, "[t]his corroborated that he got an equity interest in exchange for the legal fees, a cash equivalent, which was the equity interest." Kuchler Tr. 75.

But lacking from Kuchler's testimony and the evidence is any mention that it was *Mr. Arata's* belief or intention, or that *Mr. Arata* told her that the change in equity interest corroborated, or had any

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> Avenue MT LLC in which the tax credit investors will invest. That LLC will enter into an operating lease with SAFE LA for the operation of the facility. Nixon Peabody has drafted the first lease and Claire Durio is drafting the operating lease (which may not yet be circulated). I'll have Claire send copies of both to you.

Mr. Arata then emailed Mr. Hoffman's response to Jerry Daigle, stating "I need your help with this. Over my head." To which Jerry Daigle responded: "Yes, but the good thing is that these are real parties who are drafting real documents for the purpose of the Historic Tax Credits." Arata Ex. 276.

connection with, purported legal fees. Her speculation based on inferences she drew from statements made by Mr. Hoffman does not trump the absence of evidence implicating Mr. Arata. The government suggests that sufficient evidence supports a finding that Mr. Arata "relented" on the legal fees submission, but that suggestion is based entirely on prosecutorial advocacy anchored only by Kuchler's speculation.

Moreover, and critical to sustaining Mr. Hoffman's conviction on the legal fees expenditure, the government produces no evidence that submission of legal fees was in fact improper. It offers only the statement by Mr. Arata that he did not believe the fees should have been submitted,[31] though he did

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[31] Jerry Daigle testified that he "agreed with [Mr. Arata's] suggestion that [Seven Arts] would be better off submitting third-party legal fees rather than related-party legal fees." Daigle Tr. 29. In other words, in the opinion of some, although perhaps legal fees of principals who are also attorneys were not the purest legal fees expenditure to submit, legal fees were proper expenditures if the hours were worked and the market rate was charged. No witness testified that such legal fees did not qualify.

Although the government would have the Court uphold Mr. Arata's conviction on the legal fees expenditures, in part on the ground that Mr. Arata stated his belief that his and Mr. Hoffman's fees should not have been submitted, the government acknowledges as it must that Mr. Arata had already contemplated legal fees on the 807 Esplanade project being submitted for tax credits. Gov't Ex. 198 (Arata discussing how law firm should be paid "to properly document expenses for tax credit purposes."). And the government concedes that Arata and Hoffman both had law degrees "which made claiming their own legal work an obvious expenditure to submit."

confirm that he worked the hours, and there was no evidence disputing that the hours were not worked. In fact, Kuchler ended up including the legal fees because she confirmed that the hours were worked and the rate charged was in accordance with market standards. Another auditor witness, Mr. Craig Silva, also testified that legal services qualify for tax 31 credits. Silva Tr. 29. Given that the only support for Count 5 is speculation and inferences, the convictions on that count cannot stand.

Likewise, considering in isolation the legal fees expenditure of Count 13, the Court finds insufficient evidence supporting guilty verdicts. As to Mr. Arata, the evidence presented at trial failed to even suggest that he was aware that legal fee invoices, which were transmitted to Kuchler on December 21, 2009 in Count 13, had been created, until they were sent to him after they had been sent to Kuchler. Up to and including post-trial briefing, Mr. Arata maintains that there is insufficient evidence proving the government's theory that he ultimately acquiesced in providing support for legal fees. The Court agrees.

Additionally, viewing the evidence in the light most favorable to the government, there is insufficient evidence to support a wire fraud conviction of Mr. Hoffman for submission of legal fee invoices. There was no dispute in the testimony at trial that legal services performed for the project could qualify as expenditures under the infrastructure tax credit program. Witnesses like Kuchler and Silva agreed that, so long as the hours were worked and the market rate was applied, attorney expenses qualified as an expenditure. Although the government insists that the evidence suggested that Kuchler had reason to be suspicious of accepting the legal fees invoices in support of tax credits, that falls short of proving the elements of wire fraud beyond a reasonable doubt, as opposed to repeated resort to speculation and inference. The Court finds that there was insufficient <u>evidence</u> that submission of legal fees as expenditures constituted a scheme to defraud, involved false, material misrepresentations, or that the defendants had the specific intent to defraud; accordingly, a judgment of acquittal is warranted.

Mr. Hoffman is not entitled to a judgment of acquittal as to Count 13, however. This is so because, regardless of the legal fees expenditure, the Court finds that a rational juror could have concluded that Mr. Hoffman committed wire fraud when he caused to be submitted by Seven Arts employee, Marcia Matthew, the $10 million New Moon loan document and accompanying spreadsheet detailing the "interest calculation based on actual draws"; other documents sent by Matthew on December 21, 2009 in Government Exhibit 13 (Count 13).[32] That is, viewing the evidence in the light most favorable to the government, the evidence supports a finding that Mr. Hoffman created or caused to be created a document styled as a $10 million loan from Susan Hoffman's company, New Moon; Mr. Hoffman signed the document and purportedly signed for Mrs. Hoffman; Mr. Hoffman then created draws on the $10 million

[32] This inter-company loan agreement is also addressed in Count 19.

loan to claim interest expenditures. Gov't Ex. 145. A rational juror could have concluded based on the evidence at trial that the interest expenditures were circular transactions in which no real draws were made and that no $10 million loan ever existed. Accordingly, Mr. Hoffman has not carried his burden to show that a judgment of acquittal is warranted as to him on Count 13.

Even though Mr. Arata was found guilty of conspiracy, and the Court finds that sufficient evidence supported the guilty verdict on Count 1 (see the analysis addressing conspiracy at the conclusion of Part II), Mr. Arata is nevertheless entitled to a judgment of acquittal on Count 13.[33] This is so because the evidence at trial shows that, in August 2009, he withdrew from representing Mr. Hoffman and from being Seven Arts' point person on the 807 Esplanade infrastructure project. He consulted with an ethics attorney and communicated his withdrawal to everyone involved in the infrastructure project. The loan and other documents sent by Matthew on December 21, 2009 occurred months after Mr. Arata withdrew from the conspiracy. Thus, he is not liable for the post-withdrawal acts of Peter Hoffman.

Accordingly, Mr. Arata is entitled to a judgment of acquittal on Counts 5 and 13, and Mr. Hoffman is entitled to a judgment of acquittal on Count 5 but not Count 13.

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[33] The issue of conspiracy, withdrawal, and liability for post-withdrawal acts of coconspirators is more completely addressed at the conclusion of Part II.

Count 23. Does the evidence support a guilty verdict on Count 23, charging Mr. Arata with giving a false statement to the FBI when he said that he "was not aware" that his legal fees were submitted to the State in the 2010 tax credit application? The evidence supporting this count is the same that underlies Counts 5 and 13 -- namely, Kuchler's speculation as to Mr. Arata's understanding of the inclusion of the fees...and nothing more. On cross examination, FBI Agent Blythe gave the following testimony:

> Q: [Y]ou don't have any evidence that Michael ever saw that cost report before it was submitted to the state, do you?
>
> A: No. I have that he was discussing these legal fees with the auditor who was working on the audit to submit this cost report to the state.
>
> Q: But you don't have any evidence that he saw the cost report, correct?
>
> A: I can't put it in his hand.

Blythe Tr. 57-58.

Thus, the evidence that the government has is Mr. Arata telling Kuchler that he did not get paid for legal services. In fact, this Court noted in a prior Order and Reasons, in which it found that the government failed to prove the other false statement counts even by a preponderance of the evidence, that whether "Mr. Arata saw the tax credit application . . . will certainly be a factor for the government to contend with when it is tasked with proving guilt beyond a reasonable doubt." Order and Reasons, United States of America v. Michael P. Arata, No. 14-022, p. 26 n.16 (Mar. 6, 2015). Not only did the government fail to prove at trial that Mr. Arata saw the application, the case agent, Special Agent Bobby Blythe, testified under oath that he had no evidence at all that Mr. Arata did in fact see the application. The jury seemed to agree; they acquitted Mr. Arata of Count 17, which charged him with wire fraud for submitting that same 2010 tax credit application. That the jury also found that Mr. Arata knew at his proffer session with the FBI that these fees had been submitted is simply not rational and is not supported, at all, by the evidence. Moreover, given the absence of evidence as to the impropriety of the legal fees themselves, whether Mr. Arata knew that they had been submitted to the State may well be immaterial; at the least, their materiality was never proven -- or even mentioned -- at trial.

Count 22. The legal fees issue plays an integral role in Count 22 as well. The government charged Mr. Arata for giving a false statement when he said in his proffer session that he terminated his relationship with Mr. Hoffman in summer 2009.[34]

[34] To be precise, the government charged in Count 22:

MICHAEL ARATA stated that he terminated his relationship with defendant PETER HOFFMAN in or about July 2009, when in truth and in fact, as he then well knew, he had continued working with PETER HOFFMAN including reviewing and preparing information for the January 20, 2010 application for tax credits and other tax credit related business ventures.

Every trial witness who knew any details about Mr. Arata's participation with the 807 Esplanade project testified that Mr. Arata left the project at some point, and several were able to pinpoint summer 2009, even more specifically August of that year. Agent Blythe also confirmed that people who did not testify but were part of his investigation confirmed that Mr. Arata left the project in summer 2009. That Mr. Arata "was no longer involved in the day-to-day operations of that venture," as Agent Blythe testified, was not enough. He testified, "The one key issue that I've considered was this legal fees issue with the audit." Blythe Tr. 63, 28. That was it.

Nonetheless, the government tried to create a cloud of mischief surrounding the termination, showing: emails from Mr. Hoffman to Mr. Arata after summer 2009 (which, it turns out, remain unresponded to to this day), Gov't Exs. 428, 451; an email about old business, Gov't Ex. 449; an email from Mr. Hoffman in which Mr. Arata responds regarding the uneven treatment the State is doling out, Gov't Ex. 450. Agent Blythe testified that these emails were part of his determination that Mr. Arata lied to him about terminating his relationship with Mr. Hoffman.

The question of Mr. Arata's termination of his relationship with Mr. Hoffman is complicated by the fact that Mr. Arata was Mr. Hoffman's local attorney on several ongoing projects. Thus, as legal ethics professor Dane Ciolino testified, Mr. Arata was not able to turn his back completely on Mr. Hoffman. He could not wholly disassociate, ethically. There was no dispute in the evidence offered at trial that Mr. Arata had an ethical obligation to help Mr. Hoffman wrap up issues related to his representation and to communicate with him when necessary.

On cross-examination, defense counsel asked Agent Blythe whether he knew, based on the advice of Dane Ciolino, that Mr. Arata had obligations as a lawyer to provide information and respond to some requests from Mr. Hoffman and 807 Esplanade. Agent Blythe answered, "I understand he was given that advice. I mean, my understanding is he's a business partner to him. But beyond that, I'm not – I don't know what exactly his obligations would be as an attorney." Blythe Tr. 63. A few minutes later the agent testified, after being asked about Mr. Arata's obligation to maintain communication with Mr. Hoffman and not about Mr. Arata's reporting restrictions,

> I know he talked to an attorney about it to get their advice. I don't remember exactly what, you know, he was – I know he was supposed to report up the chain. He told me that, that he had to report up the chain, not out. But that – I don't – beyond that, I don't know what his attorney's advice was to him about dealing with Peter Hoffman.

Blythe Tr. 67. And therein lies the problem. Agent Blythe had no idea what ethical obligation Mr. Arata owed Mr. Hoffman as an attorney, and he did not find out before Mr. Arata was charged with making a false statement.

The government's incomprehension of the nuance surrounding Mr. Arata's termination with Mr.

Hoffman is only amplified by the fact that the government had in its hands at the January 2014 proffer session with Mr. Arata a termination letter that he wrote to Mr. Hoffman on August 6, 2009. Although Agent Blythe testified that he "didn't know" about the attorney/client relationship between Mr. Arata and Mr. Hoffman, the termination letter in Agent Blythe's possession very clearly pertains to legal representation: it is entitled "Termination of Representation," and it states in the opening paragraph, "I believe that it is appropriate for you to find new representation in Louisiana for your endeavors." Arata Ex. 113. The letter then lists six ongoing projects and their status. Regarding 807 Esplanade, he specifically writes,

> I will assist with the renovation and completion of 807 Esplanade as my time permits. However, I cannot in good faith retain any title with the company, as I do not have the time to dedicate to this matter properly. Therefore, I resign from any official capacity I have with Seven Arts Pictures Louisiana, LLC. Since I have an ownership interest in the property by virtue of my membership in Voodoo Studios, LLC, I will continue to assist maximizing the value of the property and the project.

Despite the clear contours of the termination of representation, the government quite oddly points to unanswered emails, responses to questions about old or ongoing projects (including other tax credit projects), and Mr. Arata's statement to Kuchler that he was not paid for legal services in support of its charge that he lied to Agent Blythe when he stated that he terminated his relationship with Mr. Hoffman in summer 2009. The government's black-and-white understanding of "termination", which is utterly divorced from the context of evidence, has no place in the factual complexion of this case.[35] More troubling than

[35] The government argues in its post-verdict briefing that "the evidence at trial showed that after Arata and Hoffman had a falling out in August of 2009, they reconciled." The government offers its Exhibit 446 in support of this reconciliation. Government Exhibit 446 is an email string starting on November 11, 2009 and continuing through November 12, 2009 among, first, Jerry Daigle and Michael Arata, and then adding Peter Hoffman concerning the "debt schedule for the NOTD tax credit deal." NOTD, or Night of the Demons, was a film production deal unrelated to the 807 Esplanade project. NOTD was on Mr. Arata's "list of ongoing matters and their status" in his August 6, 2009 termination letter to Peter Hoffman.

By framing this email exchange as a "reconciliation," the government ostensibly concedes that Mr. Arata and Mr. Hoffman parted ways, a concession that there is no evidence to support government's false statement count that Mr. Arata lied about terminating the relationship. To participate in the government's exercise of semantics, if Mr. Arata lied about terminating his relationship with Mr. Hoffman, then, one wonders, how could there be a reconciliation? (A "reconciliation" that is not supported by evidence.) More than semantics is at stake, here. The government would do better to focus on professional advocacy rather than isolating from context (and evidence!) -- to the point of distortion -- statements made to it in a proffer session to achieve conviction. It is troubling that the government charges that Mr. Arata lied and in identifying the fact or manner of that "lie," the government charges "in truth and in fact" Mr. Arata had continued working with Mr. Hoffman. The evidence at trial showed that Mr. Arata did not lie to the FBI about the parameters of the termination of his representation of Mr. Hoffman. No rational juror could have found otherwise.

Mr. Arata's conviction of Count 22 not being supported by adequate evidence, there is no evidence supporting a conviction on a charge that he lied about terminating his relationship with Peter Hoffman; the evidence at trial (the same evidence the government relies on to suggest that Mr. Arata lied about terminating his relationship) showed that Mr. Arata 35 conducted himself within the parameters of the advice of ethics counsel and consistent with the August 6, 2009 termination letter. No rational juror could have concluded that the government proved beyond a reasonable doubt that Mr. Arata lied when he stated he terminated his relationship with Peter Hoffman in July 2009.

Thus, as to the legal fees used to support convictions on two counts as to both Mr. Hoffman and Mr. Arata (Counts 5 and 13) as well as two additional convictions for Mr. Arata (Counts 22 and 23), none is supported by sufficient evidence; no rational juror could have convicted Mr. Arata or Mr. Hoffman on these counts. However, because there was sufficient evidence to support a jury verdict against Mr. Hoffman on Count 13 due to the loan documents being transmitted, he is not entitled to acquittal on that count. Thus, the Court will enter judgments of acquittal for Mr. Arata on Counts 5, 13, 22, and 23 and as to Mr. Hoffman on Count 5.

D. Duvernay/Departure Expenditures, Circular Transactions (Wire Fraud Count 6 and False Statement Counts 24 and 25)

Count 6. The wire fraud of Count 6 focuses an April 7, 2009 email from Mark Halvorson of Seven

Arts to Chris Stelly in which Halvorson sends invoices for construction and film equipment. The invoices attached to the email are (a) a five-page invoice (invoice # SAE210100) dated October 2, 2008 directed to Seven Arts Filmed Entertainment Louisiana, LLC from Departure Studios NOLA, for film equipment listed on the invoice totaling $1,027,090.00; and (b) a three-page invoice (invoice # 2345) dated July 12, 2008 "billed to" Seven Arts Pictures Louisiana, LLC from Leo Duvernay, LLC, for construction expenses totaling $2,002,480.00.[36] Government Exhibit 7 is an email dated May 14, 2009 from Michael Arata to Chris Stelly, copying Ms. Kuchler and Mr. Hoffman in which Mr. Arata writes:

> Following are the items you requested for the SAPL project.
>
> 1. Independent verification we received from the contractor and equipment vendor for Malcolm Dienes. These set [sic] for the payments received and items paid for (a separate email will follow with the contractor). The equipment vendor is a Louisiana company (see attached), but they DID NOT charge tax on the items sold.

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[36] Government Exhibit 2 is an email from Mr. Arata to Kuchler attaching a payment confirmation signed by Leo Duvernay in which Duvernay "confirm[s] that the following invoice has been paid." The invoice listed is invoice # 2345, dated July 12, 2008 for the amount of $2,002,480.00.

> If this needs to be addressed, please let me know and I will have Seven Arts and Departure resolve this matter.

Attached to this May 14, 2009 email is a payment confirmation dated February 4, 2009 in which Departure Studios NOLA through Damon Martin signs to "confirm that the following invoice has been paid." The invoice referenced in the payment confirmation is the same five-page invoice (also included as an attachment to this email) attached to the email that is the subject of Count 6, invoice #SAE210100 for $1,027,090.00 in equipment; also attached to the email of Exhibit 7 is the same payment confirmation from Leo Duvernay that is included in Government Exhibit 2 and the same three-page Duvernay invoice numbered 2345 for $2,002,480.00.

Peter Hoffman and Michael Arata were convicted of the wire fraud charged in Count 6; Susan Hoffman was acquitted. Count 6 questions the propriety of the Leo Duvernay and Departure Studios expenditures.[37] Mr. Hoffman's and Mr. Arata's motions for judgment of acquittal focus on whether

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[37] Similarly, Count 2 involves the Duvernay payment confirmation and Count 7 involves both the Duvernay and Departure invoices and payment confirmations.

In addition to its argument that its Exhibit 6 email "helped induce Stelly to accept the grossly-inflated Duvernay expenditure and the fictitious Departure expenditure listed in the first cost report," in response to Mr. Hoffman's motion, the government submits that the evidence shows that, in Exhibit 6 Stelly was asking questions about the first audit, and Mr. Hoffman and Mr. Arata concealed information from him regarding the purchase price of the property, related parties, and the equipment.

there was sufficient evidence on the specific intent to defraud element.[38] Critical to determining whether the jury irrationally rendered guilty verdicts on these counts dealing with the Departure and Duvernay transactions necessarily mandates an understanding of the substance of these transactions, placed in context by the parties' contentions and the trial evidence.

The government's account is that the Departure Studio film equipment was a mere fiction and the construction payments to Duvernay were grossly inflated. According to the government, Mr. Arata's and Mr. Hoffman's scheme focused on presenting

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The Court need not reach the government's arguments on these other aspects of Mr. Hoffman's and Mr. Arata's purported concealment.

[38] Mr. Arata first submits that, because he is not copied on the email, there is no evidence that he caused that email to be transmitted, or that he even knew that it had been sent. However, if the invoices were part of a scheme to defraud, there was sufficient evidence for a rational juror to conclude that Mr. Arata is guilty of Count 6 because he "caused" the email to be sent: in government exhibit 422, Mr. Arata sent Mr. Hoffman an email suggesting that he provide the invoices to Stelly; and Mr. Arata forwarded that email to Halvorson. As for Mr. Hoffman, he likewise caused the email to be sent by his employee, Halvorson, and, indeed, Mr. Hoffman intended to attach the invoices by his email (an email which does copy Mr. Arata), but the attachments were not transmitted. (Mr. Hoffman wrote Stelly: "We have attached a detailed list of the items purchased [from Departure] as well as pictures of the equipment" and "Attached is the detail of each item of construction cost incurred by the Company prior to the completion of the audit."). Mr. Arata had previously sent the Duvernay confirmation to Kuchler on February 9, 2009; the wire that is the subject of Count 2.

$1,027,000 in fictitious film equipment purchases from Damon Martin of Departure Studios and by inflating construction spending to Leo Duvernay by approximately $1.5 million. This was accomplished by circling money, concealing the source, and presenting the auditors with confirmation that money was in fact spent to obtain equipment from a third-party vendor and to pay a contractor's invoice; the government presents its theory of the evidence in detail:

> In . . . October 2008, just days after opening the bank accounts for Martin and Duvernay, Arata took out a $400,000 loan through his business, LEAP Film Fund II, and placed it into Seven Arts Pictures Louisiana (SAPLA) bank account. The defendants then instructed in-house accountant Erik Smith and Regions Bank employee Melissa Oelking to bounce proceeds of this loan back and forth five times ($250,000 x 4 and $27,090 x 1) between the SAPLA account and defendant-controlled Martin account to make it appear as if Martin had been paid $1,027,090 for film equipment. The same day, with the same loaned cash, the defendants conducted a similar transaction with the Duvernay account to make it appear that Duvernay had been paid $1,499,257 for construction ($250,000 x 4 and $499,257 x 1). The very next day . . ., the money was immediately withdrawn to pay off Arata's loan. The net result: $2,526,347 in outgoing transfers with $0 in real expenditures.

> After the transactions were completed, the SAPLA bank statement showed these transactions as both "withdrawals" and "deposits" . . . . [T]o conceal this, the defendants altered the General Ledger of SAPLA to show that the "deposits" were capital contributions from parent company Seven Arts Pictures, Inc. By doing this, the defendants intended to trick the auditors and the State into believing that the parent company transferred money for equipment and construction into the SAPLA operating account that was then used to pay independent Louisiana third party vendors.

Then, the government submits, the defendants sent the auditors the SAPLA general ledger indicating that there were capital contributions, and represented that Martin and Duvernay were paid as independent third parties funded by those capital contributions. Mr. Hoffman and Mr. Arata sent the auditor invoices as well as vendor confirmations "to make it appear that Martin and Duvernay had been paid millions of dollars – a fact that both Martin and Duvernay testified at trial was false."

As indicative of Mr. Arata's and Mr. Hoffman's knowledge that these sorts of advance payments do not qualify for infrastructure expenditures under the State tax credit regime, the government points to its Exhibit 283. In it, on February 2, 2009, Mr. Arata writes Mr. Hoffman about a conversation he had with Chris Stelly after Stelly had toured the progress at 807 Esplanade:

I spoke with Chris. . . .

He informed me that the division has hired a "certified fraud accountant" who provides them an independent review of all applications. He suggested that they had problems with applications where payments were not "final payments", and then volunteered that if we had made advance payments to the contractor or equipment seller, to make sure that the payments were final payments, in his account, not escrow and that "the money is in his pocket and not controlled by you." This suggests that they have taken issue with payments to vendors for "advance payments."

He also elaborated on what the State considers a "multi-use facility and the "allowable" costs for a multi-use facility. . . . He claimed that the State has made a hard rule that any facility that is not "from the ground up" is a multi-use facility. Seems impossible to me. . . . I argued that our building is a shell and that all construction is, in fact, film specific. He agreed, but said the State's approach on this issue is not his doing and he was reflecting what the DOA and legal teams have stated.

As for costs, he again suggested that he would try to get us as many credits now for items that we have paid for and help us with the DOA on the "multi-use" issue.

> I think we need to order a public record request on a few infrastructure projects and see what the practice is.[39]

This email is emblematic of a troubling feature of this federal criminal case, the fact of an inconsistently managed State program where applicants are given piecemeal information and left with little guidance to determine for themselves what the State might accept as qualified expenditures; the evidence at trial showed that Mr. Arata reviewed past projects in an effort to learn what the State had previously accepted.

Mr. Arata and Mr. Hoffman submit that the government's theory of the case concerning the Duvernay and Departure transactions (that they submitted fake and inflated expenditures for construction costs and equipment, disguised by circular transactions that were hidden from the auditors in

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[39] The government cherry-picks only the portion of the email indicating that Mr. Arata and Mr. Hoffman were on notice that a State administrator said the State had "taken issue" with "advance payments," whereas Mr. Arata submits, as he and others testified at trial and as confirmed by the last sentence of Mr. Arata's email, that applicants did not just take as gospel oral statements or explanations from a state administrator as to what was a permissible expenditure, but, rather, looked to the evidence of past projects to determine what the State had actually accepted. Researching other projects was key precedent, stray statements by an administrator were not binding.

Indeed, the evidence confirmed that that is what he did. It was not disputed that Mr. Arata spent significant time and effort researching past projects and trying to instill clarity into a disorderly State program. One that was, to be polite, inconsistently administered.

order to defraud the State of a million dollars in tax credits) was not proven. Instead, Mr. Arata and Mr. Hoffman submit, the evidence at trial showed that the construction and equipment expenses were incurred and properly documented, the circular transactions were disclosed, and the tax credits were lawfully earned.

Mr. Arata's and Mr. Hoffman's narrative is supported by trial evidence including their own testimony as well as custom and practice evidence. Where the government argues that the defendants failed to disclose the Duvernay and Departure transactions, Mr. Arata points out that documents submitted to the auditors disclosed the transactions.[40] Regarding the Leo Duvernay construction

[40] For example, as to the Duvernay transaction, Mr. Arata testified on cross-examination:

> [I]f [Katie Kuchler] had read the documentation [provided], she would have seen in the loan document there was an escrow agreement. The loan document referred to a contractor's agreement. We gave her the contractor's agreement. The loan document also referred to the Capital One account where the money was. . . .
>
> My obligation was to provide her everything that I had for this transaction. I believe it was a valid transaction. . . .
>
> [W]hat we're doing here is essentially arguing over whether you believe it was a valid transaction or I believe it was a valid transaction. . . . And reasonable people can have a debate about whether this is a qualified expense or not. . . . And I believe in good faith that it qualified under the Louisiana tax credit program. So I gave her the documentation that I had. If she would have asked for one more single piece of paper, I would

expenditure, Mr. Arata and Mr. Hoffman submit that the construction costs included in the first audit report were a properly documented expenditure into an escrow account. Countering the government's presentation -- that Mr. Arata and Mr. Hoffman chose to present purported expenditures as cash purchases from unrelated vendors -¬the defendants point out that the evidence at trial showed that Seven Arts and Leo Duvernay had a binding contract for $2,002,480.00; that Advantage Capital had funded an escrow account with $2,000,000 that was to be used for construction; that all the line items Duvernay submitted were accurate; that before Duvernay was paid, he had to submit a draw signed by an architect and then he would be paid out of the Advantage Capital escrow account; and that pre-payment into an escrow account was an accepted form of expenditure for the Louisiana film tax credit program.[41] Mr. Arata and Mr. Hoffman

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> have given it to her. . . . I gave them the documentation, which was exactly what I had done on every other project.

Arata Tr. 93-95.

[41] Notably, Mr. Arata testified that he reviewed several projects that allowed pre-payment into an escrow account to qualify as tax credit expenditures. Arata Tr. 54, 92. Mr. House testified that an escrow account could count as an expenditure under the custom and practice. House Tr. 28. Mr. Arata further testified:

> [I]f you provide the bank documents [to the auditors]; and you provide the contract, which we did; and you provide the escrow agreement, which we did, there is really nothing else to look at. . . .

Arata Tr. 108.

submit that the government failed to prove that either of them had a specific intent to defraud the State of tax credits by submitting construction costs that were pre-paid into escrow, were disclosed to the State and the auditors, and were for work that was actually performed.[42]

Under the industry's custom and practice and Louisiana law, the defendants submit that Seven Arts earned tax credits by making the $2,000,000 escrow payment. In the course of reviewing public records on other infrastructure projects approved by the State, Mr. Arata relied on the Second Line Stages project, in which Louisiana Economic Development sent an initial certification letter, dated December 19, 2008, certifying the project and allowing it to proceed. In its initial certification letter, the State noted:

> The project must expend at least $16,000,000.00 prior to December 31, 2008. A

[42] The government notes that the funding source for the Duvernay transaction was presented as operating profits from Seven Arts Pictures, not the AdCap escrow account set up to fund construction. Likewise for the Departure transaction, the defendants identified Seven Arts Pictures' operational income as the funding source for the transaction in the first cost report, suggesting a cash disbursement for California equipment. Thus, the government submits, a rational juror could have rejected the defendants' arguments regarding escrow and pre-payments and could have found that the government proved that Mr. Hoffman and Mr. Arata failed to disclose the true nature of the transactions by characterizing the Departure transaction as a purchase of equipment from a third-party vendor and by characterizing the Duvernay transaction as a payment to a general contractor.

> portion of this amount will be a pre-payment to the contractor. The payment will be placed in an irrevocable escrow account of which the contractor has the sole authority to draw from and the applicant maintains no control over this account. LED, OEID & the DOA will not certify credits for this portion of the payment until the contractor draws down the entire amount in escrow and it is actually used in the construction of the facility. The terms of this agreement are as follows. . . .

Arata Ex. 226. Mr. Arata submits that the evidence supports a finding that his review of submissions like Second Line Stages supported his good faith belief that pre-payment of construction costs into an escrow account was acceptable for a tax credit submission.[43]

As for the Departure Studios venture, the evidence showed that it was Mr. Hoffman who had a prior business relationship with Damon Martin, who did post-production work on independent films. Mr. Hoffman spearheaded the contemplated partnership arrangement, which the defendants and

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[43] Mr. Hoffman and Mr. Arata also describe the Duvernay transaction as a proper accounting method called a defeasance.

The government counters that the fact that the Duvernay submission to the auditors and the State failed to match up to the Second Line Stages submission undermines the defendants' good faith defense. The Second Line Stages project disclosed the protected escrow as an advanced payment. Second Line Stages had express written permission from the State and the restrictions on the escrow were spelled out and strict. Not so, here, the government argues.

Mr. Martin testified consistently about: Departure Studios' owner, Damon Martin, would contribute equipment in return for a 25% share in the 807 Esplanade project. This contemplated co-venture arrangement was documented by the project's business plan, emails from Departure Studios, and a sworn declaration by Peter Hoffman; all of which were disclosed to the auditors. Likewise, Mr. Martin testified that his agreement with Peter Hoffman was to contribute about $1,000,000 in equipment in return for a 25% share in the project and management responsibilities. Martin further testified that he or his staff prepared the invoices submitted and that no one asked him to fabricate anything. Mr. Arata, with his uncontroverted experience in the film tax credit program, testified that he submitted the Departure Studios materials to the auditors and the State in accordance with his understanding of the partnership (equipment would be contributed to the project by Martin/Departure as a business partner) and in accordance with the custom and practice of the tax credit process, which allowed as an appropriate expenditure the contribution of equipment so long as the equipment was properly valued.[44]

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[44] When asked why "money [was] mov[ed] around" for the contribution of equipment, Mr. Arata testified on cross-examination:

> Under the program, in order to obtain tax credit certification, you need to have proof of payment. And so the custom and practice, as developed over many years – and we did on the Sylvester Stallone example. We did it on a number of examples. I didn't create this methodology, but this is how they created it and this is how I found it.

If I sell myself something or if a related party sells themself something or if joint venturer sells themselves something, there has to be some document, some form of paper – because the state wants paper and auditors want paper – that show that the value of that thing that was transferred, whether it was by exchange, conveyance, acquisition, sale – however it was – must be documented in some form of paper.

So people have done this. They've taken their own money, put it into a bank account for a new LLC which they call the vendor LLC, and then paid themselves from that vendor LLC. That completes a paper transaction which documents the underlying substantive transaction. [T]hat is the custom and practice of the state of Louisiana....

We told the auditors exactly what the documentation showed, that Damon Martin was a business partner, a joint venturer. We disclosed him in the business plan. We disclosed him in the application thoroughly. . . . And we disclosed the payment to Damon Martin by virtue of showing the bank statements. . . .

The contribution . . . to this vendor LLC does not have to be in the form of cash. I think that's been established. Mr. Stelly said that. [T]here's no dispute that the state did not require a cash transaction.

[I]f you are contributing your equipment to yourself, you still need to show fair market value. [The state] needed to see some form of payment and so they created a mechanism [from] the documents I saw[,] a payment was made from the purchaser to the contributor. It was called a sale or an acquisition or a conveyance. And then that money was paid right back to that other party. Why it was paid back to that other party is part of a transaction that goes over my head from an accounting standpoint. But I'm telling you what I saw, With regard to circular transactions, there is no dispute that circular bank transactions are not intrinsically unlawful so long as they are properly documented and disclosed.[45] Mr. Arata submits that he disclosed the circular transactions to the auditors by providing them with bank deposit and withdrawal tickets; that there was insufficient evidence to sustain the government's "illegible" bank ticket

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> but I saw it constantly and continually from 2003 and -04 all the way through 2011 and -12 as well.

Arata Tr. 96-100.

[45] Explaining the difference between auditing the value of a simple cash transaction, a T-shirt purchased from Wal-Mart versus auditing film production and infrastructure expenditures, Mr. Arata stated:

> [F]ilm production and infrastructure is wholly different, because you're not dealing with simple transactions. People don't go buy a building with cash. People don't buy a million dollar's worth of equipment with cash in their pockets. . . . In these significant types of transactions when these deals are real deals, you have to have significant debt obligations, you have to have a financing mechanism that really works. And so the state wasn't . . . naive about this. . . . Auditors know what to do with significant transactions. This was a detailed, significant, complex transaction. We gave them all the documentation for the significant, detailed, complex transaction. [But Ms. Kuchler] didn't look at the documents. . . . I presented her all the documents I felt were relevant to the transaction, and I expected that she was going to look at all those documents, take into consideration what the law allowed, and provide us with her reasoned, professional interpretation of those documents.

Arata Tr. 109-12.

theory given that each auditor testified that Mr. Arata never withheld any access, and gave them what they requested. It was undisputed that Kuchler failed to review all documents provided to her. (Without judging her credibility, the propriety of her lapse in doing so perhaps accounts for parts of her testimony as a government witness).

To summarize, Mr. Hoffman and Mr. Arata contend that no rational juror could have found sufficient evidence to convict them of Count 6 because the Departure and Duvernay invoices were part of legitimate tax credit transactions involving the contribution of equipment and the pre-payment into an escrow account; submissions made in good faith in accordance with the custom and practice of the State of Louisiana. If any rational juror could have determined that these transactions were part of a scheme to defraud and that Mr. Hoffman and Mr. Arata had the specific intent to defraud, then the Court must defer to the jury verdict.

The Court finds that Mr. Hoffman's and Mr. Arata's motions for judgment of acquittal as to Count 6 must be denied. There was, indeed, a critical fact issue presented to the jury on the issue of Mr. Arata's and Mr. Hoffman's specific intent to defraud; and, there was also evidence in the trial record that would have supported a jury finding that the defendants lacked the specific intent to defraud the State when they submitted the Duvernay and Departure documents in accordance with their claim of a good faith understanding of the custom and practice of the indisputably murky film tax credit regime.[46] Nevertheless, notwithstanding the evidence that one could say supported their good faith defenses, viewing the evidence in the light most favorable to the government, and constrained by the Fifth Circuit, a rational jury could have concluded that the defendants presented to the auditors and to the State bank transactions along with invoices and payment verifications from Martin and Duvernay -- as opposed to presenting these transactions as they were, contemplated contribution of equipment and pre-payment into an escrow -- as part of a scheme to defraud.[47] In other words, the Court finds, under the Fifth Circuit case literature that binds this Court, that a rational jury could have rejected Mr. Arata's and Mr. Hoffman's good faith defenses and, instead, accepted the government's evidence that the transactions as styled were

[46] Singling out Mr. Arata's evidence of good faith, it was not just limited to what the government would describe as his "self-serving" testimony. That Mr. Arata believed that the equipment and construction transactions complied with the law and custom and practice was corroborated by other evidence that he sought to do things by the book in: (a) not wanting his legal fees to be included, but instead preferred that outside counsel's legal fees be included as expenditures; and (b) not wanting to be affiliated with the submission of fabricated invoices.

[47] A rational jury could have found that Mr. Hoffman and Mr. Arata did not present the transactions consistent with their characterization of what was acceptable in the industry: although they argued that equipment was being contributed and the advance payments to Duvernay were akin to prepayment into an escrow account, those transactions were presented to auditors and the State as payments to an equipment vendor and contractor.

misleading and intended to mislead in order to obtain tax credits. This discussion highlights the jury's power to make credibility calls.

The Court now considers the two false statement convictions concerning the Departure Studios equipment and circular transactions generally.

Count 24. Does the evidence support a guilty verdict on Count 24, charging Mr. Arata with giving a false statement to the FBI when he said that "the film equipment had been 'acquired' in that the equipment would be contributed to 807 Esplanade by the vendor as a business partner, when in truth and in fact, as he then well knew, the equipment had not been acquired or contributed and that he had repeatedly advised the auditors and the State that the equipment had been purchased and paid for"? No.

Putting aside this inartfully worded charge, the issue is simply whether there was sufficient evidence to support a finding that Mr. Arata lied when he told the FBI that the equipment "would be" contributed to the project by Departure Studios as a business partner. Other than the fact that the equipment partnership deal ultimately fell through after Departure Studios' owner Damon Martin lost his business, which was months after this February 2009 tax credit submission,[48] there was no evidence

[48] There was no evidence submitted at trial that would tend to suggest that Mr. Arata should have had any reason to believe that there was any problem with the Seven Arts-Departure deal, as it had been explained to him, at the time the first cost report

presented at trial that would support a finding that Mr. Arata lied to the FBI when he characterized his understanding of the Departure Studios equipment deal.

There was insufficient evidence offered by the government to prove that Mr. Arata made the statement to mislead the FBI or that he made the statement knowing that it was false. The business arrangement described by Mr. Arata to the FBI is the one borne out by the evidence at trial.[49] Peter Hoffman and Damon Martin both testified that they contemplated a partnership in which Departure Studios would contribute equipment and Martin (or Departure Studios New Orleans) would be a managerial partner, that he would manage the post-production facility in return for a 25% share in 807 Esplanade. The 807 Esplanade business plan dated May 2007 listed certain equipment to be provided by Departure. Arata Ex. 38. Emails from Departure Studios to Seven Arts provided lists of equipment valued at $1,027,090 to be provided by Departure. Arata Ex. 213. Peter Hoffman signed a sworn declaration in November 2008 in which he stated:

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was sent to the State in February 2009. It is undisputed that the deal was not officially dead until months later.

[49] The government offered no evidence that Mr. Arata knew that the equipment would not be contributed; rather, Mr. Arata's understanding of the Departure deal was consistent with the business venture described by the project's business plan, as well as government and defense witnesses alike.

> 1. ... Attached hereto are photographs of the various items of post-production sound equipment acquired by Seven Arts for use in its facility at 807 Esplanade in New Orleans, Louisiana, which equipment will be delivered to 807 Esplanade upon completion of construction of the facilities at that location.
>
> 2. Departure Studios will act an [sic] agent and co-venturer with Seven Arts in the operation of a post-production sound facility at 807 Esplanade, and it has confirmed the existence of this equipment, its location at 6121 Sunset Blvd., Third Floor, in Los Angeles, California.

Arata Ex. 119.

Notwithstanding this evidence, the government argues, "[g]iven the impossibility of Martin contributing substantial equipment and his merely tentative (and eventually non-existent) relationship to the project, Arata could not have somehow found himself under the wildly inaccurate impression that Martin was contributing over $1 million in equipment." Mr. Arata's statement was false, the government suggests, "because Arata never believed the equipment was being obtained at all and certainly not by contribution." But the government offered no evidence to prove that Mr. Arata did not believe that the equipment would be contributed, let alone that he knew his statement and characterization of the contemplated partnership and equipment deal was false. Speculation and argument are not evidence. Trying another angle, the government submits that

Martin himself did not contemplate contributing equipment.[50] Putting aside that the government submitted no evidence that Mr. Arata could have known whether or not Mr. Martin actually contemplated contributing equipment, in fact, Mr. Martin testified that he did. On cross-examination, Mr. Martin was asked about discussions he had with Mr. Hoffman[51] about being a partner in 807 Esplanade, discussions which Martin stated took place in 2007 and 2008 "over an extended period of time."

> Q: And you believed that equipment that was going to be delivered to 807 Esplanade was going to be delivered through your company, Departure, and that Departure was going to be paid for that; correct?
>
> A: My understanding was that as far as Departure New Orleans is concerned that that equipment would be paid for and delivered to Departure in New Orleans, yes.

Martin Tr. 46-47. Later on, Mr. Martin also suggested that Departure had discussions with Seven Arts

[50] The government points to Martin's direct examination in which he stated that he never finalized a partnership with the defendants and never made a formal oral agreement to provide the equipment. To suggest that "Damon Martin did not even contemplate contributing equipment" is betrayed by his testimony and other evidence.

[51] Mr. Martin could not recall having discussions with Mr. Arata concerning the details of the equipment and partnership deal, although there was evidence that he gave Mr. Arata the authority to start Departure Studios' Louisiana company.

about Seven Arts taking over Departure in Los Angeles and acquiring the equipment that Departure had in Los Angeles.[52] Yet again, this time in response to the Court's question, Mr. Martin testified consistently with this contemplated agreement, an agreement that he told the FBI about during its investigation; the contemplated arrangement that, when explained by Mr. Arata to the FBI, the government charged as a false statement.

> Q: Did you tell Agent Blythe during your interview that you were ... expected to get paid for this equipment?
>
> A: [Y]es. If Seven Arts took over the facility in Los Angeles, they would have paid for the equipment that was -- not what was on the lease, they would have taken over the lease. They would have paid for the equipment that was in the facility.

Martin Tr. 62-63. Ostensibly seeking to identify a fact issue regarding whether Mr. Arata may have known that it was (in the government's words) "physically impossible" for Departure to contribute one million

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[52] Mr. Martin explained that he recalled telling the FBI that there was a time when it was discussed that one of his roles in the project was to bring expertise and equipment to the building, that "there was a time that there was potentially equipment that was from Departure in Los Angeles that might travel to New Orleans." Martin Tr. 61. Mr. Martin explained that the FBI showed him an invoice and asked if that was meant to be the equipment that was going to New Orleans, to which Martin responded, "Yes. That was the idea, that the list that was created to have equipment come into New Orleans that would have it to be a world-class facility." Martin Tr. 61-62.

dollars worth of equipment, the government submits that "Martin did not have anything resembling the more than one million dollars in equipment at issue." But the government failed to offer any evidence suggesting that *Mr. Arata* had any knowledge regarding the actual value of the film equipment reflected in the photos and invoices with which Mr. Arata was provided; photos and invoices indicating a value at over one million dollars. A guilty verdict cannot be based on the government's conjecture.

Like the government's termination false statement charge, in which the government ignored the fact of Mr. Arata's apparent ethical obligation and had in its possession a detailed letter spelling out the parameters of the termination, the government again seeks to divorce its charge from the factual context giving rise to it, and to deny business and factual realities: the government charged Mr. Arata with making a false statement about his understanding of a business deal (a contemplated business arrangement developed by his business partner and shared by the co-venturer)[53] and, after that business deal fell through, which incidentally fell through after the tax credit submission that included the film equipment, the government charged him with lying about the dead deal.[54] Viewing the

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[53] Even the government concedes that there was some sort of contemplated deal, characterizing as "tentative" Mr. Martin's relationship to the project.

[54] Like its false statement charge regarding termination of representation, this false statement charge defies reason from a

evidence in the light most favorable to the government, no rational juror could have found that Mr. Arata lied when he explained to the FBI that the Departure "equipment *would be* contributed to 807 Esplanade by the vendor [Departure Studios] as a business partner." (emphasis added). The government failed to prove that Mr. Arata could not have believed that the equipment was going to be contributed.

The Court is compelled to make one final observation regarding this false statement charge. In its zeal to get this false statement conviction upheld, the government once again resorts to mean-spirited hype that wishfully suggests that this financial fraud case is black-and-white. This particular argument is all the more alarming in the revelation that, from a charging perspective, the government isolates semantics from context in its effort to win a conviction:

> Arata fails to confront the catch-22 his conflicting representations put him in. If one believes Arata was truthful to the FBI when he stated that he believed Departure was going to contribute the equipment ("acquired, not purchased," Blythe Tr. 39), then one must also conclude that Arata lied to the auditors when he claimed Seven Arts had "purchased" and paid for the equipment. Conversely, if one believes Arata truthfully told the auditors and

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business and timing perspective. It is no surprise that there was absolutely no evidence to prove it.

> the state that Seven Arts purchased and paid for the equipment, then one must conclude that Arata lied to the FBI when he claimed he believed Departure was going to contribute the equipment. Arata could not deal with this dilemma at trial and he cannot now–it is impossible: there is no plausible, logically-sound theory where Arata could be both innocent of fraud and innocent of making a false statement. [B]y convicting on fraud counts and the false statement charge, the jury agreed with the government's position: both representations were false. The truth, which Arata would never admit to the auditors or the FBI, was that he knew the equipment was not being provided in any manner: Arata sought tax credits on equipment that did not even exist.

One of many problems with this argument is that the government did not prove that Mr. Arata knew that "the equipment did not exist." It is the government that makes a questionable statement when it says that "Arata sought tax credits on equipment that did not even exist."[55] There is no dispute that Departure Studios was a real company with real owned and leased equipment. Simply put, it was irrational for the jury to find Mr. Arata guilty of lying to the FBI when he explained his understanding that the Departure equipment would be contributed. (To whom "payments" went to, as discussed in full, is another mat-

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[55] More about these tactics must await the Court's opinion addressing whether a new trial should be granted.

ter). In truth and in fact, Mr. Arata's statement explaining his understanding of the intended deal was supported by the evidence at trial.

Count 25. Does the evidence support a guilty verdict on Count 25, charging Mr. Arata with giving a false statement to the FBI when he said that "he thought he fully disclosed both sides of the transactions for construction and equipment expenditures to the auditors, when in truth and in fact, as he then well knew, he had purposefully concealed the circular transactions from the auditors"?[56] No.

Mr. Arata submits that not only did he think he fully disclosed both sides of the transactions, he did indeed disclose them to the auditors. The government submits that this statement was false because, not only did he fail to disclose the return of funds, he went through great lengths to conceal the return of funds.

Foremost, the Court must note that the government concedes that Mr. Arata gave Ms. Dodge a

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[56] The government's arguments in support of how it proved the falsity of this statement vary to the point of bewilderment. The government argues that "he went through great lengths to conceal them," but then vacillates between arguing that Mr. Arata provided bank transfer slips that were illegible "or at least difficult to read;" to suggesting that Mr. Arata accidently provided slips corresponding to the return of funds; to arguing that, even though both sides of the circular transactions appear in the auditor's file, "the evidence did not show that Arata ... provided this document" to the auditor; to arguing that what was disclosed did not "necessarily tell the viewer of the document that the outgoing funds were returned to the primary Seven Arts account."

bank ticket showing both sides of the circular transaction between Seven Arts and Departure Studios. Gov't Ex. 74, p. 2. The government also does not dispute that in an email on December 8, 2008, copying then-auditor, Ms. Dodge, and Mr. Hoffman, Mr. Arata wrote to Seven Arts' banker, Melissa Oelking:

> Is there any chance of us getting the original withdrawal slips and deposit slips for SAPL, LLC and Departure, and Leo Duvernay? We got the copies you sent to us, but our auditor would like to see originals. Please let me know. I apologize for the inconvenience and appreciate your help.

Arata Ex. 73. Ms. Oelking agreed that Mr. Arata was "saying give me everything for Departure, Leo, and SAPL wire transfers"; she went on to testify that Mr. Arata never told her "don't disclose all of the transactions" and never told her "don't talk to any accountants if they call." Oelking Tr. 27-28. The government nevertheless submits that the jury could reasonably conclude that Mr. Arata sent this email to "cover his tracks," arguing that Mr. Arata knew that Ms. Dodge's auditing firm was going to withdraw the next day, December 9, 2008. The government's theory finds no support in the trial record. There was no evidence that supports a finding that Mr. Arata knew that the auditor was going to terminate the relationship before it happened.[57] Nor was there evidence that Mr. Arata intended to disguise the

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[57] In any event, Ms. Dodge's firm did withdraw and never completed an audit report that was submitted to the State. Mr. Arata submits that, in addition to truthfully stating that the thought

transactions by providing only illegible copies, or that he purposefully concealed from Ms. Dodge legible copies of the transactions.[58]

As for whether or not the government submitted sufficient evidence in support of its theory that Mr. Arata lied when he said he thought he disclosed both sides of the Duvernay/Departure transactions to the only other auditor Mr. Arata dealt with before leaving the project, Kuchler testified that whenever she "asked Michael for anything, he would give [her] what [she] asked for," that he "never withheld any type of access," and that he would respond when she had questions. Kuchler Tr. 121-122. On December 29, 2008, Mr. Arata personally delivered documents to Kuchler in file folders separated by topic and asked her to "take a few days to review these documents and present us with questions/issues." Gov't Ex. 91. Bank tickets showing both sides of the Departure and Duvernay transactions appear throughout Kuchler's Malcolm Dienes file. Arata

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he disclosed both sides of the transactions to Ms. Dodge, Mr. Arata responds that his statements relative to Ms. Dodge are not material.

[58] The government concedes in its papers that "[t]here are the illegible (or at least difficult to read) bank transfer slips provided to the auditors." The government goes on to accept for the sake of argument that an illegible deposit slip qualifies as a disclosure, but argues that "it becomes obvious that Arata accidently provided slips that corresponded to the return of funds." Common sense dictates that if an auditor needs information and the papers submitted are illegible, any responsible auditor would insist upon a legible copy. That did not happen here.

Ex. 157, p. 8 (showing return of $1,027,090 from Departure Studios to Seven Arts); Arata Ex. 159, p. 2 (showing return of $499,257.21 from Duvernay to Seven Arts); Arata Ex. 160, p. 2 (showing return of $499,257.21 from Duvernay to Seven Arts); Arata Ex. 165, p. 2 (showing return of $1,499,257.21 from Duvernay to Seven Arts).[59]

There was insufficient evidence to support the government's theory that Mr. Arata intentionally concealed from the auditors both sides of the Duvernay/Departure circular transactions. Thus, it was irrational for the jury to find that the evidence showed that Mr. Arata lied when he said he thought

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[59] The government essentially argues that Mr. Arata did not prove that he sent this bank computer printout, Arata Exhibit 165, which Malcolm Dienes indisputably had in its file, showing the Duvernay circular transaction. The government suggests, without record citation, maybe Marcia Matthew supplied it to Malcolm Dienes. The government further suggests that it was not proved when this came into Malcolm Dienes custody. All the Court can do is remind the government that it had the burden of proof beyond a reasonable doubt at trial, and it had the burden of proving that Mr. Arata purposefully concealed from the auditors circular bank transactions when it charged that he lied when he said he *thought* he disclosed both sides of the transactions.

Finally, the government complains that this document "does not necessarily tell the viewer of the document that the outgoing funds were returned to the primary Seven Arts account." The Court refers the government to the testimony of its witness, Kuchler, when asked about Arata 165. Asked whether it shows that a million dollars went into the Duvernay account and came out the same day and that $499,000 went in and out of the Seven Arts Filmed Entertainment account on the same day, Kuchler responded "That's what it looks like." Kuchler Tr. 121.

he disclosed both sides of the transactions. A judgment of acquittal must be entered on Count 25.

E. Mistaken Submissions, Withdrawn (Counts 8, 10, and 12)

Only Peter Hoffman was convicted of the wire fraud charges in Counts 8, 10, and 12. He seeks a judgment of acquittal due to insufficient evidence.

Count 8. The wire fraud of Count 8 is an October 27, 2009 email from Seven Arts employee Marcia Matthew to auditor Kuchler in which Matthew sends the auditor inter-bank transfer requests, bank statements, invoices, and debit slips.[60]

Count 10. The wire fraud of Count 10 is a December 1, 2009 fax from Marcia Matthews of Seven Arts to the auditors of a 11/24/09 contractor payment certification, signed by general contractor Leo Duvernay, for $3,410,932.91 in interest payments, legal fees, construction, auditor fees, and overhead.

Count 12. The wire fraud of Count 12 is a December 19, 2009 email from Mr. Hoffman to auditor Kuchler regarding equipment purchases, legal fees, audit fees, interest expenditures, office rent for contractor, and invoices.

Mr. Hoffman submits that Counts 8, 10, and 12 all involve submissions to the auditors that were withdrawn because they were obviously incorrect

[60] One of the bank transfer requests by Mr. Hoffman/Ms. Matthew includes invoices from Duvernay for "legal fees & services" and invoices from Duvernay for "auditors."

and submitted by mistake. He so testified at trial.[61] There is no dispute that Seven Arts' financial records were in "disarray." It is not fanciful to say -- whether it was Mr. Hoffman's or Ms. Matthew's mistake, or both -- that these papers were mistakenly submitted. Nevertheless, the government contends that acquittal is not warranted because Mr. Hoffman merely focuses a factual dispute that any rational juror could have resolved in favor of the government. The Court finds that one reasonable

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[61] The possibility that these submissions were mistakenly submitted was raised in Peter Hoffman's email to Kuchler on December 19, 2009 (one of the emails that is the subject of Count 12):

> Thank you for your consideration of our position. Needless to say Susan and I are very embarrassed by Marcia's mistake which I should have caught. The summary of the transactions I prepared and reviewed was correct and the payments were in fact made to the correct affiliate that provided the financing and retained me and Michael for the extensive legal work on the project.... We of course will revise and obtain execution of the correct confirms and I will personally guarantee the rep letter. I am particularly embarrassed because Leo thought the confirm was too high but Susan told me that I said Marcia had checked the numbers. This will not happen again. Marcia is now on probation after six months and we'll see if she makes it....
>
> On the interest all funds ultimately derive from investments by our public company, Seven Arts Pictures plc to its La affiliate and the interest is a market level for those advances. Obviously Leo did not advance these monies (indeed he received a lot of them) any more than he performed legal services when he is not a lawyer....

conclusion from the evidence submitted on these counts is that these obviously incorrect submissions (indicating, for example, that the general contractor was paid for legal advice) were submitted by mistake; and mistake negates intent. That Peter Hoffman thought he could dupe the auditors into putting Leo Duvernay's (the contractor's) legal fees in a cost report seems a fiction. But the Court is constrained by the Rule 29 standard. The jury was charged with resolving all factual disputes and, here, the jury could have disbelieved Mr. Hoffman's explanation for these submissions in favor of the evidence that the government submitted which supported a factual finding that Mr. Hoffman had attempted to inflate expenditures to qualify for additional tax credits. This Court cannot make credibility choices for the jury.

F. More Equipment (Wire Fraud Count 9)

Only Peter Hoffman was convicted of wire fraud in Count 9.

Count 9. The wire fraud of Count 9 is a November 30, 2009 email from auditor Kuchler to Mr. Hoffman copying Marcia Matthew regarding confirmation letters and equipment purchase information being provided to the auditors. Kuchler writes:

> Steve is waiting for Marcia to give him the Audio Equipment invoices and support. These invoices displayed a UK purchase address. She is working on clearing that item up.
>
> We are also waiting on confirmations from certain vendors.

This email was in response to Mr. Hoffman's email to Kuchler, in which he stated he was "confused as to where we stand" and inquired as to whether the auditors needed anything more than "the confirmation letters from Susan [Hoffman] and Leo [Duvernay]." Mr. Hoffman also had this to say about equipment invoices:

> The invoices that we have sent to you showing the equipment purchased were the invoices that we had obtained from our third party vendor, which is our partner in the property. The equipment itself was sold from a company owned by me to Seven Arts Pictures Louisiana as reflected in the bank transfers, and we of course can provide the appropriate documentation for that if necessary. I understand that Steve is going to discuss that with you and I would like to make sure that that issue is resolved as we did it the last time we dealt with this issue.[62]

Mr. Hoffman submits that this communication to the auditors was part of the normal "give and take" of an audit and that there were no material falsehoods. And that this was not a step in the plot, but,

[62] Although confusing, it appears that this email apparently refers not to the dead Departure deal, but, rather, to the nascent or potential UK equipment deal. Later, on December 17, 2009, in part of the email chain which is the subject of Count 12, Mathew explains to Kuchler that "[t]he equipment we first acquired was inadequate and we were required to incur substantial additional equipment costs to meet top professional standards as suggested by our partner, Molinare." Gov't Ex. 12.

rather a communication incidental to (and not in furtherance of) any scheme to defraud. Again, the Court finds that Mr. Hoffman focuses a factual dispute that the jury was entitled to resolve in the government's favor. Because a rational juror could have found that, by this wire, Mr. Hoffman employed false representations in his efforts to have the auditors include the UK equipment on the January 20, 2010 audit report as part of a scheme to defraud -- equipment that Messrs. Conway and Ellson testified was never purchased or sold to Mr. Hoffman -- the Court must uphold the jury's guilty verdict on this count. Whether a UK arrangement ever truly existed was the important subject of part of the government's case.

G. $700,000 Leeway Payment Confirmation (Wire Fraud Count 11)

Count 11. The wire fraud of Count 11 is a December 1, 2009 fax of a 11/24/09 payment confirmation signed by Susan Hoffman as President of Leeway Properties,[63] which was faxed by Marcia Matthew to the auditors. The payment confirmation is to "confirm that the following invoices," totaling $700,000, "have been paid." The confirmation lists invoices, dates, amounts, and description of services indicating that on June 30, 2009, $400,000 project management invoice was paid; on March 30, 2009, $150,000 office space invoice was paid; and on March 30, 2009, $150,000.00 invoice for "Richard

[63] Susan Hoffman owned 100% of Leeway Properties, a company that Seven Arts worked with on film business.

Conway, Consultant" was paid.[64] Mrs. Hoffman and the government stipulated that her signature appeared after this sentence: "Our records indicate that the invoices detailed above in the amount of $700,000 for services to Seven Arts Pictures Louisiana, LLC were paid to our company, as itemized in the attachments."

The jury rendered verdicts of guilty as to Peter and Susan Hoffman, but acquitted Michael Arata as to Count 11. Peter and Susan Hoffman seek judgments of acquittal. The government contends that acquittal is not warranted because the $400,000 fee for Mrs. Hoffman's project management services "was a complete fiction."[65] In support of the guilty verdicts against Mr. and Mrs. Hoffman, the government submits that this evidence met the government's burden of proof:

- Mrs. Hoffman signed and caused to be faxed in interstate commerce a false certification that she was paid $400,000 for fees relating to being project manager.
- Mrs. Hoffman convinced Leo Duvernay to sign payment confirmations, telling him they were "just for [Peter Hoffman's] records."

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[64] A notation by Kuchler indicates that, as of January 11, 2010, the $150,000 consultant fee was "excluded cost-per client."

[65] The government submits that the Leeway Properties invoice did not match any of the wire transfers provided to Kuchler by Marcia Matthew, "calling into question whether the defendants even bothered to circle the money prior to claiming it as an expenditure." Gov't Ex. 8, p. 33. Daigle Tr. 166. Kuchler Tr. 11-13.

- Seven Arts submitted to the auditors a Leeway Properties declaration signed in Mrs. Hoffman's name (the government and Mrs. Hoffman did not agree that she signed the declaration) in which it was represented that Mrs. Hoffman had "spent in excess of 1000 hours supervising the construction project located at 807 Esplanade." Gov't Ex. 160. Mrs. Hoffman sent Leo Duvernay an email outlining how many hours she and Peter had given to the project and this suggested significant involvement in the project. Gov't Ex. 160.

- Mrs. Hoffman was a sophisticated business woman, who had a close relationship with her husband, best friend, and business partner, Mr. Hoffman.

- Mrs. Hoffman owned 100% of Leeway Properties, a company that Seven Arts worked with on film business.

- Mr. Hoffman minimized Mrs. Hoffman's involvement with the Leeway project management fee, denied that Mrs. Hoffman was paid $400,000 (Hoffman Tr. 81), and denied that Mrs. Hoffman was "involved in any of the financial transactions with this project." Hoffman Tr. 169.

Mrs. Hoffman and the government stipulated that Mrs. Hoffman's signature appears on the $700,000 confirmation. Nevertheless, she submits that there is no evidence that she read the document before signing it or understood its significance. Merely that she signed the document because Mr. Hoffman asked her to and she trusted him. Although there was scarcely any mention of Mrs. Hoffman during the trial, Mr. Hoffman confirmed that his wife trusted him, that he would periodically give her documents to sign, which she would sign without question, and that Mrs. Hoffman knew nothing of the finances of the project. Other witnesses confirmed that, to their knowledge, Mrs. Hoffman had nothing to do with the finances of the project. The auditors testified that they did not know Mrs. Hoffman. Mr. Duvernay testified that he trusted Mrs. Hoffman, who trusted Mr. Hoffman, and that he called her when Mr. Hoffman wanted him to sign papers that he did not agree with and she told him they were for Mr. Hoffman's records.

The only evidence as to how many hours Susan Hoffman may have spent on the project was from an email sent by Mrs. Hoffman to Leo Duvernay, in which she defended a suggestion that she and Mr. Hoffman spent 1,000 hours of their time on the project, as well as tidbits of evidence that Mrs. Hoffman was integral to selecting the building, design, and ensuring historical accuracy of its renovation. In other words, whether Mrs. Hoffman's contribution to the project could have earned a $400,000 fee was not something the government directly addressed.[66] Government witness Michael Daigle opined that he did not think Mrs. Hoffman had the knowledge that

[66] Persisting in its mistake to shift the burden of proof, the government submits in its supplemental papers in support of its position that Mrs. Hoffman did not earn a $400,000 fee that "it appeared from the outset of the trial that Susan Hoffman's defense of ignorance inherently conceded that she was no project manager."

a project manager should have.[67] But that was about it.

Nevertheless, the government contends that a rational juror could have found sufficient evidence to convict Peter and Susan Hoffman for submitting this payment confirmation. That Susan and Peter Hoffman were best friends, and that Mrs. Hoffman had a more-than close relationship with Leo Duvernay, who used a room in Mrs. Hoffman's house rent-free prior to working on 807 Esplanade. The government submits that the jury could have easily inferred that Mrs. Hoffman (a) "could understand the plain meaning of the terms on the sheet of paper confirming paid invoices for work that she knew was not complete on the project" and for which she did not get paid; and (b) was not oblivious of attempts to get tax credit money from the State of Louisiana by submission of materially false documents. The government also relies on its Exhibit 160, which purports to bear Mrs. Hoffman's signature (alt-

[67] Counsel for Susan Hoffman asked Michael Daigle:

> [I]f you went [to see Mrs. Hoffman] with questions and suspicions and looking for explanations, why didn't you just ask her if she got $400,000; if she was the project manager; if she thought that was a fair lease amount; if she received the rentals on the lease?

Mr. Daigle admitted he did not ask those questions of Mrs. Hoffman.

hough she did not stipulate to this at trial) and attests to the fact that Mrs. Hoffman worked 1,000 hours on the project by December 2009.[68]

Viewing the evidence in the light most favorable to the government, the Court finds that a rational jury could have found that sufficient evidence supported a finding that submitting or causing to submit the $700,000 payment confirmation amounted to wire fraud. Mr. and Mrs. Hoffman represented to the auditors that this amount had been paid to Leeway Properties for project management and office space (and the excluded Conway fee), and that this was an expenditure for film tax credits. The jury was presented with an issue of fact, which it resolved in favor of the government. Although there was limited evidence tending to show Mrs. Hoffman's intent to defraud, and it would have been rational for the jury to conclude that Mrs. Hoffman signed the document because she trusted her husband and not because she had the specific intent to

[68] Mrs. Hoffman counters that the government failed to prove that Mrs. Hoffman's signature appears on the 1000 hour affidavit and notes that Ms. Matthew testified that she did not believe it contained Mrs. Hoffman's true signature including because it includes her middle initial, which Mrs. Hoffman typically did not use when signing documents. The government insists that it did in fact prove that she signed the 1000 hour affidavit, pointing to the email from Mrs. Hoffman to Leo Duvernay in June 2011, in which she confirms that she and Mr. Hoffman had spent 1000 hours over a two or three year period working on the project. Mrs. Hoffman argues in her papers that nowhere in the email is there any reference to the affidavit, nor does she say anything about telling the auditors or the film tax administrators that she alone worked 1000 hours.

defraud, the Court must defer to the jury's verdict when one cannot say it was irrational to conclude that Mrs. Hoffman read the document and understood what she was signing. As for Mr. Hoffman, he testified to his involvement in the $700,000 payment confirmation,[69] and there was sufficient evidence for a rational juror to find him guilty of wire fraud.

H. Wire Fraud Counts 14-20

The jury found only Peter Hoffman guilty of committing wire fraud Counts 14, 15, 16, 17, 18, 19, and 20. He submits that the guilty verdicts were irrational.

It is difficult to discern precisely what the reason was for conviction on each of these counts, none of which involve a singular topic or expenditure; all involve responses or materials relative to the second or final submission to the auditors or the State.[70] Complicating matters, neither Mr. Hoffman nor the government separately brief the sufficiency of the evidence on these counts. Nevertheless, the Court

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[69] And, a fact that could have gone either way as to Mr. Hoffman's intent to defraud, Mr. Hoffman researched whether $400,000 would be a reasonable fee for a project manager for a project like 807. But see, Jackson, supra note 18.

[70] Although the government argues, correctly, that the material sent by wire need not itself be fraudulent to amount to wire fraud, it is equally true in this case that submitting applications seeking state tax credits is not per se fraudulent. In other words, 807 Esplanade was a real infrastructure project with real expenditures...and was completed.

finds that as to each of these convictions, Mr. Hoffman's arguments advance nothing more than factual disputes that the jury was entitled to resolve in the government's favor.

Count 14 and Count 15. The wires of Count 14 and 15 are lengthy email communications among Mr. Hoffman and Kuchler. Exhibit 14 is an email chain among Mr. Hoffman and Ms. Matthew and Ms. Kuchler, a total of 10 email exchanges spanning four printed pages, starting on December 28, 2009 and continuing on December 29, 2009. Mr. Hoffman provides information to Kuchler regarding equipment purchases, equipment consultant fees, legal fees, office rent for contractor, and supervisory fees. Exhibit 15 includes emails among Mr. Hoffman and Kuchler on December 30 and 31, 2009 regarding supervisory fees, lease agreements, interest payments, and office rent for contractor.

The email exchanges are lengthy and are not reproduced here. Kuchler seems to be frustrated at the task of getting the proper support for her audit, stating "The problem I am having with all of these are proper paper documentation and quotes from third parties to determine fair market value. Invoices from your own company is not good enough when the companies are related." Gov't Ex. 14. And relating to the $400,000 project management fee, Kuchler says:

> Thank you for the information from Lou but he said $400,000 was fair but you all paid $400,000 to numerous companies, not just to Leeway. You paid the contractor $400,000

> and Seven Arts another $883,240 for essentially the same services. It seems like we are double-dipping here.

Gov't Ex. 15. In both exhibits, there is back-and-forth between Kuchler and Mr. Hoffman, Kuchler seeking to independently verify whether expenditures being claimed by Mr. Hoffman are supported by documents, or otherwise constitute fair market value representations. In defense of the numbers he provides, Mr. Hoffman says "[t]hese fees represent 3 years of work and more than 10 different transactions ... on a project which will have expenses in excess of $17,000,000." Gov't Ex. 15.

Viewing the evidence in the light most favorable to the government, the Court finds sufficient evidence to support the wire fraud convictions in Counts 14 and 15.[71]

Count 16. The wire of Count 16 is a January 7, 2010 email from Kuchler to Mr. Hoffman and his same-day reply. Kuchler tells Mr. Hoffman that Malcolm Dienes is "disallowing the following costs due to lack of supporting documentation":

[71] The Court understands Mr. Hoffman's argument to be that simple exchanges between him and the auditor should not be grounds for a wire fraud conviction. But once there is sufficient evidence to support a scheme to defraud and intent, the government need only prove that certain wires were sent in furtherance of executing the scheme to defraud. There was sufficient evidence to support a finding that Mr. Hoffman furthered the scheme in these communications with Kuchler.

1) $250,000 - in Audit Fees paid to Seven Arts Film Entertainment, Louisiana - no official back-up received to support what this is for.

2) $150,000 in Office Rent to Leeway for Leo - do you have anything in Leo's contract stating his office is on Royal Street and he will be taking free rent in lieu of a fee in the GC section of his contract?

3) Seven Arts Pictures, LA - did this company receive $122,048.62? No explanation or calculation or documentation has been provided.

4) Michael stated that he did not receive the money for which you are billing a company he has no interest in, so I am taking out his hours and fees of $203,637.50.

5) We will remove the $150,000 fee to Richard Conway as an equipment consultant due to lack of documentation provided.

6) We will remove the $58,072.47 in operational fees paid to Leo for water, sewage, and power.

7) Another question about the interest amount, it seems as though we are not comparing the interest rate to the going market rate. If the project had to borrow money from a bank, what would the interest rate be?

Mr. Hoffman replies:

1. I was not aware of an issue regarding audit fees.... I will revert to you this am after reviewing this item with Marcia.

2. I believe this charge is entirely appropriate and it is not in lieu of his fee but in effect an addition to his fee because of providing this benefit. Leo will confirm and we can put in the rep letter that Leo's sole office (including this job) for all periods is at 900 Royal St. Please reconsider.

3. I don't know what this item refers to and will discuss with Marcia this am.

4. Michael did not receive this money because he is an equity owner as I thought he proved to you. He acknowledges that the value for his services is the increase in the vale [sic] of his equity in the project, which is what he told me he told you. He will confirm that and this can be included in the rep letter. Please reconsider.

5. Agreed.

6. Agreed.

7. We provided two other loan agreements from private lenders for recent projects of our [sic] with interest rates higher than charged here - 15% and 18%. Bank financing of such projects is not available and private lenders insist on these types of interest rates. I can confirm in the rep letter that Seven Arts could only borrow at rates in excess of 12% for such projects in the market today. Michael also told me the state's policy is to accept interest rates up to 15%, which is more than we have charged.

> I will call you after checking out these two new (to me) items this am.

The government submits in its briefing, without more, that this was Mr. Hoffman's second attempt at claiming fraudulent construction finance supervision fees for Lou Sandoz.[72] Mr. Hoffman counters that Seven Arts did not in the second or third application claim construction supervision for payments to Lou Sandoz; rather, Mr. Hoffman points to Note 6 to the second audit report, which states that the fee was for finance supervision and *Mr. Hoffman's* services: "Seven Arts Filmed Entertainment Louisiana LLC also received $250,000 in construction finance supervision costs for additional time spent by Peter Hoffman in negotiating deals, etc." Gov't Ex. 17, p. 9. It is unclear from the face of the emails that the alleged Sandoz fee, or construction finance supervision fee, was claimed or represented as part of "audit fees." Other evidence must be examined in order to determine whether the jury irrationally found Mr. Hoffman guilty of this wire fraud count.

Later on January 7, 2010, Mr. Hoffman writes Kuchler "[t]he 'audit fees' – a bad description – are the fees paid to SAFELA on account of financial supervision of the project and particularly the services of Lou Sandoz, as Marcia had mentioned in her

[72] Advantage Capital had hired construction finance expert Lou Sandoz (an independent consultant engaged through Gurtler Bros.) in September 2009 after construction progress at 807 Esplanade had halted due to lack of funds; AdCap wanted an expert to resolve "confusion as to where the project was and how the money was being spent."

email of the 18th." Gov't Ex. 135. The day after this email was sent, on January 8, 2010, Mr. Hoffman writes to Kuchler explaining that the construction finance fee is indeed justified as part of a developer's fee. Gov't Ex. 137. Seven Arts sent an updated general ledger to Kuchler in preparation for the second audit; Seven Arts also sent Kuchler on November 9, 2009 invoices to justify expenditures for various expenses including a construction finance supervision fee for Lou Sandoz, described in the invoice as "Auditors Lou Sandoz Payment per Advantage Capital Agreement." Gov't Ex. 107. Seven Arts also submitted to Becky Hammond as late as March 18, 2011 the same SAPLA-SAFELA consulting agreement used to support the Sandoz fee. Gov't Ex. 248. Sandoz testified that he knew nothing of this $250,000 fee being claimed for his supervision, that he was unfamiliar with the invoice listing his "payment," and that he/Gurtler Bros. was paid by AdCap approximately $20,000 to $30,000 for the services he performed.[73] Sandoz Tr. 34-35.

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[73] In his reply papers, Mr. Hoffman submits that the only invoice mentioning Mr. Sandoz was a related party expenditure mistakenly prepared by Ms. Matthew in which Sandoz was referred to as an "auditor," but that mistaken invoice was withdrawn with an apology from both Ms. Matthew and Mr. Hoffman before the second audit report was completed and was never used in connection with the third audit report. Mr. Hoffman submits that the government produced no evidence that any claim was made to the auditors or the State based on the contract prepared by Mr. Hoffman for Mr. Sandoz's services (a contract that was never completed or provided to the auditors as the basis for any

Viewing this evidence offered at trial in the light most favorable to the government, the Court finds that a rational juror could have concluded that sufficient evidence supports a wire fraud conviction for Mr. Hoffman relative to the construction finance supervision fee.

Count 17. The wire of Count 17 is a January 20, 2010 email from Stephanie Dillon of Seven Arts to State administrator Chris Stelly, attaching the January 20, 2010 application (the second tax credit application) and supporting documents for infrastructure tax credits relative to the 807 Esplanade project. This submission totaled $5,980,838 in infrastructure expenditures, including developers' fees; interest payments to SAFELA at 12.5%; $350,000 in legal fees; $807,202 in audio equipment; $2,302,860 in construction; financing fees; $250,000 in construction finance supervision; office space for Leo Duvernay; $400,000 project management fee paid to Leeway; and audit fees paid to Malcolm Dienes. The government submits that most if not all of these expenditures were fraudulent.

Equipment. The government submits that Mr. Hoffman fraudulently claimed an additional $807,202 in equipment allegedly purchased by Richard Conway and Simon Ellson from the United

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claimed payments relating to Mr. Sandoz); any claim to the auditors would have required production of an invoice and proof of payment, which the government never produced.

Whether or not Mr. Hoffman improperly sought to claim as an expenditure for tax credits the construction finance supervision fee was clearly a fact issue to be resolved by the jury.

Kingdom; both Conway and Ellson pointedly testified that no equipment was ever purchased or sold to Mr. Hoffman. The government submits that the evidence at trial showed that Mr. Hoffman was informed on January 4, 2010 (two weeks before the second audit report was released) that the equipment would not be purchased by Conway's company, Molinare, and that Conway would no longer work with Mr. Hoffman. But the $807,202 in equipment was nevertheless included in the second audited cost report.

Construction Payments. Mr. Hoffman submitted $2,302,860 in payments to Leo Duvernay in the second application; this was in addition to the $1,749,257 in construction payments included in the first application. By January 2010, however, the government submits that the evidence at trial (including Government Exhibit 162,[74] Duvernay's testimony,[75] and Michael Daigle's testimony[76]) showed

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[74] Government Exhibit 162 is an email from Leo Duvernay or his assistant to Stephanie Dillon at Seven Arts dated June 3, 2011 in which Duvernay confirms that he has been paid a total of $1,266,496.50 from October 2008 through October 2009; the email includes copies of four out of six checks.

[75] Duvernay testified consistent with Government Exhibit 162 that he had not been paid even $2,000,000 by 2010. Duvernay Tr. 28, 31-32.

[76] Michael Daigle testified that "almost $1.4 million of this amount [the $2.3 million in construction expenditures in the second audit] was based on what I believe to be fabricated circular transactions involving Mr. Duvernay. And there appears to be only about a million dollars of hard costs spent at this time [at the time of the second audit report]." Daigle Tr. 116.

that Duvernay had received just over $1,000,000 in payments for construction.

Interest Payments. See the Court's comments regarding Count 13.

Legal Fees. See the Court's comments regarding Counts 5 and 13.

Construction Finance Supervision Fee. See the Court's comments regarding Count 16.

$400,000 Project Management Fee. See the Court's comments regarding Count 11.

Office Rent Payments. In the second application for tax credits, Mr. Hoffman claimed a $150,000 expenditure for office space provided to Leo Duvernay over a three year period. Mr. Hoffman claimed that the office space included three units, the courtyard in Susan Hoffman's building, and use of Susan Hoffman's bathroom. Mr. Duvernay testified that he used an approximately 12x12 room with no bathroom, no running water, and no kitchen. That the room only had a desk and a few filing cabinets in it. When Michael Daigle met with Susan Hoffman to tour the site, Daigle asked to see the three units, but Mrs. Hoffman told him that the 12x12 room was all that Duvernay used. The government submits that Duvernay testified that he did not receive use of the office in lieu of $150,000 in payment; that the space he used was worth no more than $400 per month; that he never would have paid $50,000 per year for the 12x12 room; and that he rented an apartment (that was twice the size of the office space and had a bathroom and kitchen) from Mrs.

Hoffman in the very same building for $600 per month.

Viewing the evidence in the light most favorable to the government, the Court finds that a rational juror could have concluded that Mr. Hoffman's submissions in the second application amounted to wire fraud.

Count 18. The wire of Count 18 is an email dated January 20, 2010 in which Marcia Matthew sends to Kuchler, per Kuchler's request on January 19, the signed, revised management letter from Peter Hoffman in preparation for finalizing the January 20, 2010 second audit.

Mr. Hoffman submits that the management representation letter included no representations that could have influenced the State administrators, and that the government failed to prove that the letter included any representation regarding any of the transactions alleged by the government to be fraudulent. Although there are several representations made by Mr. Hoffman in the management rep letter relative to the second application,[77] in support of

[77] These are representations made by Peter Hoffman relative to the same exact expenditures included in the second audit and addressed in the Analysis for Count 17. Some examples:

13) ...

New Moon Pictures, LLC was reimbursed $807,202 for equipment purchases for the project.

Leeway Properties, Inc. also received $400,000 as a project management fee for Susan Hoffman's time involved in the project. ...

Mr. Hoffman's conviction the government focuses on Mr. Hoffman's confirmation to the auditors with respect to the $150,000 expenditure for office space provided to Duvernay that "The contractor, Leo A. Duvernay, received free rent at 900 Royal Street in lieu of payments valued at $150,000." Mr. Duvernay testified at trial that there was "not really" any stated arrangement between him and Mrs. Hoffman as to why he could use the office space; he testified that he did not use that room instead of receiving payments for the work he did on 807 Esplanade (nor was that ever suggested to him). Duvernay Tr. 5, 49. By the signed management letter of Count 18, Mr. Hoffman represented the opposite.

Viewing the evidence in the light most favorable to the government,[78] the Court finds that a rational

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19) The audio equipment listed on the cost report was bought and is located in the United Kingdom. The appropriate state and local taxes will be paid once the equipment is put into use in Louisiana.

[78] There were some facts disputed at trial as to precisely what Mr. Duvernay was using in terms of office space (that he also used the courtyard and had access to a bathroom in another part of the property) and as to what the fair market value of the claimed rent would have been (depending on how much space was being used by Duvernay). The jury was entitled to resolve those facts in the government's favor. And this Court must resolve any evidentiary conflict in favor of the verdict. United States v. Moreno-Gonzales, 662 F.3d 369, 372 (5th Cir. 2011)("[A]ny conflict in the evidence must be resolved in favor of the jury's verdict.").

Same with the issue of falsity or materiality of such statement. Applying the following jury instructions, and viewing the evidence in the light most favorable to the prosecution, a rational juror could have concluded that Mr. Hoffman's representation to the auditors that Duvernay received the rent-free office space in lieu of payment amounted to wire fraud.

Count 19. The wire of Count 19 is an email, subject line "807 Esplanade - Proof of Payments," dated June 29, 2012 from Kate Hoffman to auditor Becky Hammond, copying Peter Hoffman, Seven Arts employee Yuliya Yurchanka, and auditor Craig Silva. Ms. Kate Hoffman says:

> I hope this finds you well. Attached please find copies of the invoices and online payment confirmations from Seven Arts Pictures Louisiana LLC to New Moon (the managing member of Seven Arts Filmed Entertainment Louisiana) for the development fees and yearly interest payments. As it is after banking hours, I could not access the final bank statement but hope these confirmations will suffice.

Attached to the email are the following:

- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Developer's Fee" of $300K

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juror could have determined that the representation was false and material: A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. A representation is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

- Regions confirmation of transfer from SAPLA account to New Moon account for $300K on 6/29/2012
- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Interest–2008" of $20,324.72
- Regions confirmation of transfer from SAPLA account to New Moon account for $20,324.72 on 6/29/12
- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Interest–2009" of $128,103.31
- Regions confirmation of transfer from SAPLA account to New Moon account for $128.103.31 on 6/29/12
- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Interest–2010" of $318,060.16
- Regions confirmation of transfer from SAPLA account to New Moon account for $318,060.16 on 6/29/12
- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Interest–June 2012" of $178,483.00
- Regions confirmation of transfer from SAPLA account to New Moon account for $178,483.00 on 6/29/12
- Invoice from SAFELA to SAPLA, 6/29/12, for "SAFELA Interest–2011" of $325,831.61
- Regions confirmation of transfer from SAPLA account to New Moon account for $325,831.61 on 6/29/12

At trial, Ms. Hammond explained that this email provided the payments at the end of the project in order to pay the accrued interest for the related-party loan and it was also the developer's fees. Hammond Tr. 23. The government submits that this was Mr. Hoffman's second attempt at claiming fraudulent interest payments. According to the government's evidence, Mr. Hoffman continued to represent that interest had been paid on what it insists is a non-existent $10 million loan. Gov't Ex. 255.[79] Hammond testified that she was only shown the outgoing wire transfers showing payment of interest. Gov't Ex. 19; Hammond Tr. 24. Had she known the payments were nothing but circular transfers, Hammond testified that it would have caused her concern in including those interest payments. Hammond Tr. 24-25.

Mr. Hoffman testified that the regulations are clear that financing costs are allowed for tax credit applications. Hoffman Tr. 261. No one told Mr. Hoffman that it was impermissible to make a claim for

[79] Page 64 of this exhibit (an email from Seven Arts to Becky Hammond) is a spreadsheet entitled SAFELA "interest calculation based on actual draws." Becky Hammond testified that this was the interest schedule provided to her auditing firm, that the interest rate being charged on this related-party loan (mostly 12.5%, but 9.75% and 9.25% in 2008 and 2007) was "a little on the high side." Hammond Tr. 22. When the prosecutor asked her "how did you confirm whether or not these draws had actually been made on this loan," Ms. Hammond responded that she "couldn't match up these draws specifically to transactions so we actually had to recalculate and redo the schedules." Hammond Tr. 22-23.

interest on a loan;[80] the only issue is whether the interest is reasonable and "both the auditors and LED would have to make a judgment that the interest rate was okay." Hoffman Tr. 262. He explained:

> I emphasize that on the related-party payments and also the way the interest was calculated, these are areas of uncertainty. That is, it may be that LED, when it looks at it, says, you know, we're not going to allow that, we're going to allow less. This is just a claim. It's not something where we're saying, oh, definitely, you know, we're entitled to this no matter what. This is what the accountants thought was the best claim we could make. It might well be less. And if we got less from LED, we would still be happy. Right now, we would be happy with $6.5 million of certified base investment.

Hoffman Tr. 261. When asked by the prosecutor whether the interest payments in Government Exhibit 19 "were just bounced back and forth between the two bank accounts," Mr. Hoffman disagreed with that characterization. He explained:

> What happened was there was a draw under the loan, which was the stand-in for all of the other real funding. And that money was advanced, which we showed the bank accounts,

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[80] Indeed, the government does not question the permissibility of claiming as infrastructure tax credit expenditures the interest on the Advantage Capital or Palm Finance loans, which were included in the Silva cost report along with the inter-company loan interest.

> to SAPLA. And then SAPLA paid the interest. That was exactly what I described to Mr. Silva in response to the inquiries from the FBI. And it was right after that response that he reissued his statement.

Hoffman Tr. 240. The prosecutor continued to challenge Mr. Hoffman as to "where are the bank records [showing] that the money actually existed and actually was withdrawn on that [inter-company loan between SAPLA and SAFELA]?" Hoffman Tr. 241-42. Mr. Hoffman explained to the Court that page 64 of Government Exhibit 255 was Seven Arts' work product, which Ms. Hammond rejected and then did her own work product. Hoffman Tr. 241-42. The Court then asked: "was there backup for the draws that are reflected in these papers? And if so, was the back up available to Ms. Hammond?" Mr. Hoffman answered: "Whatever there was, was available to her." Hoffman Tr. 244.

Viewing the evidence in the light most favorable to the government, a rational juror could have resolved this factual dispute -- concerning whether Mr. Hoffman attempted to claim fraudulent interest payments as qualifying expenditures in furtherance of a scheme to defraud the State -- in favor of the government and could rationally have concluded that Mr. Hoffman's conduct in doing so amounted to wire fraud.[81]

[81] The Court has also addressed interest payments on the $10 million loan previously in analyzing whether a rational juror could have found Mr. Hoffman guilty of Count 13.

Count 20. The wire of Count 20 is an email dated July 3, 2012 from Kate Hoffman to Chris Stelly, copying Peter Hoffman in which Ms. Hoffman writes: "Please see attached which was also sent via mail today." Attached to the email are (1) a three-page letter to Mr. Stelly from Peter Hoffman; and (2) the Silva audit report dated July 3, 2012 indicating total infrastructure expenditures of $11,785,934. By his letter, Mr. Hoffman writes "[e]nclosed please find the cost report and general ledger of Seven Arts Pictures Louisiana LLC, as well as the Independent Auditors Report submitted by Silva Gurtner & Abney LLC, dated June 30, 2012, all regarding the [807 Esplanade] infrastructure project." Mr. Hoffman states that the enclosures include "'qualified expenditures' on the Project from October 1, 2007 through June 29, 2012."

Neither party singles out Count 20 in their papers. Because the government argues that Mr. Hoffman made a second attempt at claiming certain expenditures (that Leeway Properties received $400,000 for Susan Hoffman's management services; construction finance supervision fees; office rent for Duvernay; interest payments on an intercompany loan; legal fees for Mr. Hoffman and Mr. Arata; and developer's fees)[82] it appears that the government argues that the jury rationally found that causing this final audit report to be emailed

[82] Singling out developer's fees, the government submits that developer's fees are based on 20% of costs per industry practice. Thus, "[t]he logical conclusion is that if the costs are fraudulent, the addition of 20% of the fraudulent costs is also fraudulent."

across state lines amounts to wire fraud for the same reasons that several of the prior charges constituted wire fraud. This final audit report includes, among other things, a \$1.6 million developer's fee to SAFELA; interest on the SAFELA inter-company loan; the \$350,000 in legal fees for Mr. Hoffman and Mr. Arata; the \$400,000 consulting/supervisory fee for Leeway Properties; \$250,000 construction finance supervision fee paid to SAFELA; and \$157,450 for office space for Leo Duvernay.

When Mr. Hoffman was presented with Government Exhibit 20 during his redirect examination, Mr. Hoffman stated that he stands by the numbers in the Silva audit. Hoffman Tr. 260-61. During his cross-examination, the government accused Mr. Hoffman of glossing over the fact that Seven Arts submitted almost \$12 million in expenditures (Gov't Ex. 20) for a property worth \$5 million. Hoffman Tr. 259. The jury, the government submits, could have rationally concluded that Mr. Hoffman -- consistent with his statements to the board before taking on this project that government tax credits would finance the project[83] -- attempted to claim millions of

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[83] When asked by the prosecutor about his statement from the minutes of the board of directors, where Mr. Hoffman suggested that the project would be "no cost to the company" and the project would be funded by "the government tax credits," Mr. Hoffman explained that all of the government tax credits included the federal and state historic rehabilitation credits and that "the largest single source of financing [was] the value of the building itself [and] the state and federal historic rehabilitation credits, which were far more secure, because we had a certainty about how that would work and in fact the infrastructure expenses were an uncertain source." Hoffman Tr. 255. Mr. Hoffman

dollars in tax credits to which Seven Arts was not entitled.

Viewing the evidence in the light most favorable to the government, a rational juror could have determined that Mr. Hoffman's conduct in causing Exhibit 20 to be submitted to the State amounted to a transmission for the purpose of executing a scheme to defraud.

I. Mail Fraud (Count 21)

Count 21. The mailing of Count 21 is a FedEx package from Peter Hoffman to State forensic auditor Michael Daigle dated February 3, 2010 in which Mr. Hoffman sends to Daigle materials in support of the January 2010 tax credit application.[84] Although Mr. Daigle had requested materials from both prior applications, Mr. Hoffman only sent materials related to the second audit.[85] In the memorandum accompanying the mailing, which was also

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added: "If you're charging me with being too optimistic and misunderstanding what it would take, I stand guilty of that. I wish...it was no where near sufficient to get the funding from tax credits." Hoffman Tr. 256.

[84] The attachments included within Mr. Hoffman's submission to Michael Daigle include Government Exhibit 11, as well as other documents which the government charged were misleading or fraudulent. The Court notes that it is impossible to determine on which document or documents the jury relied in its finding of guilt.

[85] As to why he did not sent responsive information relating to the first audit report, Mr. Hoffman writes Daigle that the tax credits issued in connection with that first audit are not subject

apparently sent via email, Mr. Hoffman copies Katie Kuchler and Michael Arata.

All three defendants were convicted of mail fraud. All three seek acquittal.[86]

The government submits that the mailing in Count 21 contained a litany of fraudulent records by which Mr. Hoffman intended to convince State forensic auditor Michael Daigle that the claimed expenditures in the audit reports were correct (including an affidavit signed by Mr. Hoffman that Conway was his agent and that equipment had been purchased). Mr. Hoffman contends that this mailing occurred after delivery of the second audit report and, therefore, was incapable of influencing Daigle. The government submits that it need not prove that Daigle himself was the intended victim or that he or anyone was defrauded; that Mr. Hoffman was charged with concealing the conspiracy in Overt Act 35; that a representation is false if it "conceals a material fact."

As to Mr. Arata and Mrs. Hoffman, the government submits that sufficient evidence supports the jury's guilty verdict because Mr. Arata and Mrs. Hoffman were members of the conspiracy at that

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to recapture and that "Seven Arts feels that this matter should not be reopened at this time." Gov't Ex. 21.

[86] The jury acquitted Mr. Arata and Mrs. Hoffman of Count 17, which involved the submission of the January 2010 application to the State. But this Court may not enter a judgment of acquittal simply due to inconsistent verdicts, as such verdicts "may be the result of lenity" by the jury. United States v. Powell, 469 U.S. 57, 66 (1984).

time; it was foreseeable that Mr. Hoffman would make such a mailing; and the mailing obstructed the State's investigation of the fraudulent expenditures in the first cost report. Although Mr. Hoffman refused to provide documentation regarding the Departure and Duvernay transactions that were submitted in support of the first application, Mr. Hoffman provided a general ledger listing expenditures that for Duvernay, Departure, and legal fees; Mr. Hoffman also provided Daigle the Leeway Properties payment confirmation (Gov't Exhibit 11).

As to Mr. Hoffman, viewing the evidence in the light most favorable to the government, the Court finds that sufficient evidence supports a rational juror's guilty verdict as to mail fraud. The jury could have resolved any factual dispute focused by Mr. Hoffman in favor of the government.

As to Mr. Arata, he argues that his participation in any conspiracy is limited to the first application because the jury acquitted him of wire fraud for submitting the second and third application. Because the evidence at trial showed that Mr. Arata withdrew from any conspiracy in August 2009 (as detailed below), the Court agrees; he cannot be responsible for acts of his coconspirators after he withdraws from the conspiracy.

Finally, as to Mrs. Hoffman, because the Court finds that there was sufficient evidence to support a rational jury's guilty verdict as to conspiracy (as detailed below), viewing the evidence in the light most favorable to the government, the Court must defer to the jury's guilty verdict against Mrs. Hoffman on mail fraud in Count 21.

J. Conspiracy (Count 1)

Count 1. This is the conspiracy charge in which all three defendants were found guilty. Each defendant likewise seeks a judgment of acquittal.

> The jury was instructed on the law regarding conspiracy:
>
> One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him or her for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

And, the Court also instructed the jury on Pinkerton,[87] that a defendant may be convicted of substantive counts if found to be a member of a conspiracy:

> A conspirator is responsible for offenses committed by another conspirator if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

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[87] Pinkerton v. United States, 328 U.S. 640, 647 (1946).

> Therefore, if you have first found a defendant guilty of the conspiracy charged in Count 1 and if you find beyond a reasonable doubt that during the time a defendant was a member of the conspiracy, other conspirators committed the offense in Counts 2 through 21 in furtherance of and as a foreseeable consequence of that conspiracy, then you may find that defendant guilty of Counts 2 through 21, eve though the defendant may not have participated in any of the acts which constitute the offenses described in Counts 2 through 21.

The government submits that it is "beyond dispute" that it proved conspiracy because it proved that Mr. Arata and Mr. Hoffman formed an agreement to obtain tax credits involving the representations at issue. Presumably, the government intended to argue that Mrs. Hoffman was part of that conspiracy. The government also argues that proof of any substantive mail or wire fraud count shows proof of intent and, therefore, supports the jury's guilty verdicts on conspiracy. Because the conspiracy statute and the case literature spawn the difficult question "what isn't a conspiracy?", the Court must agree.

To prove a conspiracy to commit wire or mail fraud, the government had to prove beyond a reasonable doubt that (1) two or more persons made an agreement to commit wire or mail fraud; (2) that the defendant knew the unlawful purpose of the agreement; and (3) that the defendant joined in the agreement wilfully, in other words, with the intent to further the unlawful purpose. <u>United States v. Grant</u>, 683 F.3d 639, 643 (5th Cir. 2012). The agreement need not be formal, or spoken. Id. "An agreement may be inferred from concert of action, voluntary participation may be inferred from a collection of circumstances, and knowledge may be inferred from surrounding circumstances." United States v. Stephens, 571 F.3d 401, 404 (5th Cir. 2009)(quoting United States v. Bieganowski, 313 F.3d 264, 276 (5th Cir. 2002)). Having determined that sufficient evidence supports substantive wire fraud convictions against each defendant, the Court likewise finds sufficient evidence supported guilty verdicts on the conspiracy charge as to each defendant. The jury could have inferred an agreement from the circumstantial evidence and concert of action.

There is, however, one oddity as to Mr. Arata's conspiratorial, or Pinkerton, liability. Mr. Arata submits that the evidence at trial proved that he withdrew from representing Mr. Hoffman and, thus, withdrew from any conspiracy such that he cannot be guilty of any post-withdrawal acts of his coconspirators. The government insists that the evidence did not support a finding that Mr. Arata withdrew from the conspiracy and notes that Mr. Arata did not pursue a withdrawal defense or request a withdrawal jury instruction.

The preponderance of the evidence at trial proved that Mr. Arata terminated his relationship with Mr. Hoffman after suspecting him of fabricating invoices in July or August 2009. That satisfies the mandate of Pinkerton. The government would have the Court elevate form over substance, but the Court finds that because the evidence at trial showed that Mr. Arata did, in fact, withdraw from the conspiracy,[88] he cannot be responsible for post-withdrawal acts committed by his coconspirators. "Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws." Smith v. United States, 133 S. Ct. 714, 717 (2013). "An untimely withdrawal does not negate liability on the *conspiracy charge*, but instead helps a defendant guard against post-withdrawal acts done by other co-conspirators and thereby serves to minimize his liability on subsequent crimes." United States v. Salazar, 751 F.3d 326, 330-31 (5th Cir. 2014) (citation omitted, emphasis in original).

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Accordingly, for the foregoing reasons, the Court finds that Mr. Hoffman's motion for judgment of acquittal is GRANTED in part (as to Counts 2, 3, 4, 5, and 7) and DENIED in part (as to Counts 1, 6, and 8 through 21); Mr. Arata's motion for judgment of acquittal is GRANTED in part (as to Counts 2, 3, 4, 5, 7, 13, and 21, as well as Counts 22 through 25) and DENIED in part (as to Counts 1 and 6); and

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[88] The evidence supporting withdrawal, as previously mentioned: Mr. Arata sent a letter dated August 6, 2009 to Mr. Hoffman terminating their business relationship; he notified other Seven Arts officers and others of his resignation; he advised the State that he had withdrawn from his representation of Seven Arts and Peter Hoffman; he met with government agents and lawyers, cooperated and provided them with documents and participated in interviews; and he reminded the State film office that he had withdrawn from representing Seven Arts and that he was adverse to it.

Mrs. Hoffman's motion for judgment of acquittal is DENIED.

III.

A.

Rule 33 of the Federal Rules of Criminal Procedure allows a trial court, upon a defendant's motion, to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Disfavored, Rule 33 motions are viewed "with great caution." See United States v. Infante, 404 F.3d 376, 387 (5th Cir. 2005).

In the Fifth Circuit, "a new trial ordinarily should not be granted 'unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict.'" United States v. Wright, 634 F.3d 770, 775 (5th Cir. 2011)(citations omitted); see also United States v. Robertson, 110 F.3d 1113, 1120 n. 11 (5th Cir. 1997)("It has been said that on such a motion [for new trial] the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial ... should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.").[89] "A new trial is granted only upon demonstration of adverse effects on substantial rights of a defendant." United States

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[89] But see United States v. O'Keefe, 128 F.3d 885, 898 (5th Cir. 1997)("The grant of a new trial is necessarily an extreme measure, because it is **not** the role of the judge to sit as a thirteenth member of the jury.")(emphasis added).

v. Wall, 389 F.3d 457, 466 (5th Cir. 2004)(citation omitted). The Court lacks "authority to grant a motion for a new trial under Rule 33 on a basis not raised by the defendant." United States v. Shoemaker, 746 F.3d 614, 631¬32 (5th Cir. 2014)(citation omitted).

Unlike the cramped standard applicable to Rule 29 motions, during its consideration of a motion for a new trial, the Court has broad discretion to "carefully weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial." United States v. Herrera, 559 F.3d 296, 302 (5th Cir. 2009)(quoting United States v. Tarango, 396 F.3d 666, 672 (5th Cir. 2005)); United States v. Shoemaker, 746 F.3d 614, 631-32 (5th Cir. 2014)("The 'interest of justice' may take into account 'the trial judge's evaluation of witnesses and weighing of the evidence'", but the Court "may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable.")(citations omitted). A new trial may be appropriate where the evidence "tangentially supports a guilty verdict, but in actuality, the evidence preponderates sufficiently heavily against the verdict such that a miscarriage of justice may have occurred." Tarango, 396 F.3d at 672 (citations omitted). However, the Court still "must not entirely usurp the jury's function or simply set aside a jury's verdict because it runs counter to [the] result the district court believed was more appropriate." Id. (citations omitted). Rather, the Court should set aside a jury's guilty verdict in the interests of justice only when exceptional circumstances are present. See id.; see also United States v. Poole, 735 F.3d 269, 279 (5th Cir. 2013)("Rule 33 case law cannot be understood except through the lens of avoiding the injustice of a compromised verdict.").

B.

All three defendants seek a new trial insofar as the Court has denied their motions for judgment of acquittal.

Mr. Hoffman submits that a new trial is warranted because (a) the manifest weight of the evidence was that the government did not prove beyond a reasonable doubt either that the related party transactions were not proper claims of base investment, or the Duvernay/Departure confirmations were valid, or the auditors or the State assumed that final cash payments had been made to Duvernay or Departure; and (b) prosecutorial misconduct caused prejudice. Mr. Arata submits that a new trial is warranted based on prosecutorial misconduct, including disparaging comments made about Mr. Arata and his family; the government's strategy to vilify Mr. Arata as a connected, manipulating player; and the government's strategy to overstate evidence, engage in inappropriate questioning of witnesses on key issues. Mrs. Hoffman submits that the weight of the evidence does not support the guilty verdicts.

C.

Because the Court orders that judgments of acquittal must be entered as to Mr. Hoffman and Mr. Arata on Counts 2, 3, 4, 5, and 7, as well as Counts

13, 21, and 22 through 25 for Mr. Arata, the Court must also decide whether a new trial should conditionally be granted if the Fifth Circuit reverses the judgment of acquittal. The Court applies the same Rule 33 standard to decide whether a new trial is warranted (if the Fifth Circuit reverses the judgments of acquittal) as it applies to decide whether the defendants are entitled to their alternate relief of new trial, which each urges insofar as the Court denies the motions for judgment of acquittal.

The Court finds that no new trial is warranted as to those counts that the Court denied motions for judgment of acquittal. Insofar as the defendants argue that the weight of the evidence preponderates heavily against the verdict, the Court disagrees. Even making credibility determinations in favor of the defendants and against such government witnesses as Kuchler,[90] the Court finds that the jury was nevertheless left with sufficient evidence to reject the defendants' good faith theories of defense and find that the defendants had engaged in a scheme to defraud and conspired to do so. Nor has any defendant shown that the hyperbole employed

[90] Ms. Kuchler, the tax credits auditor, was a central government witness. She was argumentative, self-interested, defensive, and rehearsed. She endlessly intoned repeatedly that one can't "audit for fraud." And yet, everything she needed for her review was in a box of materials delivered to her in response to her audit requirements. Nevertheless, she either didn't examine everything, and admittedly, some vital material was "illegible" but she never asked for a legible copy.

by the government,[91] or its inappropriate questioning of witnesses,[92] caused any prejudice. Without more, the Court cannot grant a judgment of acquittal or grant a new trial simply because the Court disagrees with the jury's verdict or because the Court would have resolved the case differently.

Likewise, as to Counts 2, 3, 4, 5, 7, and (as to Mr. Arata only) Counts 13, 21, and 22 through 25, if the Fifth Circuit reverses this Court's judgment of acquittal on these counts, the Court does not find that a new trial is warranted. There has been no demonstration of adverse effects on substantial rights of any defendant that would warrant the exceptional remedy of a new trial.

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Accordingly, for the foregoing reasons, IT IS ORDERED: that Susan Hoffman's motion for judgment of acquittal and motion for new trial are DENIED; Michael Arata's motion for judgment of acquittal is

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[91] For example, in its opening statement, the government stated that the defendants "utterly abused the Louisiana film tax credit program, and in the process they took advantage of and exploited every human being they could." False theater.

[92] It was utterly inappropriate for the government to ask Jerry Daigle "Did Michael Arata tell you that he later called Katie [Kuchler] and told her that the operating agreement was substantiation for the legal fees?" or "Did Michael Arata tell you that he later, after your conversation with him, called Katie [Kuchler] and told her that his equity interest was in support of legal fees/tax credit submission?" Jerry Daigle Tr. 32-33. There was no evidence that Mr. Arata ever called Kuchler to tell her that he was relenting on the legal fees issue.

GRANTED in part and DENIED in part, but his motion for new trial is DENIED; and Peter Hoffman's motion for judgment of acquittal is GRANTED in part and DENIED in part, but his motion for new trial is DENIED. Finally, the Court conditionally determines that no new trial shall be granted if the judgments of acquittal are later reversed or vacated on appeal.[93]

New Orleans, Louisiana,
December 9, 2015
/s/Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES
DISTRICT JUDGE

[93] Ever since the Supreme Court in 1979 in the Jackson case announced the "any rational trier of fact" standard of review, the case literature on Rule 29 review has resulted in little more than hollow slogans. The Fifth Circuit contributed to that disarray when it adopted and sporadically applied, but then unwisely abandoned, the realistic equipoise formula. It is this Court's hope that eventually this issue will be revisited by higher courts that will announce a brighter line test for district judges in Rule 29 settings.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	*	14-CR-22
OF AMERICA	*	
	*	Section F
versus	*	
	*	January 27, 2016
MICHAEL P. ARATA	*	

* * * * * * * * * * * * * * * *

SENTENCING BEFORE THE
HONORABLE MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

Appearances:

For the United States:
U.S. Attorney's Office
By: DALL KAMMER, ESQ.
CHANDRA MENON, ESQ.
JAMES S. BAEHR, ESQ.
MICHAEL REDMANN, ESQ.
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For Michael P. Arata:
Schonekas Evans McGoey &
McEachin, LLC
By: WILLIAM P. GIBBENS, ESQ.
909 Poydras Street, Suite 1600
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For Michael P. Arata:
Hymel Davis & Petersen, LLC

By: MICHAEL R. DAVIS, ESQ.
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Official Court Reporter:
Toni Doyle Tusa, CCR, FCRR
500 Poydras Street, Room HB-275
New Orleans, Louisiana 70130
(504) 589-7778

* * *

[2] PROCEEDINGS

(January 27, 2016)

THE COURT: Call the next case.

THE DEPUTY CLERK: Criminal Action 14-22, *United States of America v. Michael P. Arata.*

MR. KAMMER: Good afternoon, Your Honor. Dall Kammer, Chandra Menon, Jim Baehr, and Michael Redmann for the United States.

MR. GIBBENS: Good afternoon, Judge. Billy Gibbens and Mike Davis for the defendant, Michael Arata.

THE COURT: This is before the Court for sentencing, Counsel. Is there any reason why sentence shouldn't be imposed at this time?

MR. GIBBENS: No, sir.

MR. KAMMER: No, sir.

THE COURT: There have been some 40 objections to the presentence report, which I will rule on in a moment, but let me ask you before we begin: Is there anything else that should be called to the Court's attention at this time?

MR. KAMMER: Not by the government, Your Honor.

MR. GIBBENS: Judge, I don't know if we need to discuss this now or not. I know there was a very late filed --

THE COURT: I'll get to that in a moment.

MR. GIBBENS: Okay. Thank you, Judge.

THE COURT: Anything else?

[3] MR. GIBBENS: No, sir.

THE COURT: The Court orders that a copy of its statement of reasons for imposing sentence be filed of record under seal, together with a copy of the defendant's presentence investigation report.

I will rule on the objections and then, Mr. Arata, I will ask you if you have anything to say in mitigation of sentence before your sentence is imposed.

As to the objections, the government has filed 13. The Court rules as follows:

Objection 1 is denied.

Objection 2 is granted, and the presentence report has been revised accordingly.

Objection 3 is denied. The Court finds that the defendant withdrew from the conspiracy in August of 2009.

Objection 4 is granted, and the presentence report is deemed revised accordingly.

Objections 5 and 6 are granted in part and denied in part. The presentence report has been revised as to the United Kingdom equipment issue. It has been denied as to the legal fees pursuant to this Court's Order and Reasons dated December 9, 2015.

I should add this Court orders that its statement of reasons regarding the Rule 29 issues of December 9, 2015, is also ordered to be a part of the **[4]** transcript of this Court's reasons for imposing sentence.

Objections 7 and 8 are granted, and the presentence report is deemed revised accordingly. Similarly, Objection 9 has been granted.

Objection 10 is denied. See this Court's Order and Reasons of December 9, 2015.

Objection 11 is granted, and the presentence report has been revised accordingly. The same ruling on Objection 12. The same ruling on Objection 13.

The defendant has filed some 27 objections to the presentence report, and the Court rules as follows:

Objection 1 is granted, and the report has been revised accordingly. The same ruling on Objections 2 and 3. The same ruling on Objections 4, 16, and 27. The same ruling on Objection 5.

As to Objection 6, the objection is denied.

Objection 7 is granted.

Objection 8 is granted.

Objection 9 is granted pursuant to the Court's Order and Reasons of December 9, 2015.

Objection 10, the Court will hold a so-called forfeiture or restitution hearing after all defendants have been sentenced. Presently a forfeiture hearing, I think, is mistakenly scheduled for March 9, which is the sentencing date in this case for the two remaining defendants and, therefore, **[5]** it will be continued. Objection 10 is granted in part. As to the issue of minimal loss to the state, I will address that in a moment.

Objections 11, 12, and 13 are granted in part as to the issue of whether the defendant was answerable for the acts of others after he withdrew from the conspiracy. So it is granted in part as to paragraph 41 of the presentence report only.

As to Objection 14, the objection is granted in part. As I indicated, there will be a hearing as to the question of loss.

Objection 15 is denied.

Objections 17 and 20 are denied.

Objection 18 is denied. As I indicated, there will be a hearing as to restitution after all defendants have been sentenced.

Objection 21 is denied.

Objections 22, 23, 24, and 26 are denied.

Objection 27 is granted.

That's it. That covers all of the objections by the government and the defendant.

Now, Mr. Arata, do you have anything to say in mitigation of sentence before sentence is imposed?

MR. GIBBENS: Your Honor, I wish to speak for Mr. Arata. As you know, the government has already filed a **[6]** notice of appeal, so I have advised Mr. Arata that I think it's best if I speak on his behalf. He has agreed to that.

Judge, there has been --

THE COURT: I'm sorry to interrupt, but is there anyone else who wants to speak as well?

MR. GIBBENS: Judge, I do believe that Father Maestri would like to speak. He did not have the opportunity, I don't believe, to write a letter. He would like to address the Court.

THE COURT: Well, let me hear from Father Maestri first.

MR. GIBBENS: Thank you, Judge.

THE COURT: Where is Father Maestri?

Father Maestri, come on up here, please.

Sorry to interrupt, but I was told that maybe somebody wanted to speak.

MR. GIBBENS: Thank you, Judge.

THE COURT: Father, identify yourself for the record, please.

FATHER MAESTRI: Yes, sir. Good afternoon, Your Honor. My name is William Maestri, M-A-E-S-T-R-I, and I'm a Catholic priest with the Archdiocese of New Orleans.

Your Honor, in January of 2013, on the corner of Touro and Dauphine, I opened the Bishop Perry

Center. Bishop Perry was the first black Catholic Bishop in the **[7]** United States. What we do is we serve the homeless and the poor. Last year we served 15,000 people who came to the center.

Your Honor, Mr. Arata has provided incredible services to our inner city children in our Project HOPE, their families, and also provided services to the center. He has given of himself.

I'm not an attorney. I'm hoping for salvation, so I'm not an attorney, but --

THE COURT: You better ask for mine first.

FATHER MAESTRI: I'm sure you will be there.

He has given of himself to our inner city children, their families. He has visited them. This was before whatever is involved, and I have no idea about that. Again, really, I have no idea of the particulars and all that. He has done incredible work and witness for the Bishop Perry Center, for the Archdiocese, for our families, and for the children.

I thank you for the opportunity to address you. I guess what I'm asking is that if there is any leniency or mitigation or whatever the term is -- I have no idea. Mr. Arata has been just magnificent to us without cost. Nobody has ever been charged money. Nobody has ever received any kind of recompense. None of that kind of stuff. We are on Touro and Dauphine Street right there in the Marigny.

[8] So I would just like to bring that to your attention and ask you to take that into consideration, obviously. It's a request to take that into consideration as to the character of Mr. Arata. Obviously, that's your decision, but I just felt that if I had the opportunity, and I don't want to take the time of the Court --

THE COURT: That's all right.

FATHER MAESTRI: -- to speak to you, sir.

THE COURT: Thank you, Father.

FATHER MAESTRI: Thank you very much, Your Honor. Thank you.

THE DEFENDANT: Thank you, Father.

MR. GIBBENS: Thank you.

FATHER MAESTRI: Thank you.

THE COURT: Mr. Gibbens, go ahead.

MR. GIBBENS: Yes, sir. Judge, I won't be long either because we have taken so much of the Court's time in this case for so long. Every single issue has been discussed and rediscussed and briefed and litigated over the past several years.

One thing that I really did want to point out was a letter that the Court received. I just saw it for the first time on Monday, and we sent it over right way.

THE COURT: From Advantage Capital.

MR. GIBBENS: I mean Friday, from Advantage Capital.

[9] Judge, we are very grateful for it now. I would have loved to have it at trial, too, and that testimony at trial, because the government tried very hard to put Advantage Capital in the category of a victim of Mr. Arata. One of the managing directors of that company wrote a letter to the Court saying they don't feel that they were defrauded by Mr. Arata at all, and they were very happy with his services.

THE COURT: They blamed it on underwriting decisions.

MR. GIBBENS: Yes, sir. They were proud to be part of a project that was successful and is a benefit to the city.

There's also been a letter, I believe, from Patrick Calhoun, from LEAP, another company that was tried to be portrayed as a victim in this case. Mr. Calhoun also is in support of Michael.

One of the, I think, very amazing things, too, about -- just the sheer amount of support that Michael has received is impressive, but more than that, Judge, it's people who are involved in his professional life, which really was part of what was on trial here.

A lot of times when we get these sentencing letters, we will see a letter that says: I don't know anything about what this person was doing, I don't know anything about the case, but otherwise he is a really great guy.

Here there have been letters from other lawyers in the tax credit field who have said: Michael did everything **[10]** by the book. We were all struggling to understand this very complicated, difficult system, and he was in good faith trying to find his way through, just like the rest of us were.

We have other businesspeople, filmmakers, who were involved with Michael in tax credit projects, who have written the Court about their experiences with him in those projects. They were successful, and they were impressed with Michael's honesty and integrity in those projects.

So it's very close to what was happening in this case. We have a very good picture of what kind of person Michael was, how he was conducting himself both as a lawyer and in the tax credit field.

Then, of course, we have the countless letters -- and I do apologize for sending so many, but I really didn't feel like there was one that I should take out -- talking about all of the wonderful things he has done for the community, for various charities. The list, I know you have seen, Judge, is very long.

Finally, Judge, I just wanted to say that this has been a long case and a hard-fought case, and Michael has never wavered. I know the jury didn't agree with us, and we are disappointed with that, but we disagree with them.

Michael is going to try to continue as best he can in the life that he has, but already up through today he has suffered a lot: financially, emotionally, his family. I **[11]** couldn't imagine being in a worse situation than he is right now with young children and facing the prospect of being sentenced to a prison term.

Judge, I know you know our position on what we believe the guidelines should be. I understand you have denied some of our objections. I think that even under a guideline interpretation we could get to a sentence of probation in this case. Even without, we would ask, Judge, that you use your discretion to grant a variance or a downward departure and allow Mr. Arata to serve a sentence of probation so that he can stay with his family and he can continue all the good work he has done despite what has happened here. We thank you, Judge, for your consideration.

THE COURT: Thank you.

Well, this case presents a classic example of bewilderment resulting from confusion caused by inconsistent applications of law as to what might be a criminal hoax. This Court's previous 124-page Rule 29 decision speaks for itself.

So that the record is clear, the Court reiterates everything that was said in that opinion, including -- and I underscore *including* -- the last footnote to the opinion on its final page. As I have indicated, the Court includes that decision as part of its reasons for imposing sentence in this case.

That opinion underscores the clash of norms that **[12]** animate this case: to what some see as the perfectly proper quest for maximum profit, as evil. All without regard to what this Court has noted took place during a statutory environment that was bungled, that lacked leadership, that lacked any visionary guide, that lacked coherence. It seems helpful at this point to caution that unchecked prosecutorial zeal deals a vicious body blow to the Constitution.

The over 130 letters sent to the Court on behalf of Mr. Arata all convey the same theme, one who is reliable, generous, charitable, and admirable, but one letter stands out which I want to quote from. The writer of the letter writes to the Court about justice being blind and quotes the poet Melvin Tolson. I would like to read from the letter and the quote:

"Who blindfolds Justice on the courthouse roof while the lawyers weave the sleight-of-hand of proof?"

The author goes on to write the verse invokes to him the idea that people -- in this case Mr. Arata -- can be easily tricked by circumstances in their lives, finding themselves facing something dire at the hands of courtroom presentations, and that our system should take into account the whole person and not always be totally blind.

There are broader concepts of crime, the writer notes. There are broader concepts of right, of crime and punishment, beyond what is in the statutes that govern us. A **[13]** good person deserves a good result, and the nice guy in the room sometimes deserves just a break. Now, that is another way of saying that, when it's justified, mercy must be a component of justice.

Because of the oddity of this Court's oversight of the jury verdict under Rule 29 of the Federal Rules of Criminal Procedure, you stand convicted and remain convicted of one count of mail fraud conspiracy and one count of wire fraud.

Let me note, however, before sentence is imposed that the presentence report in paragraph 60 refers to the lack of a victim in this case. Nevertheless, the Court received a last-minute affidavit from the state claiming to be a victim, although the state has never asked for the tax credits to be given back. The government did not object to paragraph 60 in the presentence report.

Paragraph 151 of the presentence report indicates that perhaps the Court should consider a variance in view of the fact that there might well not be a victim in this case. The government has not objected to paragraph 151 of the presentence report.

As I indicated, there will be a restitution hearing in which even the person who submitted the last-minute affidavit under oath will be expected to testify here in court under oath.

Pursuant to the Sentencing Reform Act of 1984 **[14]** and considering the provisions found in law binding on this Court, it is the judgment of this Court that the defendant, Michael P. Arata, is hereby placed on probation for a term of four years, consisting of four years to each of Counts 1 and 6, to be served concurrently.

The sentence is a variance. It promotes respect for the law, it protects the Constitution of the United States, it provides just punishment, it acknowledges the nature and the odd circumstances of the offense before this Court, the history and characteristics of Mr. Arata, and it affords adequate deterrence to any criminal conduct.

Again, let me reiterate. Whether or not there was any damage to the State of Louisiana or any other victim is a serious issue, which until 5:00 yesterday afternoon was not an issue and was never raised by the state.

It is the finding of this Court that the defendant has the ability to pay a fine and, therefore, the defendant is ordered to pay the United States a total fine of $15,000, to be paid in full by February 3, 2020. The Court will waive the interest requirement in this case.

While on probation, the defendant shall not commit any federal, state, or local crime. He shall be prohibited from possessing a firearm, ammunition, destructive device, or any other dangerous weapon. He shall not possess a controlled substance. He shall cooperate in the collection of **[15]** a DNA sample. He shall comply with all other standard conditions of probation, including the following: the financial disclosure condition; the financial restriction condition. He shall pay any fine imposed by this Court, the question of restitution to be another day.

The defendant shall maintain full-time employment. Given what I understand to be his background, including the testimony of Father Maestri here today, the defendant shall perform 300 hours of unpaid community service as directed by his United States probation officer. Father Maestri might find that he has 300 free hours of service from this defendant.

Anything else, Counsel?

Oh, and a special assessment of $200.

Anything else?

MR. GIBBENS: No, sir. Thank you, Judge.

MR. KAMMER: Your Honor, respectfully, may I make a record of my objections to the sentence, sir?

THE COURT: Well, this is not Tulane and Broad. I already understand your objections, but go ahead.

MR. KAMMER: To the extent that the sentence is below the sentencing guidelines, the government respectfully objects, and to the substantive reasonableness of the sentence.

THE COURT: You read that well, Mr. Kammer. Court is adjourned.

[16] THE DEPUTY CLERK: All rise.

(Proceedings adjourned.)

* * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.

s/ Toni Doyle Tusa

Toni Doyle Tusa, CCR,
FCRR
Official Court Reporter

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-30104

UNITED STATES OF AMERICA,
Plaintiff - Appellee Cross-Appellant

v.

PETER M. HOFFMAN,
Defendant - Cross-Appellee

MICHAEL P. ARATA; SUSAN HOFFMAN,
Defendants - Appellants Cross-Appellees

CONS. W/ 16-30226

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

v.

PETER M. HOFFMAN,
Defendant - Appellant-Cross- Appellee

CONS. W/ 16-30013

UNITED STATES OF AMERICA,
Plaintiff - Appellant

v.

PETER M. HOFFMAN; MICHAEL P. ARATA,
Defendants - Appellees

CONS. W/ 16-30527

UNITED STATES OF AMERICA,
Plaintiff - Appellee Cross-Appellant

v.

PETER M. HOFFMAN
Defendant - Appellant Cross-Appellee

MICHAEL P. ARATA; SUSAN HOFFMAN,
Defendants - Cross Appellees

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____ F.3d _____)

Before KING, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gregg Costa
UNITED STATES CIRCUIT JUDGE

APPENDIX E

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 371:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341:

Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343:

Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Fed. R. Civ. P. 29:

Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

La. Rev. Stat. 47:6007
(Effective: July 1, 2007 to July 8, 2009):

Motion picture investor tax credit

A. Purpose. The primary objective of this Section is to encourage development in Louisiana of a strong capital and infrastructure base for motion picture film, videotape, digital, and television program productions in order to achieve an independent, self-supporting industry. This objective is divided into immediate and long-term objectives as follows:

(1) Immediate objectives are to:

(a) Attract private investment for the production of motion pictures, videotape productions, and television programs in Louisiana.

(b) Develop a tax and capital infrastructure which encourages private investment. This infrastructure will provide for state participation in the form of tax credits to encourage investment in state-certified productions and infrastructure projects.

(c) Develop a tax infrastructure utilizing tax credits which encourage investments in multiple state-certified production and infrastructure projects.

(2) Long-term objectives are to:

(a) Encourage increased employment opportunities within this sector and increased global competition with other states in fully developing economic development options within the film and video industry.

(b) Encourage new education curricula in order to provide a labor force trained in all aspects of film and digital production.

(c) Encourage development of a Louisiana film, video, television, and digital production and post-production infrastructure with state-of-the-art facilities.

B. Definitions. For the purposes of this Section:

(1) "Base investment" shall mean the actual investment made and expended by:

(a) A state-certified production in the state as production expenditures incurred in this state that are directly used in a state-certified production or productions.

(b) A person in the development of a state-certified infrastructure project.

(2) "Division" means the division of administration of the office of the governor.

(3) "Expended in the state" in the case of tangible property shall mean property which is acquired from a source within the state and, in the case of services, shall mean services procured and performed in the state.

(4) "Headquartered in Louisiana" shall mean a corporation incorporated in Louisiana or a partnership, limited liability company, or other business entity domiciled and headquartered in Louisiana for the purpose of producing nationally distributed motion pictures as defined in this Section.

(5) "Motion picture" means a nationally distributed feature-length film, video, television series, or commercial made in Louisiana, in whole or in part, for theatrical or television viewing or as a television pilot. The term "Motion picture" shall not include the production of television coverage of news and athletic events.

(6) "Motion picture production company" shall mean a company engaged in the business of producing nationally distributed motion pictures as defined in this Section. Motion picture production company shall not mean or include any company owned, affiliated, or controlled, in whole or in part, by any company or person which is in default on a

loan made by the state or a loan guaranteed by the state, nor with any company or person who has ever declared bankruptcy under which an obligation of the company or person to pay or repay public funds or monies was discharged as a part of such bankruptcy.

(7) "Office" means the Governor's Office of Film and Television Development until August 15, 2006; thereafter, the term "office" means the office of entertainment industry development in the Department of Economic Development provided for in R.S. 51:938.1.

(8) "Payroll" shall include all salary, wages, and other compensation, including related benefits sourced or apportioned to Louisiana.

(9) "Production expenditures" means preproduction, production, and postproduction expenditures directly incurred in this state that are directly used in a state-certified production, including without limitation the following: set construction and operation; wardrobes, make-up, accessories, and related services; costs associated with photography and sound synchronization, lighting, and related services and materials; editing and related services; rental of facilities and equipment; leasing of vehicles; costs of food and lodging; digital or tape editing, film processing, transfer of film to tape or digital format, sound mixing, special and visual effects; total aggregate payroll; music, if performed, composed, or recorded by a Louisiana musician, or released or published by a Louisiana-domiciled and headquartered company; airfare, if purchased

through a Louisiana-based travel agency or travel company; insurance costs or bonding, if purchased through a Louisiana-based insurance agency; or other similar production expenditures as determined by rule. This term shall not include postproduction expenditures for marketing and distribution, any indirect costs, any amounts that are later reimbursed, any costs related to the transfer of tax credits, or any amounts that are paid to persons or entities as a result of their participation in profits from the exploitation of the production.

(10) “Resident” or “resident of Louisiana” means a natural person and, for the purpose of determining eligibility for the tax incentives provided by this Chapter, any person domiciled in the state of Louisiana and any other person who maintains a permanent place of abode within the state and spends in the aggregate more than six months of each year within the state.

(11) “Secretary” means the secretary of the Department of Economic Development.

(12) “State-certified infrastructure project” shall mean a film, video, television, and digital production and postproduction facility , and movable and immovable property and equipment related thereto, or any other facility which supports and is a necessary component of such proposed state-certified infrastructure project, all as determined and approved by the office, the secretary of the Department of Economic Development, and the division of administration under such terms and conditions as

are authorized by this Section. The term "infrastructure project" shall not include movie theaters or other commercial exhibition facilities.

(13) "State-certified production" shall mean a production approved by the office and the secretary of the Department of Economic Development produced by a motion picture production company domiciled and headquartered in Louisiana which has a viable multi-market commercial distribution plan.

C. Investor tax credit; specific productions and projects.

(1) There is hereby authorized a tax credit against state income tax for Louisiana taxpayers for state-certified productions, other than motion picture production companies. The tax credit shall be earned by investors at the time expenditures are made by a motion picture production company in a state-certified production. However, credits cannot be applied against a tax or transferred until the expenditures are certified by the office and the secretary of the Department of Economic Development. For state-certified productions, expenditures shall be certified no more than twice during the duration of a state-certified production unless the motion picture production company agrees to reimburse the office for the costs of any additional certifications. The tax credit shall be calculated as a percentage of the total base investment dollars certified per project.

(a) For state-certified productions approved by the office and the secretary on or after January 1, 2004, but before January 1, 2006:

(i) If the total base investment is greater than three hundred thousand dollars and less than or equal to eight million dollars, each taxpayer shall be allowed a tax credit of ten percent of the actual investment made by that taxpayer.

(ii) If the total base investment is greater than eight million dollars, each taxpayer shall be allowed a tax credit of fifteen percent of the actual investment made by that taxpayer.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(b) For state-certified productions approved by the office and the secretary on or after January 1, 2006, but before July 1, 2010:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of twenty-five percent of the base investment made by that investor.

(ii) To the extent that base investment is expended on payroll for Louisiana residents employed in connection with a state-certified production, each investor shall be allowed an additional tax credit of ten percent of such payroll. However, if the payroll to any one person exceeds one million dollars, this additional credit shall exclude any salary for that person that exceeds one million dollars.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(c) For state-certified productions approved by the office and the secretary on or after July 1, 2010, but before July 1, 2012:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of twenty percent of the base investment made by that investor.

(ii) To the extent that base investment is expended on payroll for Louisiana residents employed in connection with a state-certified production, each investor shall be allowed an additional tax credit of ten percent of such payroll. However, if the payroll to any one person exceeds one million dollars, this additional credit shall exclude any salary for that person that exceeds one million dollars.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(d) For state-certified productions approved by the office and the secretary on or after July 1, 2012:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of fifteen percent of the base investment made by that investor.

(ii) To the extent that base investment is expended on payroll for Louisiana residents employed in connection with a state-certified production, each investor shall be allowed an additional tax credit of ten percent of such payroll. However, if the payroll to any one person exceeds one million dollars, this additional credit shall exclude any salary for that person that exceeds one million dollars.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(e) Motion picture investor tax credits associated with a state-certified production shall never exceed the total base investment in that production.

(2)(a) Beginning July 1, 2005, and ending on January 1, 2009, there shall be allowed a credit against state income tax for state-certified infrastructure projects which meet the criteria provided for in this Paragraph and which are approved by the office, the secretary of the Department of Economic Development, and the division of administration. The tax credit shall be equal to forty percent of the base investment expended in this state on such project which is in excess of three hundred thousand dollars. The total tax credit allowed for any state-certified infrastructure project shall not exceed twenty-five million dollars, and the tax credit shall be earned and may be structured as provided for in this Paragraph.

(b)(i) An infrastructure project shall be approved if it is a film, video, television, or digital production or postproduction facility.

(ii) However, if all or a portion of an infrastructure project is a facility which may be used for other purposes unrelated to production or postproduction activities, then the project shall be approved only if a determination is made that the multiple-use facility will support and will be necessary to secure production or postproduction activity for the production and postproduction facility and the applicant provides sufficient contractual assurances that:

(aa) The facility will be used as a state-of-the-art production or postproduction facility, or as a support and component thereof, for the useful life of the facility.

(bb) No tax credits shall be earned on such multiple-use facilities until the production or postproduction facility is complete.

(c) Tax credits for infrastructure projects shall be earned only as follows:

(i) Construction of the infrastructure project shall begin within six months of the initial certification provided for in Subparagraph (D)(2)(c) of this Section.

(ii) Expenditures shall be certified by the office, the secretary, and the division as provided for in

Paragraph (D)(2) of this Section, and credits are not earned until such certification.

(iii) Twenty-five percent of the total base investment provided for in the initial certification of an infrastructure project pursuant to Subparagraph (D)(2)(d) of this Section shall be certified as expended before any credits may be earned.

(iv) No tax credit shall be allowed for expenditures made for any infrastructure project after December 31, 2008, unless fifty percent of total base investment provided for in the initial certification of the project pursuant to Subparagraph (D) (2)(d) of this Section has been expended prior to that date. The expenditures may be finally certified at a later date.

(v) For purposes of allowing tax credits against state income tax liability and transferability of the tax credits, the tax credits shall be deemed earned at the time the expenditures are made, provided that all requirements of this Subsection have been met and after the tax credits have been certified.

(d) The office, the secretary, and the division may require the tax credits to be taken and/or transferred in the tax period in which the credit is earned or may structure the tax credit in the initial certification of the project to provide that only a portion of the tax credit be taken over the course of two or more tax years.

(3) The credit shall be allowed against the income tax for the taxable period in which the credit is earned or for the taxable period in which initial

certification authorizes the credit to be taken. If the tax credit allowed pursuant to this Section exceeds the amount of such taxes due for such tax period, then any unused credit may be carried forward as a credit against subsequent tax liability for a period not to exceed ten years.

(4) Application of the credit.

(a) All entities taxed as corporations for Louisiana income tax purposes shall claim any credit allowed under this Section on their corporation income tax return.

(b) Individuals, estates, and trusts shall claim any credit allowed under this Section on their income tax return.

(c) Entities not taxed as corporations shall claim any credit allowed under this Section on the returns of the partners or members as follows:

(i) Corporate partners or members shall claim their share of the credit on their corporation income tax returns.

(ii) Individual partners or members shall claim their share of the credit on their individual income tax returns.

(iii) Partners or members that are estates or trusts shall claim their share of the credit on their fiduciary income tax returns.

(5) Transferability of the credit. Any motion picture tax credits not previously claimed by any taxpayer against its income tax may be transferred or

sold to another Louisiana taxpayer or to the office, subject to the following conditions:

(a) A single transfer or sale may involve one or more transferees. The transferee of the tax credits may transfer or sell such tax credits subject to the conditions of this Subsection.

(b) Transferors and transferees shall submit to the office, and to the Department of Revenue in writing, a notification of any transfer or sale of tax credits within thirty days after the transfer or sale of such tax credits. The notification shall include the transferor's tax credit balance prior to transfer, a copy of any tax credit certification letter(s) issued by the office and the secretary of the Department of Economic Development and, in the case of an infrastructure project, to the office, the secretary, and the division of administration, the name of the state-certified production or infrastructure project, the transferor's remaining tax credit balance after transfer, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate, price paid by the transferee to the transferor, in the case when the transferor is a state-certified production or state-certified infrastructure project, for the tax credits, and any other information required by the office or the Department of Revenue. For the purpose of reporting transfer prices, the term "transfer" shall include allocations pursuant to Paragraph (3) of this Subsection as provided by rule. The office may post on its web site an average tax credit transfer value, as determined by the office and the secretary of the Department of Economic

Development to reflect adequately the current average tax credit transfer value. The tax credit transfer value means the percentage as determined by the price paid by the transferee to the transferor divided by the dollar value of the tax credits that were transferred in return. The notification submitted to the office shall include a processing fee of up to two hundred dollars per transferee, and any pricing information submitted by a transferor or transferee shall be treated by the office and the Department of Revenue as proprietary to the entity reporting such information and therefore confidential. However, this shall not prevent the publication of summary data that includes no fewer than three transactions.

(c) Failure to comply with this Paragraph will result in the disallowance of the tax credit until the taxpayers are in full compliance.

(d) The transfer or sale of this credit does not extend the time in which the credit can be used. The carryforward period for credit that is transferred or sold begins on the date on which the credit was originally earned or, in the case of a structured infrastructure credit, the date upon which the credit is allowed to be taken.

(e) To the extent that the transferor did not have rights to claim or use the credit at the time of the transfer, the Department of Revenue shall either disallow the credit claimed by the transferee or recapture the credit from the transferee through any collection method authorized by R.S. 47:1561. The transferee's recourse is against the transferor.

(f) Beginning on and after January 1, 2007, the investor who earned the motion picture investor tax credits may transfer the credits to the office for seventy-two percent of the face value of the credits. Beginning January 1, 2009, and every second year thereafter, the percent of the face value of the tax credits allowed for transferring credits to the office shall increase two percent until the percentage reaches eighty percent. Upon the transfer, the Department of Economic Development shall notify the Department of Revenue and shall provide it with a copy of the transfer documentation. The Department of Revenue may require the transferor to submit such additional information as may be necessary to administer the provisions of this Section. The secretary of the Department of Revenue shall make payment to the investor in the amount to which he is entitled from the current collections of the taxes collected pursuant to Chapter 1 of Subtitle II, provided such credits are transferred to the office within one calendar year of certification.

(6) The transferee shall apply such credits in the same manner and against the same taxes as the taxpayer originally awarded the credit.

(7) Notwithstanding any other provision of law, on or after January 1, 2006, a state-certified production which receives tax credits pursuant to the provisions of this Chapter shall not be eligible to receive the rebates provided for in R.S. 51:2451 through 2461 in connection with the activity for which the tax credits were received.

D. Certification and administration.

(1)(a) The secretary of the Department of Economic Development and the office shall determine through the promulgation of rules the minimum criteria that a project must meet in order to qualify according to this Section. The secretary, the office, and the division of administration shall determine through the promulgation of rules the minimum criteria that a project must meet in order to qualify according to this Section.

(b) The secretary, the office, and the division of administration shall determine, through the promulgation of rules, an appeals process in the event that an application for or the certification of motion picture production or infrastructure tax credits is denied. The office shall promptly provide written notice of such denial to the Senate Committee on Revenue and Fiscal Affairs and the House Committee on Ways and Means.

(c) Prior to adoption, these rules shall be approved by the House Committee on Ways and Means and the Senate Committee on Revenue and Fiscal Affairs.

(d) When determining which productions and infrastructure projects qualify, the office and the secretary of the Department of Economic Development and, in the case of infrastructure projects, also the division of administration shall take the following factors into consideration:

(i) The impact of the production or infrastructure project on the immediate and long-term objectives of this Section.

(ii) The impact of the production or infrastructure project on the employment of Louisiana residents.

(iii) The impact of the production or infrastructure project on the overall economy of the state.

(2)(a) Application. An applicant for the motion picture investor credit shall submit an application for initial certification to the office and the secretary of the Department of Economic Development and, in the case of infrastructure projects, to the office, the secretary, and the division of administration that includes the following information:

(i) For state-certified productions the application shall include:

(aa) The distribution plan.

(bb) A preliminary budget including estimated Louisiana payroll and estimated base investment.

(cc) The script, including a synopsis.

(dd) A list of the principal creative elements, including the cast, producer, and director.

(ee) A statement that the production will qualify as a state-certified production.

(ff) Estimated start and completion dates.

(ii) For state-certified infrastructure projects the application shall include:

(aa) A detailed description of the infrastructure project.

(bb) A preliminary budget.

(cc) A complete detailed business plan and market analysis.

(dd) Estimated start and completion dates.

(b) If the application is incomplete, additional information may be requested prior to further action by the office or the secretary of the Department of Economic Development or, in the case of infrastructure projects, the office, the secretary, and the division of administration. An application fee shall be submitted with the application based on the following:

(i) 0.2 percent times the estimated total incentive tax credits.

(ii) The minimum application fee is two hundred dollars, and the maximum application fee is five thousand dollars.

(c) The office and the secretary and, in the case of infrastructure projects, the division shall submit their initial certification of a project as a state-certified production or infrastructure project to investors and to the secretary of the Department of Revenue indicating the total base investment which shall be expended in the state on the state-certified production or state-certified infrastructure project and, in the case of state-certified infrastructure projects, when such tax credits may be taken or transferred. The initial certification shall include a unique identifying number for each state-certified production.

(d) Prior to any final certification of the state-certified production or infrastructure project, the motion picture production company or applicant for the infrastructure project shall submit to the office and the secretary and, in the case of infrastructure projects, to the office, the secretary, and the division, a cost report of production or infrastructure project expenditures audited and certified by an independent certified public accountant as determined by rule. The office and the secretary and, in the case of infrastructure projects, the office, the secretary, and the division shall review the production or infrastructure project expenses and will issue a final tax credit certification letter indicating the amount of tax credits certified for the state-certified production or state-certified infrastructure project to the investors. The rules required by this Subparagraph shall, at a minimum, require that:

(i) The auditor shall be a certified public accountant licensed in the state of Louisiana and shall be an independent third party, not related to the producer.

(ii) The auditor's opinion shall be addressed to the party which has engaged the auditor (e.g., directors of the production company, producer of the production).

(iii) The auditor's name, address, and telephone number shall be evident on the report.

(iv) The auditor's opinion shall be dated as of the completion of the audit fieldwork.

(v) The audit shall be performed in accordance with auditing standards generally accepted in the United States of America and the auditor shall have sufficient knowledge of accounting principles and practices generally recognized in the film and television industry.

(3) The secretary of the Department of Revenue, in consultation with the office and the secretary of the Department of Economic Development and, in the case of infrastructure projects, also the division of administration, shall promulgate such rules and regulations as are necessary to carry out the intent and purposes of this Section in accordance with the general guidelines provided herein.

(4)(i) Any taxpayer applying for the credit shall be required to reimburse the office for any audits required in relation to granting the credit.

(ii)(aa) The production or infrastructure project application fee provided for in Subparagraph (2)(b) of this Subsection received by the office shall be deposited upon receipt in the state treasury. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund and prior to any money being placed into the general fund or any other fund, an amount equal to that deposited as required by this Item shall be credited by the treasurer to a special fund hereby created in the state treasury to be known as the Entertainment Promotion and Marketing Fund. The money in the fund shall be appropriated by the legislature to be used solely for promotion and marketing of Louisiana's entertainment industry.

(bb) The money in the fund shall be invested by the treasurer in the same manner as money in the state general fund and interest earned on the investment of the money shall be credited to the fund after compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund. All unexpended and unencumbered money in the fund at the end of the year shall remain in the fund.

(5) A motion picture production company applying for the additional credit for the employment of Louisiana residents must remit a schedule to the Department of Revenue, in a machine-sensible format approved by the secretary of the Department of Revenue, that includes the following information: the names of all persons who received salary, wages, or other compensation for services performed in Louisiana in connection with the state-certified production, and the address, taxpayer identification number, permanent address of, and the amount of compensation for services performed in Louisiana received by each such person.

(6) With input from the Legislative Fiscal Office, the office shall prepare a written report to be submitted to the Senate Committee on Revenue and Fiscal Affairs and the House of Representatives Committee on Ways and Means no less than sixty days prior to the start of the Regular Session of the

Legislature in 2007, and every second year thereafter. The report shall include the overall impact of the tax credits, the amount of the tax credits issued, the number of net new jobs created, the amount of Louisiana payroll created, the economic impact of the tax credits and film industry, the amount of new infrastructure that has been developed in the state, and any other factors that describe the impact of the program.

(7) Either the Department of Economic Development or the Department of Revenue may audit the cost report submitted by the motion picture production company.

E. Recapture of credits. If the office finds that monies for which an investor received tax credits according to this Section are not invested in and expended with respect to a state-certified production within twenty-four months of the date that such credits are earned, and with respect to a state-certified infrastructure project also within the time provided for in Paragraph (C)(2) of this Section, then the investor's state income tax for such taxable period shall be increased by such amount necessary for the recapture of credit provided by this Section.

F. Recovery of credits by Department of Revenue. (1) Credits previously granted to a taxpayer, but later disallowed, may be recovered by the secretary of the Department of Revenue through any collection remedy authorized by R.S. 47:1561 and initiated within three years from December thirty-first of the year in which the twenty-four-month investment period specified in Subsection E of this Section ends.

(2) The only interest that may be assessed and collected on recovered credits is interest at a rate three percentage points above the rate provided in R.S. 9:3500(B)(1), which shall be computed from the original due date of the return on which the credit was taken.

(3) The provisions of this Subsection are in addition to and shall not limit the authority of the secretary of the Department of Revenue to assess or to collect under any other provision of law.

La. Rev. Stat. 47:6007
(Effective: July 9, 2009):

Motion picture investor tax credit

A. Purpose. The primary objective of this Section is to encourage development in Louisiana of a strong capital and infrastructure base for motion picture production in order to achieve an independent, self-supporting industry. This objective is divided into immediate and long-term objectives as follows:

(1) Immediate objectives are to:

(a) Attract private investment for the production of motion pictures in Louisiana.

(b) Develop a tax and capital infrastructure which encourages private investment. This infrastructure will provide for state participation in the form of tax credits to encourage investment in state-certified productions.

(c) Develop a tax infrastructure utilizing tax credits which encourage investments in multiple state-certified productions.

(2) Long-term objectives are to:

(a) Encourage increased employment opportunities within this sector and increased global competitiveness with other states in fully utilizing economic development options within the motion picture industry.

(b) Encourage new education curricula in order to provide a labor force trained in all aspects of film and digital production.

B. Definitions. For the purposes of this Section:

(1) "Base investment" means cash or cash equivalent investment made and used for production expenditures in the state for a state-certified production.

(2) "Expended in the state" means an expenditure to lease immovable property located in the state; an expenditure as compensation for services performed in the state; or an expenditure to purchase or lease tangible personal property within the state where the transaction is subject to the state sales or lease tax provisions of Title 47 of the Louisiana Revised Statutes of 1950. A transaction that is subject to the state sales or lease tax provisions of Title 47 of the Louisiana Revised Statutes of 1950

shall include transactions which are also subject to a statutory exclusion or exemption.

(3) "Expenditure" means actual cash or cash equivalent exchanged for goods or services.

(4) "Headquartered in Louisiana" means a corporation incorporated in Louisiana or a partnership, limited liability company, or other business entity domiciled and headquartered in Louisiana for the purpose of producing nationally or internationally distributed motion pictures as defined in this Section.

(5) "Motion picture" means a nationally or internationally distributed feature-length film, video, television pilot, television series, television movie of the week, animated feature film, animated television series, or commercial made in Louisiana, in whole or in part, for theatrical or television viewing. The term "motion picture" shall not include the production of television coverage of news and athletic events.

(6) "Motion picture production company" means a company engaged in the business of producing nationally or internationally distributed motion pictures as defined in this Section. Motion picture production company shall not mean or include any company owned, affiliated, or controlled, in whole or in part, by any company or person which is in default on a loan made by the state or a loan guaranteed by the state, nor with any company or person who has ever declared bankruptcy under which an obligation of the company or person to pay or repay public

funds or monies was discharged as a part of such bankruptcy.

(7) "Office" means the Governor's Office of Film and Television Development until August 15, 2006; thereafter, the term "office" means the office of entertainment industry development in the Department of Economic Development provided for in R.S. 51:938.1.

(8) "Payroll" means all salary, wages, and other compensation, including benefits paid to an employee for services relating to a state-certified production and taxable in this state. However, "payroll" for purposes of the additional tax credit for Louisiana-resident payroll shall exclude any portion of an individual salary in excess of one million dollars.

(9) "Production expenditures" means preproduction, production, and postproduction expenditures in this state directly relating to a state-certified production, including without limitation the following: set construction and operation; wardrobes, makeup, accessories, and related services; costs associated with photography and sound synchronization, lighting, and related services and materials; editing and related services; rental of facilities and equipment; leasing of vehicles; costs of food and lodging; digital or tape editing, film processing, transfer of film to tape or digital format, sound mixing, special and visual effects; and payroll. This term shall not include expenditures for marketing and distribution, non-production related overhead, amounts reimbursed by the state or any other governmental entity, costs related to the transfer of tax credits,

amounts that are paid to persons or entities as a result of their participation in profits from the exploitation of the production, the application fee, or state or local taxes.

(10) "Resident" or "resident of Louisiana" means a natural person domiciled in the state . A person who maintains a permanent place of abode within the state and spends in the aggregate more than six months of each year within the state shall be presumed to be domiciled in the state.

(11) "Secretary" means the secretary of the Department of Economic Development.

(12) "Source within the state" means a physical facility in Louisiana, operating with posted business hours and employing at least one full-time equivalent employee.

(13) "State" means the state of Louisiana.

(14) "State-certified production" shall mean a production approved by the office and the secretary which is produced by a motion picture production company domiciled and headquartered in Louisiana and which has a viable multi-market commercial distribution plan.

C. Investor tax credit; specific productions and projects.

(1) There is hereby authorized a tax credit against state income tax for Louisiana taxpayers for investment in state-certified productions. The tax credit shall be earned by investors at the time expenditures are made by a motion picture production

company in a state-certified production. However, credits cannot be applied against a tax or transferred until the expenditures are certified by the office and the secretary. For state-certified productions, expenditures shall be certified no more than twice during the duration of a state-certified production unless the motion picture production company agrees to reimburse the office for the costs of any additional certifications. The tax credit shall be calculated as a percentage of the total base investment dollars certified per project.

(a) For state-certified productions approved by the office and the secretary on or after January 1, 2004, but before January 1, 2006:

(i) If the total base investment is greater than three hundred thousand dollars and less than or equal to eight million dollars, each taxpayer shall be allowed a tax credit of ten percent of the actual investment made by that taxpayer.

(ii) If the total base investment is greater than eight million dollars, each taxpayer shall be allowed a tax credit of fifteen percent of the actual investment made by that taxpayer.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(b) For state-certified productions approved by the office and the secretary on or after January 1, 2006, but before July 1, 2009:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of twenty-five percent of the base investment made by that investor.

(ii) To the extent that base investment is expended on payroll for Louisiana residents employed in connection with a state-certified production, each investor shall be allowed an additional tax credit of ten percent of such payroll. However, if the payroll to any one person exceeds one million dollars, this additional credit shall exclude any salary for that person that exceeds one million dollars.

(iii) The initial certification shall be effective for a period twelve months prior to and twelve months after the date of initial certification, unless the production has commenced, in which case the initial certification shall be valid until the production is completed.

(c) For state-certified productions approved by the office and the secretary on or after July 1, 2009:

(i) If the total base investment is greater than three hundred thousand dollars, each investor shall be allowed a tax credit of thirty percent of the base investment made by that investor.

(ii) To the extent that base investment is expended on payroll for Louisiana residents employed in connection with a state-certified production, each investor shall be allowed an additional tax credit of five percent of such payroll. However, if the payroll to any one person exceeds one million dollars, this additional credit shall exclude any salary for that person that exceeds one million dollars.

(d) Motion picture investor tax credits associated with a state-certified production shall never exceed the total base investment in that production.

(2) The credit shall be allowed against the income tax for the taxable period in which the credit is earned or for the taxable period in which initial certification authorizes the credit to be taken. If the tax credit allowed pursuant to this Section exceeds the amount of such taxes due for such tax period, then any unused credit may be carried forward as a credit against subsequent tax liability for a period not to exceed ten years.

(3) Application of the credit.

(a) All entities taxed as corporations for Louisiana income tax purposes shall claim any credit allowed under this Section on their corporation income tax return.

(b) Individuals, estates, and trusts shall claim any credit allowed under this Section on their income tax return.

(c) Entities not taxed as corporations shall claim any credit allowed under this Section on the returns of the partners or members as follows:

(i) Corporate partners or members shall claim their share of the credit on their corporation income tax returns.

(ii) Individual partners or members shall claim their share of the credit on their individual income tax returns.

(iii) Partners or members that are estates or trusts shall claim their share of the credit on their fiduciary income tax returns.

(4) Transferability of the credit. Any motion picture tax credits not previously claimed by any taxpayer against its income tax may be transferred or sold to another Louisiana taxpayer or to the office, subject to the following conditions:

(a) A single transfer or sale may involve one or more transferees. The transferee of the tax credits may transfer or sell such tax credits subject to the conditions of this Subsection.

(b) Transferors and transferees shall submit to the office, and to the Department of Revenue in writing, a notification of any transfer or sale of tax credits within thirty days after the transfer or sale of such tax credits. The notification shall include the transferor's tax credit balance prior to transfer, a copy of any tax credit certification letter(s) issued by the office and the secretary of the Department of Economic Development and, the transferor's remaining tax credit balance after transfer, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate, price paid by the transferee to the transferor, in the case when the transferor is a state-certified production, for the tax credits, and any other information required by the office or the Department of Revenue. For the purpose of reporting transfer prices, the term "transfer" shall include allocations pursuant to Paragraph (2) of this Subsection as provided by rule. The office may post on its website an average tax credit transfer value, as determined by the office and the secretary of the Department of Economic Development to reflect adequately the current average tax credit transfer value. The tax credit transfer value means the percentage as determined by the price paid by the transferee to the transferor divided by the dollar value of the tax credits that were transferred in return. The notification submitted to the office shall include a processing fee of up to two hundred dollars per transferee, and any pricing information submitted by a transferor or transferee shall be treated by the office and the Department of Revenue as proprietary to the entity reporting such information and therefore confidential. However, this shall not prevent the publication of summary data that includes no fewer than three transactions.

(c) Failure to comply with this Paragraph will result in the disallowance of the tax credit until the taxpayers are in full compliance.

(d) The transfer or sale of this credit does not extend the time in which the credit can be used. The carryforward period for credit that is transferred or sold begins on the date on which the credit was earned.

(e) To the extent that the transferor did not have rights to claim or use the credit at the time of the transfer, the Department of Revenue shall either disallow the credit claimed by the transferee or recapture the credit from the transferee through any collection method authorized by R.S. 47:1561. The transferee's recourse is against the transferor.

(f)(i) Beginning on and after January 1, 2007, the investor who earned the motion picture investor tax credits may transfer the credits to the office for seventy-two percent of the face value of the credits. Beginning January 1, 2009, and every second year thereafter, the percent of the face value of the tax credits allowed for transferring credits to the office shall increase two percent until the percentage reaches eighty percent. Upon the transfer, the Department of Economic Development shall notify the Department of Revenue and shall provide it with a copy of the transfer documentation. The Department of Revenue may require the transferor to submit such additional information as may be necessary to administer the provisions of this Section. The secretary of the Department of Revenue shall make payment to the investor in the amount to which he is entitled from the current collections of the taxes collected pursuant to Chapter 1 of Subtitle II, provided such credits are transferred to the office within one calendar year of certification.

(ii) For projects which receive initial certification on and after July 1, 2009, the investor who earned the motion picture investor tax credits pursuant to such certification may transfer the credits to the office for eighty-five percent of the face value of the credits in accordance with the procedures and requirements of Item (i) of this Subparagraph.

(5) The transferee shall apply such credits in the same manner and against the same taxes as the taxpayer originally awarded the credit.

(6) Notwithstanding any other provision of law, on or after January 1, 2006, a state-certified production which receives tax credits pursuant to the provisions of this Chapter shall not be eligible to receive the rebates provided for in R.S. 51:2451 through 2461 in connection with the activity for which the tax credits were received.

D. Certification and administration.

(1)(a) The secretary of the Department of Economic Development and the office shall determine through the promulgation of rules the minimum criteria that a project must meet in order to qualify according to this Section. The secretary, the office, and the division of administration shall determine through the promulgation of rules the minimum criteria that a project must meet in order to qualify according to this Section.

(b) The secretary, the office, and the division of administration shall determine, through the promulgation of rules, an appeals process in the event that an application for or the certification of motion picture production tax credit is denied. The office shall promptly provide written notice of such denial to the Senate Committee on Revenue and Fiscal Affairs and the House Committee on Ways and Means.

(c) In addition, these rules shall be approved by the House Committee on Ways and Means and the Senate Committee on Revenue and Fiscal Affairs in accordance with the provisions of the Administrative Procedure Act.

(d) When determining which productions may qualify, the office and the secretary of the Department of Economic Development shall take the following factors into consideration:

(i) The impact of the production on the immediate and long-term objectives of this Section.

(ii) The impact of the production on the employment of Louisiana residents.

(iii) The impact of the production on the overall economy of the state.

(2)(a) Application. An applicant for the motion picture investor credit shall submit an application for initial certification to the office and the secretary of the Department of Economic Development that includes the following information:

(i) For state-certified productions the application shall include:

(aa) The multi-market commercial distribution plan.

(bb) A preliminary budget including estimated Louisiana payroll and estimated base investment.

(cc) The script, including a synopsis.

(dd) A list of the principal creative elements, including the cast, producer, and director.

(ee) A statement that the production will qualify as a state-certified production.

(ff) Estimated start and completion dates.

(b) If the application is incomplete, additional information may be requested prior to further action by the office or the secretary of the Department of Economic Development. An application fee shall be submitted with the application based on the following:

(i) Two-tenths of one percent times the estimated total incentive tax credits.

(ii) The minimum application fee is two hundred dollars, and the maximum application fee is five thousand dollars.

(c) The office and the secretary shall submit their initial certification of a project as a state-certified production to investors and to the secretary of the Department of Revenue indicating the total base investment which shall be expended in the state on the state-certified production. The initial certification shall include a unique identifying number for each state-certified production.

(d) Prior to any final certification of the state-certified production, the motion picture production company shall submit to the office and the secretary an audit of the production expenditures certified by an independent certified public accountant as determined by rule. The office and the secretary shall review the audit, the production expense details, and may require additional information needed to make a determination. Upon approval of the audit, the office and the secretary shall issue a final tax credit certification letter indicating the amount of tax credits certified for the state-certified production to the investors. The rules required by this Subparagraph shall, at a minimum, require that:

(i) The auditor shall be a certified public accountant licensed in the state of Louisiana and shall be an independent third party, not related to the producer.

(ii) The auditor's opinion shall be addressed to the party which has engaged the auditor (e.g., directors of the production company, producer of the production).

(iii) The auditor's name, address, and telephone number shall be evident on the report.

(iv) The auditor's opinion shall be dated as of the completion of the audit fieldwork.

(v) The audit shall be performed in accordance with auditing standards generally accepted in the United States of America and the auditor shall have sufficient knowledge of accounting principles and practices generally recognized in the film and television industry.

(e) In addition to the requirements of Subparagraph (d) of this Paragraph, prior to any final certification of a state-certified production or infrastructure project, the motion picture production company or infrastructure project applicant shall submit to the office a notarized statement demonstrating conformity with, and agreeing to, the following:

(i) To pay all undisputed legal obligations the film production company has incurred in Louisiana.

(ii) To publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming has taken place in order to notify the public of the need to file creditor claims against the film production company by a specified date.

(iii) That the outstanding obligations are not waived should a creditor fail to file by the specified date.

(iv) To delay filing a claim for the film production tax credit until the office delivers written notification to the secretary of the Department of Revenue that the film production company has fulfilled all requirements for the credit.

(3) The secretary of the Department of Revenue, in consultation with the office and the secretary of the Department of Economic Development shall promulgate such rules and regulations as are necessary to carry out the intent and purposes of this Section in accordance with the general guidelines provided herein.

(4)(i) Any taxpayer applying for the credit shall be required to reimburse the office for any audits required in relation to granting the credit.

(ii)(aa) The production application fee provided for in Subparagraph (2)(b) of this Subsection received by the office shall be deposited upon receipt in the state treasury. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund and prior to any money being placed into the general fund or any other fund, an amount equal to that deposited as required by this Item shall be credited by the treasurer to a special fund hereby created in the state treasury to be known as the Entertainment Promotion and Marketing Fund. The money in the fund shall be appropriated by the legislature to be used solely for promotion and marketing of Louisiana's entertainment industry.

(bb) The money in the fund shall be invested by the treasurer in the same manner as money in the state general fund and interest earned on the investment of the money shall be credited to the fund after compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund. All unexpended and unencumbered money in the fund at the end of the year shall remain in the fund.

(5) A motion picture production company applying for the additional credit for the employment of Louisiana residents must remit a schedule to the Department of Revenue, in a machine-sensible format approved by the secretary of the Department of Revenue, that includes the following information: the names of all persons who received salary, wages, or other compensation for services performed in Louisiana in connection with the state-certified production, and the address, taxpayer identification number, permanent address of, and the amount of compensation for services performed in Louisiana received by each such person.

(6) With input from the Legislative Fiscal Office, the office shall prepare a written report to be submitted to the Senate Committee on Revenue and Fiscal Affairs and the House of Representatives Committee on Ways and Means no less than sixty days prior to the start of the Regular Session of the Legislature in 2007, and every second year thereafter. The report shall include the overall impact of the tax credits, the amount of the tax credits issued, the number of net new jobs created, the amount of Louisiana payroll created, the economic impact of the tax credits and film industry, and any other factors that describe the impact of the program.

(7) The Department of Economic Development may request an additional audit of the expenditures submitted by the motion picture production company at the cost of the motion picture production company.

(8) As a condition for receiving certification of tax credits under this Section, state-certified productions may be required to display an animated state brand or logo, or both, which includes a fleur de lis as prescribed by the secretary of the Department of Economic Development as long as the animated state brand or logo is not contrary to any rule or regulation of the Federal Communications Commission.

E. Recapture of credits. If the office finds that monies for which an investor received tax credits according to this Section are not invested in and expended with respect to a state-certified production within twenty-four months of the date that such credits are earned, then the investor's state income tax for such taxable period shall be increased by such amount necessary for the recapture of credit provided by this Section.

F. Recovery of credits by Department of Revenue. (1) Credits previously granted to a taxpayer, but later disallowed, may be recovered by the secretary of the Department of Revenue through any collection remedy authorized by R.S. 47:1561 and initiated within three years from December thirty-first of the year in which the twenty-four-month investment period specified in Subsection E of this Section ends.

(2) The only interest that may be assessed and collected on recovered credits is interest at a rate three percentage points above the rate provided in R.S. 9:3500(B)(1), which shall be computed from the original due date of the return on which the credit was taken.

(3) The provisions of this Subsection are in addition to and shall not limit the authority of the secretary of the Department of Revenue to assess or to collect under any other provision of law.