No. 23-

IN THE

Supreme Court of the United States

DEVON ARCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Federal Rule of Criminal Procedure 33 permits a district court to order a new trial "if the interest of justice so requires." The district court here exercised its discretion under Rule 33 to order a new trial, concluding that the entirely circumstantial evidence weighed so heavily against the verdict that there was a "real concern that [Petitioner] is innocent" and that letting his "guilty verdict stand would be a manifest injustice."

On the government's interlocutory appeal, the Second Circuit reversed, holding that—contrary to the approach taken in every other Circuit—district courts lack discretion to grant a new trial under Rule 33 based on the weight of the evidence unless there is also some evidentiary or instructional error, or "the evidence was patently incredible or defied physical realities." *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020) ("*Archer I*"),[1] annexed as Appendix C. Absent such circumstances, a district court "must defer to the jury's resolution of conflicting evidence." App. 31a. Following remand, sentencing, and final judgment, the Court of Appeals adhered to the rule announced in *Archer I*.

The first question presented is whether Rule 33 affords district courts discretion to reweigh the evidence when evaluating a new trial motion, as eleven other federal courts of appeals have held to varying degrees, or whether the rule requires a district court to defer to the verdict

1. In case citations, all emphases are added and all internal alterations, citations, and quotation marks are omitted unless otherwise noted.

unless there is some concern beyond the weight of the evidence, as the Second Circuit held in this case?

2. The second question presented is whether a criminal defendant can forfeit an argument of plain error from a conceded Guidelines miscalculation. The district court here made a simple arithmetic error in calculating Petitioner's guidelines, resulting in a higher sentencing range. The error went unnoticed until argument on Petitioner's appeal. Following supplemental briefing, the government conceded error but argued that it was waived. The Second Circuit disagreed, holding that the argument was forfeited rather than waived, but nonetheless refused to consider the argument at all, declining to engage in plain error review. *United States v. Archer*, 2023 WL 3860530, at *6 n.2 (2d Cir. June 7, 2023) ("*Archer II*"), annexed as Appendix A.

PARTIES TO THE PROCEEDINGS

Petitioner is Devon Archer, who was defendant-appellee below.

Respondent is the United States of America, which was plaintiff-appellant below.

RELATED CASES

The following cases are directly related:

- United States v. Archer, No. 22-539, U.S. Court of Appeals for the Second Circuit. Judgment entered June 7, 2023.

- United States v. Archer, No. 18-3727, U.S. Court of Appeals for the Second Circuit. Judgment entered October 7, 2020.

- United States v. Galanis, No. 16-CR-371 (RA), U.S. Court of Appeals for the Second Circuit. Judgment entered November 15, 2018.

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INTRODUCTION

This case affords the Court the opportunity to address an important question about the role of the district judge in a federal criminal trial, which has divided the circuits: whether a district court may grant a new trial based solely on concerns about the weight of the evidence. The Court has never previously addressed this question under Rule 33 of the Federal Rules of Criminal Procedure, although the Court's pre-Rules precedent holds that a district court does have such discretion. Nonetheless, the circuit courts are divided, with the Second Circuit now located on the far end of the spectrum of approaches in holding that a district court has no such discretion unless it first identifies some other error that casts the verdict into doubt, such as the mistaken introduction of important evidence or an error in the jury instructions.

As the Fourth Circuit recently explained, the approach adopted by the Second Circuit "make[s] little sense." *United States v. Rafiekian*, 68 F.4th 177, 189 (4th Cir. 2023). In cases (such as this one) that rely on circumstantial evidence of guilt, "[b]arring the district court from granting a new trial based solely on disagreement with the jury's inferences of guilt would place this class of cases beyond the reach of the new-trial standard, which would mean that when the government has introduced *less* direct evidence, district courts are *more* constrained in their ability to grant a new trial. That can't be right." *Id.* at 190 (emphasis in original). Ten other circuits agree (to various degrees) that a district court must have some discretion to reweigh the evidence under Rule 33, while the Second Circuit now holds that the district courts have no such discretion. The Court should

grant review to resolve this important and recurring question.

1. Like the Fourth Circuit, the other courts of appeals have recognized that district courts must have some discretion to reweigh the evidence when deciding whether to grant a new trial under Rule 33 "in the interest of justice." Fed. R. Crim. P. 33(a). Some courts of appeals expressly hold that the district judge functions as a "thirteenth juror," whose role is to consider all of the evidence anew, including the credibility of witnesses. *E.g.*, *Rafiekian*, 68 F.4th at 186; *United States v. Robertson*, 110 F.3d at 1120 n.11 (5th Cir. 1997). Other courts of appeals hold that a district court must defer to the jury's credibility determinations but is free to consider competing evidentiary inferences. *See United States v. Burks*, 974 F.3d 622, 628 (6th Cir. 2020); *United States v. Merlino*, 592 F.3d 22, 32–33 (1st Cir. 2010).

The Second Circuit, however, denies district courts any ability to reweigh the evidence, holding that a district court "must defer" to the verdict so long as the jury was "entitled" to convict—*i.e.*, so long as the evidence was legally sufficient. App. 28a n.3, 43a. In doing so, the Second Circuit dramatically deepened an existing circuit split: *Archer I* expressly conflicts with decisions of three other courts of appeals, and is inconsistent with the holdings of every other geographic court of appeals. The Second Circuit's holding that a district court "must defer" to a verdict unaffected by evidentiary or instructional error "absent a situation in which the evidence was patently incredible or defied physical realities," App. 30a-31a, is in direct conflict with decisions of the Seventh and Eighth circuits, in addition to the Fourth. Those courts have held,

consistent with the text of Rule 33, that the question is "whether the verdict is against the manifest weight of the evidence," regardless of whether it was "contrary to the laws of nature or otherwise incapable of belief." *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999); *see also United States v. Stacks*, 821 F.3d 1038, 1046 (8th Cir. 2016).

2. The Second Circuit's decision is also at odds with this Court's pre-Rule 33 precedent. In *Crumpton v. United States*, this Court confirmed that even where there is sufficient evidence to convict, district courts presiding over criminal trials may, as "a matter of discretion," grant "a new trial upon th[e] ground" that the verdict was "manifestly against the weight of evidence." 138 U.S. 361, 364 (1891). And in *United States v. Smith*, this Court suggested that Rule 33 at least maintained, if not expanded upon, all the grounds for ordering a new trial that existed prior to the Rule. 331 U.S. 469, 472 (1947). The Second Circuit's new standard, however, strips any discretion that a district court in the Second Circuit has to grant a new trial based on the weight of the evidence, even where it finds that the evidence, properly considered, weighs so heavily in favor of factual innocence that allowing a defendant's conviction to stand represents a manifest injustice.

3. This is an important and recurring issue, and this case is an ideal vehicle to resolve it. There is no dispute that Petitioner's conviction rested purely on circumstantial evidence. No witness, including the government's cooperators, implicated him directly, nor was there any admission by the Petitioner, any evidence that turned on witness credibility, any "smoking gun"

document, or any other direct evidence of guilt at all. Instead, the government's case indisputably relied upon inferences from the circumstantial evidence. And "when viewing the entire body of evidence," the district court concluded that there was "a real concern that [Petitioner] is innocent." App. 114a. The district court meticulously surveyed the trial evidence, concluding that the inferences urged by the government were unsupported or weak, and that there was substantial affirmative evidence of innocence—including evidence that the nature of the crime was actively concealed from him, and that unlike every other alleged conspirator, he did not receive fraudulent proceeds but in fact lost money as a result of the scheme. The district court was left with a serious concern that Petitioner "lacked the requisite intent and is thus innocent of the crimes charged," App. 55a, and that letting Petitioner's "guilty verdict stand would be a manifest injustice," App. 79a.

The Second Circuit recognized that "the district court relied on [its] prior case law on" Rule 33, but held that this case law required "clarifying." App. 34a. Purporting to provide "much needed guidance to district courts," the Second Circuit "stress[ed] that" under Rule 33, "a district court *must* defer to the jury's resolution of conflicting evidence" and may not weigh the evidence, "absent a situation in which the evidence was patently incredible or defied physical realities, or where an evidentiary or instructional error compromised the reliability of the verdict." App. 30a–31a. Because no procedural or instructional error infected the verdict, and because the evidence was not insufficient as a matter of law, the Second Circuit held that "the jury was entitled to conclude" that Petitioner was guilty and that the district court erred by

attempting to weigh the evidence. App. 28a. After the case was remanded for sentencing, Petitioner appealed the final judgment and the Second Circuit affirmed, reiterating the holding in its interlocutory opinion as law of the case. App. 2a–4a.[1]

4. The Second Circuit's decision is wrong. It is contrary to the text of Rule 33, and it takes from district courts a much-needed tool to avoid miscarriages of justice in the most extreme cases. Although different courts of appeals give district courts more or less discretion to reweigh the trial evidence under Rule 33, Petitioner's appeal would have been decided differently—and correctly—by any other court. Whether a district court has the authority to correct a manifest injustice under Rule 33 when the weight of the evidence cannot support conviction should not depend on geography.

5. This Petition also presents a second important question, regarding the discretion of courts to refuse to consider an unwaived, plain, and conceded error. The district court at sentencing miscalculated Petitioner's Guidelines offense level as a result of a simple mathematical mistake, resulting in a higher sentencing range. The error went unnoticed until argument on Petitioner's appeal. Although the government conceded the error, the Second

1. Petitioner sought certiorari from the Second Circuit's interlocutory decision. The government objected on the grounds that the judgment was not final, Brief for the United States, No. 20-1644, 2021 WL 4441408, at *6–7 (Sept. 24, 2021), and this Court denied the petition. No. 20-1644, 142 S. Ct. 425 (Mem) (Nov. 1, 2021). Now that the judgment is final, Petitioner can seek review of all previous non-final appellate orders. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

Circuit held that it need not consider Petitioner's claim of plain error because it was "forfeited." App. 14a n.2. That approach is inconsistent with this Court's holdings that a court of appeals "should correct" a plain error that "seriously affects the fairness, integrity or public reputation of judicial proceedings," even when those claims of error were "forfeited." *United States v. Olano*, 507 U.S. 725, 736 (1993), and is at odds with the rule in at least one other Circuit. This case therefore presents the Court with an opportunity to clarify the discretion courts of appeals have to disregard plain errors under Rule 52(b) of the Federal Rules of Criminal Procedure.

OPINIONS BELOW

The court of appeals' orders affirming the judgment (App. 1a-15a) and denying rehearing (App. 16a–17a) are unpublished, and its interlocutory opinion reversing the district court's new trial order (App. 18a–53a) is reported at 977 F.3d 181. The district court's new trial order (App. 54a–133a) is reported at 366 F. Supp. 3d 477. The sentencing transcript (relevant excerpts at App. 134a–142a) is unpublished. The court of appeal's order requesting supplemental briefing on the Sentencing Guidelines miscalculation (App. 143a–144a) is unpublished.

JURISDICTION

The court of appeals' order and judgment affirming Petitioner's conviction and sentence was issued on June 7, 2023. That court denied a timely rehearing petition on July 18, 2023, and its mandate issued on July 25. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 33(a) provides in relevant part:

> Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.

Federal Rule of Criminal Procedure 52(b) provides:

> Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

1. Following a six-week trial in an "indisputably complex case," Petitioner was convicted of securities fraud and conspiracy. App. 80a. The thrust of the government's case was that Jason Galanis, "the admitted mastermind of the conspiracy and a serial fraudster," App. 55a, effectively took control of a series of financial institutions and used that control to issue bonds on behalf of a Native American tribal corporation, which he caused clients of one of the financial institutions to purchase without their knowledge or consent. Galanis then misappropriated the proceeds of the bonds for his own purposes, including to buy a luxury home. App. 42a.

Galanis and several co-conspirators pleaded guilty, while Petitioner and two other defendants went to trial, where "the primary issue was intent." App. 80a. Although the government called one cooperating

witness and two immunized ones, it is undisputed that no witness directly implicated Petitioner, nor was there any direct documentary evidence of his guilt. Rather, the government's case hinged entirely on circumstantial evidence. The jury nonetheless convicted all three defendants on all counts.

2. Following trial, the district court held that while Petitioner was not entitled to acquittal as a matter of law under Federal Rule of Criminal Procedure 29, he was entitled to a new trial under Rule 33. It denied the other defendants' Rule 29 and Rule 33 motions. App. 122a–123a. In a lengthy and thorough decision, the court evaluated the entire trial record and applied what all parties agreed was the correct standard at the time: whether, after "examin[ing] the entire case," there is "a real concern that an innocent person may have been convicted," *i.e.*, that "letting a guilty verdict stand would be a manifest injustice." App. 79a.

The district court's Rule 33 analysis focused on the intent element of the charged crimes. After meticulously surveying the trial evidence, the court concluded that the evidence as a whole demonstrated that "Galanis viewed [Petitioner] as a pawn," whom he sought to keep [] in the dark" "such that [Petitioner] knew only that which was essential" to his "narrowly defined role." App. 80a–81a. Viewed as a whole, the record left the court with an "unwavering concern that [Petitioner] is innocent." App. 83a.

In reaching this conclusion, the district court carefully weighed the inferences pressed by the government and found them seriously lacking. The government's case

relied on drawing strained inferences from common business "terms such as 'liquidity' and 'discretionary' as if they are necessarily evidence of criminal intent." App. 87a. The government treated these as synonymous with misappropriation, but the district court looked at the evidence "cumulatively" and found that "when these individuals used the word discretionary in this context they were referencing the ability of an asset manager to exercise discretion in selecting investments for a client," not as a synonym for embezzlement. App. 92a. Because "[d]iscretionary liquidity is frequently referenced in the course of discussing perfectly legitimate transactions and entities, including the sorts at issue in the case at hand," the court concluded that this "language in the emails is facially innocuous or, at best, most naturally subject to innocent interpretations," App. 87a. (No witness who was involved in the relevant emails testified to their meaning. App. 87a.)

Similarly, the government put "much weight" on a line in an email from one of Petitioner's co-defendants—"$20mm bond approved. Proceeds are 15mm to us and 5mm to them." App. 89a. The government argued that "15mm to us" put Petitioner on notice of his co-defendants' intent to misappropriate funds. App. 89a. The district judge, however, read the email in the context of the whole record, including a legal opinion letter attached to the email itself that set out how certain proceeds would be distributed to the tribal corporation "while the remaining $15 million was to be invested on its behalf" through the financial institutions in which Petitioner had invested. App. 89a. Because the "to us" language simply reiterated what was in the legal opinion, the court drew the "more natural inference" that a reader of this email would "not

understand [the author] to mean that they would steal the money." App. 89a.

Upon reviewing these and many other documents, the court found that the government had advanced a "misleading impression" of the evidence, which required "simply too large an inferential leap." App. 97a.

The district court likewise found the government's other circumstantial evidence to be wanting in light of the full record. For example, the government emphasized an instance in which Petitioner sent $250,000 of his own money to one of the Galanis-controlled financial institutions—one in a series of investments and loans that Petitioner made to that company. App. 104a. The court found that Galanis stole $240,000 of the $250,000 for himself, "further undercut[ting] the notion that [Petitioner] was aware that the money he supplied was being used for illicit purposes." App. 105a–06a n.22.

The district court also analyzed the weakness of the inculpatory inferences urged by the government against the substantial countervailing evidence of Petitioner's innocence. This included extensive evidence that Galanis actively concealed his scheme from Petitioner, App. 26a, and that "unlike his co-defendants at trial, [Petitioner] never received misappropriated proceeds directly," and instead lost the substantial amounts that he had invested. App. 113a; *see* App. 26a. The court was "left wondering why [Petitioner] would have engaged in this scheme, especially in light of the illegal gains reaped by his alleged co-conspirators but not by him." App. 113a.

At the end of the day, the district court had a "substantial concern [] that [Petitioner] lacked the requisite intent and is thus innocent of the crimes charged in the indictment." App. 55a. Because "when viewing the entire body of evidence . . . the Court harbors a real concern that [Petitioner] is innocent," the court vacated the conviction and ordered a new trial under Rule 33. App. 114a.

3. After the government appealed, the Second Circuit concluded that its prior precedents—which permitted district courts to order new trials based solely on weight of the evidence considerations—were in need of "clarifying." App. 34a. Under *Archer I's* new reading of Rule 33, district courts no longer had discretion to "reweigh the evidence" and determine whether the evidence weighed so heavily against the verdict as to require a new trial. App. 30a–31a. Instead—and putting aside cases involving instructional or evidentiary error—district courts were precluded from weighing the evidence at all, except in that narrow class of cases where key evidence was insufficient as a matter of law:

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

App. 30a–31a. Under this standard, courts in the Second Circuit are required to view the facts on a Rule 33 weight-of-the-evidence challenge "in the light most favorable to the [g]overnment," deviating only when, as a matter of law, the jury would not have been "entitled" to draw an inculpatory inference. App. 19a n.1. Based on its newly-"clarified" standard, the Second Circuit held that the district court should not have attempted to weigh the evidence in the first place, reversed, and remanded for sentencing.

4. At sentencing, the district court calculated Petitioner's offense level under the Guidelines in light of what it believed it "ha[d] to accept" following reinstatement of the verdict, including holding Petitioner responsible for the conspiracy's full loss amount and number of victims. App. 136a. The district court also held, and the government did not object, that Petitioner was entitled to a two-point minor role adjustment under Section 3B1.2(b) of the Guidelines. App. 137a.

When it came time to compute Petitioner's total offense level, however, the district court simply forgot to subtract two levels for the minor role adjustment. As the government later conceded, the "district court misstated the Guidelines Range" because it failed, as a mathematical matter, to subtract two levels "based on [Petitioner's] minor role." CA2 ECF No. 70, at 1. "That should have resulted in an offense level of 29 and a Guidelines range of 87 to 108 months' imprisonment. But Judge Abrams stated that the offense level was 31 and the Guidelines range was 108 to 135 months' imprisonment." *Id.* The error went unnoticed at the time, however, and after determining that it was appropriate to vary from the (erroneously-

calculated) range, the district court sentenced Petitioner to a term of a year and a day. App. 141a.

5. Petitioner appealed his conviction and sentence, and noticed the Guidelines calculation error for the first time in preparation for argument before the court of appeals. After Petitioner raised the miscalculation at oral argument, the panel requested supplemental briefing on "whether the district court miscalculated the applicable Sentencing Guidelines range, and if so, whether [Petitioner] has forfeited his claim of error." App. 144a. The government conceded the miscalculation, but argued that Petitioner had "waived," *i.e.*, intentionally relinquished, the error rather than forfeited it. CA2 ECF No. 70, at 1–2.

6. The Second Circuit affirmed. App. 2a. With respect to the new trial decision, the court of appeals held that its decision in *Archer I* was law of the case, and there was no reason or authority to revisit it. App. 2a–4a.[2] With respect

2. In between its interlocutory and final decisions in this case, the Second Circuit decided another case dealing with Rule 33 review based on weight-of-the-evidence concerns. That decision reiterated that district courts lack any discretion to "reweigh the evidence" unless there was "an evidentiary or instructional error" or evidence that was "patently incredible or defied physical realities." *United States v. Landesman*, 17 F.4th 298, 331 (2d Cir. 2021). *Landesman* also stated that those "were merely examples, and not an exhaustive list," of the kinds of "extraordinary circumstances" (on top of weight-of-the-evidence concerns) that must be present for a district court not to be bound by the inferences drawn by the jury. Consistent with its interlocutory opinion in *Archer I* and *Landesman*, the Second Circuit's decision affirming the judgment here held that a district must defer to "a jury's resolution of conflicting evidence" unless

to the conceded sentencing error, the court of appeals did not accept the government's waiver argument, finding the error "forfeited" instead, but nonetheless refused to consider it. App. 14a n.2.

REASONS FOR GRANTING THE PETITON

The decisions below adopted a reading of Rule 33 that strips district courts of discretion to weigh the trial evidence even when, as here, there is no direct evidence of guilt and the jury's verdict rests entirely on inferences from circumstantial evidence. The Second Circuit's decision in *Archer I* requires district courts under Rule 33 to defer to the jury's evaluation of the evidence, unless some extraordinary circumstance, such as evidentiary or instructional error, also undermines the verdict. App. 30a–31a. No other court of appeals takes so limited an approach to Rule 33 review, which is also in conflict with this Court's pre-Rule 33 holdings, not to mention the text of the Rule itself. This split of authority was recently recognized by the Fourth Circuit, and this Court should grant review before it deepens further.

The court of appeals also held that it was free to refuse to consider an unwaived claim of plain error. By claiming discretion to ignore otherwise meritorious claims of plain error, the Second Circuit departed from this Court's precedents and split from at least the Tenth Circuit, which requires plain error review of forfeited (rather than waived) errors.

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some extraordinary circumstance, in addition to concerns about the weight of the evidence itself, called the verdict into question. App. 4a.

Both of these questions raise important and recurring questions of criminal procedure, and this case presents an ideal record for assessing them.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY DISTRICT COURTS' AUTHORITY TO ORDER A NEW TRIAL BASED ON THE WEIGHT OF THE EVIDENCE

The courts of appeals are divided on the discretion that a district court has to grant a new trial based on the weight of the evidence alone, with the Second Circuit staking out the most extreme position—and one incompatible with this Court's pre-Rule 33 precedent. In every other Circuit, district courts are not required to draw all inferences in the government's favor, and have broad discretion to reweigh the evidence. In the D.C, Fourth, Fifth, and Tenth Circuits, district courts act as a "thirteenth juror" and have virtually unfettered discretion to reweigh the evidence. The Third, Seventh, Eighth, Ninth, and Eleventh Circuits also afford district courts with discretion to weigh the evidence without deferring to the jury's inferences. In the First and Sixth Circuits, district courts are free to draw their own inferences from circumstantial evidence, but have to accept the jury's credibility determinations in most instances. But in the Second Circuit, district courts are required to examine the trial evidence in the light most favorable to the government and "must defer" to the verdict in virtually all cases. App. 43a. The only exception permitted in the Second Circuit is where some extraordinary circumstance, in addition to concerns about the weight of the evidence, casts the verdict into doubt, such as an "evidentiary or instructional error" or the evidence being "patently incredible," and therefore

inadmissible as a matter of law, App. 30a–31a—a standard that has been expressly rejected by the Fourth, Seventh, and Eighth Circuits.

Only this Court can resolve this disagreement and restore district courts' discretion to grant a new trial where "the interest of justice so requires." Fed. R. Crim. P. 33(a).

A. The Second Circuit's Decision Conflicts with Those of Other Circuits, Which Permit Rule 33 New Trials Based Solely on the Weight of the Evidence.

Rule 33 provides a critical safeguard in criminal jury trials by permitting a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." *Id.* This Court has yet to interpret how Rule 33 should be applied to motions based on the weight of the evidence alone, and this case gives the Court the opportunity to address a split among the circuit courts on precisely that issue: whether a district court may grant a new criminal trial under Rule 33 based solely on weight of the evidence considerations.

Here, the government appealed the district court's grant of Petitioner's Rule 33 new trial motion. The district court, after reviewing the entire record, had concluded that there was no direct evidence of guilt, and that the circumstantial evidence weighed so heavily against the verdict that letting Petitioner's "guilty verdict stand would be a manifest injustice." App. 79a. The Second Circuit reversed, holding that the district court lacked discretion to weigh the evidence at all, and that a district

court "must defer" to the verdict unless one of two types of errors affected the proceedings: (1) the evidence of guilt was patently incredible or physically impossible, and therefore inadmissible as a matter of law, or (2) there was evidentiary or instructional error. App. 30a–31a. Following remand and final judgment, the Second Circuit adhered to its interlocutory decision as law of the case, while allowing the hypothetical possibility that there might be other "examples" of the kind of "extraordinary circumstances" (on top of concerns about the weight of the evidence) that could permit a district court to weigh the evidence. App. 3a. Still, the Second Circuit held that absent such extraordinary circumstances, district courts must "defer to the jury's resolution of conflicting evidence." App. 3a. As one of the judges on the *Archer I* panel summarized in a later decision, "The Court may not reweigh the evidence." *United States v. Berry*, No. 20 Cr. 84, 2022 WL 1515397, at *11 (S.D.N.Y. May 13, 2022) (Nathan, then-*D.J.*).

1. The Second Circuit's approach to Rule 33 is in tension with every other court of appeals, and more akin to review for sufficiency of the evidence. The Fourth Circuit underscored this difference recently, when it rejected the government's argument that a district could not order a new trial based "solely on the court's disagreement with the jury's inferences." *Rafiekian*, 68 F.4th at 189. The court explained:

> On the one hand, a judgment of acquittal is appropriate when the evidence is so deficient that acquittal is the *only* proper verdict. That is, if the evidence is so insufficient that no rational trier of fact could convict, the court should

> enter a judgment of acquittal. Accordingly, in determining whether to grant a judgment of acquittal [under Rule 29], the court views the evidence and inferences therefrom in the light most favorable to the government.
>
> A new trial, on the other hand, may be granted where the government has presented sufficient evidence for a reasonable jury to convict, but the court nevertheless disagrees with the jurors' weighing of the evidence in finding the defendant guilty. So in determining whether a new trial is warranted, the district court—sitting as a "thirteenth juror"—conducts its own assessment of the evidence, unconstrained by any requirement to construe the evidence in the government's favor.

Id. at 186. While a district court should exercise its discretion to disturb a jury's verdict sparingly, the Fourth Circuit held that a court may do so "when the evidence weighs so heavily against the verdict that it would be unjust to enter judgment." *Id.*

The *Rafiekian* court also expressly noted the circuit split over weight of the evidence review, rejecting the government's characterization of the law as "uniform and unequivocal." *Id.* at 188. Quoting, for example, the Second Circuit's "patently incredible" test, the Fourth Circuit noted that "some of our sister circuits have suggested—consistent with the government's view here—that a serious vulnerability in the evidence must exist to warrant a new trial based on the weight of the evidence." *Id.* (quoting *Archer I*, 977 F.3d at 181, 188). But the Fourth

Circuit rejected the notion that weight of the evidence, standing alone, is insufficient to merit Rule 33 relief, explaining that "prohibiting the court from granting a new trial based solely on disagreement with the jury's inferences would make little sense," particularly in cases where, as here, the government relied on "circumstantial evidence." *Id.* at 189.

Thus, in contrast to the Second Circuit, the Fourth Circuit holds that a district court need not clear any threshold of "special deference" to the jury's inferences before it weighs the evidence on a Rule 33 motion: "even though the jury itself had apparently drawn inferences favorable to the government, the court was *free to draw different inferences in making its new-trial determination*." *Id.* at 189–90 (emphasis added). The only hurdle that the Fourth Circuit requires is that the evidence weigh so heavily against the verdict that it would be a manifest injustice to let the verdict stand, *id.* at 190, which is precisely the finding the district court made here, before the Second Circuit held that there was no basis for weighing the evidence in the first place. App. 30a–31a.

2. *Rafiekian* is not the only court to reject the Second Circuit's approach to Rule 33. Prior to *Archer I*, the Seventh Circuit explained, "The focus in a motion for a new trial is not on whether the testimony is so incredible that it should have been excluded." *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). "Rather, the court considers whether the verdict is against the manifest weight of the evidence," regardless of whether the evidence was "contrary to the laws of nature or otherwise incapable of belief." *Id.*

The *Washington* decision continued a line of reasoning that began in *United States v. Morales*, where the Seventh Circuit held that a verdict could be so against the weight of the evidence as to warrant a new trial, even where that evidence was "not impossible," "inconsistent with physical reality[,] or otherwise incredible." 902 F.2d 604, 607–08 (7th Cir. 1990) ("*Morales I*"), *amended*, 910 F.2d 467 (7th Cir. 1990) ("*Morales II*"). In *Morales I*, the district court had denied a motion for a new trial despite severe concerns about the defendant's guilt, apparently believing itself constrained by prior circuit precedent that prevented it from excluding testimony that did not defy physical reality and was not otherwise inherently incredible. *Id.* at 606, 608. The Seventh Circuit reversed and ordered a new trial, finding that even though the testimony was admissible, "it would be a manifest injustice to let the guilty verdict stand" in light of the entire trial record. *Id.* at 609.

In a brief amendment, the Seventh Circuit confirmed that courts have discretion to order a new trial when the evidence weighs strongly against the verdict: "If the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial" under Rule 33. *Morales II*, 910 F.2d at 468.

The Eighth Circuit likewise rejects the "patently incredible" test. In *United States v. Stacks*, 821 F.3d 1038, 1046 (8th Cir. 2016), the government appealed from the grant of a new trial and argued that a district court may only grant relief under Rule 33 "if [the evidence] is physically impossible." *Id.* The Eighth Circuit disagreed, explaining that the "physically impossible" test it had

previously articulated applied to Rule 29 motions, not Rule 33. *Id.*

On a Rule 33 motion, the Eighth Circuit continued, "The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Id.* (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). Under this standard, the district court "did not abuse its considerable discretion" in ordering a new trial, even though the district court had acknowledged that the record contained "evidence from which a reasonable jury could convict Stacks." *Id.* at 1045–46. "The district court acknowledged the evidence supporting the verdicts. The district court weighed it against the exculpatory evidence before concluding in a thorough, reasoned manner that a miscarriage of justice may occur if the verdicts were allowed to stand. It did not abuse its considerable discretion in doing so." *Id.* at 1046.

Here, the district court also considered "the most damning evidence" against Petitioner; also weighed the government's evidence "against the exculpatory evidence"; and also issued a "thorough, well-reasoned opinion." *Id.* at 1045–1046; *see* App. 98a (considering "most damaging evidence against [Petitioner]"); App. 92a (weighing "inculpatory" and "exculpatory" evidence against one other). But because the Second Circuit subsequently adopted the physical impossibility standard for Rule 33 that *Stacks* had rejected, App. 30a–31a, it held that the district court had no discretion to order a new trial despite its "real concern that [Petitioner] is innocent," App. 114a.

Thus, of the four courts of appeals to have expressly considered the question, the Second Circuit stands alone in holding that the evidence must be "patently incredible or def[y] physical reality" before a district court may reweigh the evidence under Rule 33.

3. More generally, the other courts of appeals all permit district courts to reweigh the evidence under Rule 33 rather than requiring them todefer to the inferences drawn by the jury. For example, the D.C, Fifth, Sixth, and Tenth Circuits have joined the Fourth Circuit in adopting some version of the "thirteenth juror" standard for Rule 33. As this Court explained in *Tibbs v. Florida*, the "thirteenth juror" standard permits a district court to order a new trial when it "disagrees with the jury's resolution of the conflicting testimony." 457 U.S. 31, 43 (1982). Five courts of appeals use this analogy, whereby "on such a motion for new trial the court sits as a thirteenth juror." *United States v. Robertson*, 110 F.3d at 1120 n.11 (5th Cir. 1997); *accord Rafiekian*, 68 F.4th at 186; *United States v. Sears*, 2023 WL 395024, at *4 (6th Cir. Jan. 25, 2023) ("When evaluating a Rule 33 motion, a district court may act as a thirteenth juror, weighing the evidence and deciding if the witnesses are credible."); *United States v. Lopez*, 576 F.2d 840, 845 n.1 (10th Cir. 1978) ("[U]nder Federal Rule of Criminal Procedure 33 a trial judge considers the credibility of witnesses and weighs the evidence as a thirteenth juror."); *United States v. Brodie*, 295 F.2d 157, 160 (D.C. Cir. 1961) ("[O]n a motion for a new trial made . . . 'the court sits as a thirteenth juror,' and the trial court has broader powers." (quoting Barron & Holtzoff, Federal Practice & Procedure § 2281 (Rules ed. 1958))).

The First, Third, Ninth, and Eleventh Circuits have likewise adopted Rule 33 standards that are incompatible with the Second Circuit's approach. Each of these courts holds that a district court may generally reweigh the evidence on a Rule 33 motion without being required to defer to the jury's inferences. *See, e.g.*, *United States v. Rothrock*, 806 F.2d 318, 321 (1st Cir. 1986) ("In considering such a motion, the court has broad power to reweigh evidence . . . ."); *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) ("[W]hen a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government"); *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992) (same) (citing *Lincoln*, 630 F.2d at 1319); *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985) (same) (citing *Lincoln*, 630 F.2d at 1319).

4. To be sure, the other courts of appeals are not entirely in lockstep. For example, the Sixth Circuit limits the ability of district courts to second-guess questions of witness credibility. *See United States v. Burks*, 974 F.3d 622, 628 (6th Cir. 2020). The First Circuit likewise permits district courts to reevaluate witness credibility only in "exceptional circumstances," but has confirmed that a district court may otherwise make "its own evaluation of the evidence." *Merlino*, 592 F.3d at 32–33. And the Eleventh Circuit restricts new trials based on weight of the evidence to instances where that evidence is "marked by uncertainties and discrepancies," although it is clear that district courts "may weigh the evidence and consider the credibility of the witnesses," on Rule 33 motions. *United States v. Witt*, 43 F.4th 1188, 1194 (11th Cir. 2022). *See generally Rafiekian*, 68 F.4th at 188 (discussing different circuits' approach to Rule 33 review).

But the Second Circuit alone holds that the trial record on a Rule 33 weight-of-the-evidence challenge must be viewed "in the light most favorable to the [g]overnment," with the district court required to "defer to the jury's resolution of conflicting evidence." App. 19a n.2, 31a. In the Second Circuit, the question under Rule 33 is whether the jury was "entitled" to convict, *i.e.*, whether the evidence it relied on was patently incredible, defied physical realities, App. 30a–31a, or was marred by some other "extraordinary circumstance" beyond concerns about the weight of the evidence alone. *Landesman*, 17 F.4th at 330 (quoting *Archer I*, 977 F.3d at 188). The Second Circuit's standard simply cannot be reconciled with the approach taken in any of the other circuits, where the starting point under Rule 33 is that a district court may view the trial evidence with fresh eyes—albeit eyes that have "experience[d] the tenor of the testimony at trial" and engaged in "personal evaluation[] of witness demeanor." *Rafiekian*, 68 F.4th at 187(quoting *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1212 (9th Cir. 1992)).

B. The Second Circuit's Standard Departs from this Court's Precedents on Granting a New Trial Based on the Weight of the Evidence.

The Second Circuit's decisions here are also at odds with this Court's pre-Rule 33 decisions concerning district courts' discretion to weigh the evidence in criminal proceedings.

1. Long before Rule 33 was adopted, this Court recognized that "[i]f the verdict were manifestly against the weight of evidence, defendant was at liberty to move for

a new trial upon that ground," and that "the granting or refusing of such a motion is a matter of discretion" for the trial court. *Crumpton v. United States*, 138 U.S. 361, 364 (1891). The Court contrasted this "weight of the evidence" review with a motion for a "directed verdict" based on whether the evidence was "sufficient." *Id.* *Crumpton*'s citations to civil cases also confirmed that district courts possessed the same discretion to grant a new trial in criminal cases as they did in civil ones. That discretion, the Court had explained just four years prior, included the ability to grant a new trial based on the weight of the evidence even "where there is no insufficiency in point of law; that is, there be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it." *Metro. R.R. Co. v. Moore*, 121 U.S. 558, 568–69 (1887).

These cases are still controlling because when Rule 33 was adopted, it did not overwrite the Court's jurisprudence on when a new trial may be granted based on weight of the evidence; instead Rule 33 marked a "continuation of the common law tradition." *United States v. Wolff*, 892 F.2d 75 (4th Cir. 1989). The drafting history of the Rules confirms that the Advisory Committee contemplated that motions under Rule 33 would include the long-standing grounds "[t]he verdict is contrary to the weight of the evidence," 7 Drafting History of the Federal Rules of Criminal Procedure 88, and that such motions would be "grantable in the discretion of the court," 1 Drafting History of the Federal Rules of Criminal Procedure 130.

2. Just one year after Rule 33 went into effect, this Court confirmed that the Rule, if anything, expanded the discretion of district courts to grant new trials. In

United States v. Smith, 331 U.S. 469, 472 (1947), the Court reviewed a district court's exceedingly terse grant of a new trial—"It is our opinion upon this reconsideration that in the interest of justice a new trial should be granted the defendant"—issued with "no more particular ground for the order." *Id.* at 471. While the Court ultimately held that the new trial order was granted out of time, it also held that, on the merits, the order was unassailable. *Id.* at 472–74.

The Court began by noting that Rule 33 "is declaratory of the power to grant a new trial 'in the interest of justice'" generally and did not limit itself to any specific "reasons catalogued as they might have been." *Id.* at 472. Based on this broad reading of Rule 33, the Court held: "The generality of the reasons assigned by Judge Smith for the order in question is all that is required." *Id.* Thus, the district court's one-sentence explanation, which merely recited the governing standard, was "all that is required" to satisfy Rule 33. *Id.* at 471–72. By setting the bar for compliance with Rule 33 so low, the Court showed that Rule 33 had at least codified, if not expanded upon, district courts' historical discretion to order new trials.

3. That discretion continues today even after 18 U.S.C. § 3731 "gave the government the right to appeal new-trial orders." *Rafiekian*, 68 F.4th at 187. [N]othing about that amendment suggests that it was intended to significantly curb the district court's historically unreviewable discretion in ordering new trials." *Id.* Thus, while courts of appeals now have the literal authority to review grants of new trials, their "review must be highly deferential in view of the wide discretion accorded district courts by Rule 33," with a district court's decision disturbed only "if it acted

arbitrarily, if it failed to adequately take into account judicially recognized factors constraining its exercise of discretion, or if it rested its decision on erroneous factual or legal premises." *Id.*[3]

The Second Circuit's decisions ignore this long-standing precedent. Instead of recognizing that district courts may "weigh the evidence" in their "discretion," *Crumpton*, 138 U.S. at 364, the Second Circuit cabined that discretion, requiring district courts to defer to a verdict absent some identifiable fault at trial separate from weight-of-the-evidence concerns itself. App. 30a–31a. As the *Rafiekian* court pithily observed: "That can't be right. The government is entitled to rely on circumstantial evidence, but it is not entitled to special deference when it does so." 68 F.4th at 190.

C. This Question is Important and Recurring.

The question presented concerns an "important feature" of the law. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, *C.J.*, in chambers). By curtailing district courts' historic discretion to grant new trials, the Petition raises a legal question that is fundamental in criminal (and civil) procedure, and that arises with frequency. Certain charges in particular—such as fraud and conspiracy—turn largely on the defendant's state of mind and must be proved through circumstantial evidence. *See Rafiekian*, 68 F.4th at 189. In such cases, the role of

3. *See generally* Brief of Procedure Scholars as Amici Curiae, submitted in support of certiorari on Petitioner's interlocutory petition (No. 20-1644), which discusses in greater detail the historical origins of new trial decisions and the deference afforded to trial courts.

the district court in preventing a miscarriage of justice is particularly important. "The exercise of the trial court's power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (quoting with approval *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)).

D. This Case Is an Ideal Vehicle to Resolve the Question Presented.

This case presents a clean vehicle to reach the question of whether a district court may order a new trial based solely on the weight of the evidence, despite its legal sufficiency. The evidence here was entirely circumstantial and the district court, after reviewing the record as a whole and considering all the government's evidence, concluded that letting the verdict stand would be a manifest injustice. App. 79a. If the law of any other circuit had applied to the district court's new trial order here, the decision would have been affirmed. While certain courts of appeals limit district courts' discretion to assess witness credibility, the district court's Rule 33 decision here avoided making any such credibility determinations, as no witnesses directly implicated Petitioner. Rather, the court simply reweighed the evidence and determined that the interests of justice demanded a new trial, as every other circuit permits district courts to do. Thus, this case perfectly illustrates the stark contrast between the Second Circuit's approach to Rule 33 and that followed in the rest of the country.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE RULES FOR CORRECTING PLAIN ERROR FROM SENTENCING GUIDELINES MISCALCULATIONS

The decision below also held that the court of appeals had the discretion to ignore an unwaived claim of plain error, if it went unnoticed by both the district court and the parties until oral argument—even when the error was conceded and seriously affected the fairness, integrity, and public reputation of judicial proceedings. In so holding, the Second Circuit split from the Tenth Circuit, which has held that it will consider belatedly raised claims of plain error where an appellant's "failure to argue plain error in his opening brief appears to be a product of mistake (more akin to a forfeiture, not a waiver)." *United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016); *see also United States v. Jackson*, 327 F.3d 273, 304 (4th Cir. 2003) (reviewing argument raised in "reply brief on appeal . . . for plain error"). The Tenth Circuit's practice is consistent with this Court's precedents, and the Court should take this opportunity to clarify the scope of appellate discretion under Rule 52(b).

The specific plain error here occurred when the district court miscalculated the applicable Guidelines range—the plainest kind of procedural sentencing error there is. This error was initially overlooked by all involved, until Petitioner's counsel realized the error and raised it before the Second Circuit at oral argument. The Second Circuit ordered supplemental briefing, and in its brief, the government conceded the error. Despite this concession, despite the issue having been briefed, and despite all the requirements for plain error being satisfied, the Second Circuit refused to consider Petitioners' claim. Instead,

the court of appeals held that it was not required to do so because the error had not been raised in Petitioner's initial briefs and therefore was "forfeited." App. 14a n.2.

1. Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This Court has explained that the word "may" in Rule 52(b) does not afford courts unlimited discretion to ignore plain errors that affect substantial rights:

> Rather, the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*. The Court of Appeals *should correct* a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

The Court has also explained what a court of appeals should do when, as here, "an incorrect Guidelines range goes unnoticed" by the court and the parties. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)). The court of appeals must "[f]irst" determine that the error was not waived; "[s]econd the error must be plain"; and "[t]hird, the error must have affected the defendant's substantial rights." *Id.* (last quotation quoting *Molina-Martinez*, 578 U.S. at 194). "Once those three conditions have been met, '*the court of appeals should exercise its discretion to correct the forfeited error* if[, fourth,] the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.*

Under this Court's precedents, forfeiture alone is not a reason to refuse to consider a plain error. "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733. An appellate court may not rely on forfeiture to avoid considering plain error, because "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Second Circuit itself had previously acknowledged that a defendant's "[f]orfeiture does not preclude appellate consideration of a claim in the presence of plain error." *United States v. Yu-Leung*, 51 F.3d 1116, 112–22 (2d Cir. 1995).

Despite these clear standards, the Second Circuit determined that it could disregard an error that met all of the factors set out in *Rosales-Mireles*, on the grounds that it was not timely raised. *Olano* and *Molina-Martinez* afford no such discretion. While a criminal defendant certainly puts him- or herself in a disadvantaged position by failing to raise a claim of plain error until reply or oral argument—thereby limiting the number of opportunities to explain the error—that untimeliness cannot disqualify an error from review under Rule 52(b). To the contrary, the very purpose of Rule 52(b) is "to correct the forfeited error." *Rosales-Mireles*, 138 S. Ct. at 1901. As Judges Tjoflat and Wilson observed in *United States v. Levy*: "Rule 52(b) . . . was intended not only to allow appellate courts to correct errors not objected to at trial, but also to allow them to correct errors not raised on appeal." 391 F.3d 1327, 1341 n.8 (11th Cir. 2004) (Tjoflat & Wilson, *JJ.*, dissenting from denial of rehearing *en banc*). That reading of Rule 52 was vindicated when this Court granted certiorari in *Levy*, vacated, and remanded "for further consideration in light of *United States v. Booker*." *Levy v. United States*, 545 U.S. 1101 (2005).

2. This case presents a particularly good vehicle for correcting this practice by the Second Circuit because the Guidelines miscalculation here clearly satisfies each of the elements of plain error. First, there was no waiver. Petitioner pressed his claim of error at oral argument and in supplemental briefing. And while the government argued that the error had been waived, the Second Circuit did not accept that position and instead deemed the argument "forfeited," *i.e.*, untimely. App. 14a n.2. Second, the "error is plain": the district court made a two-level Guidelines miscalculation and this plain arithmetic error is conceded by the government. *Rosales-Mireles*, 138 S. Ct. at 1904. The error also affected Petitioner's substantial rights because there is a "reasonable probability that [he] would have been subject to a different sentence but for the error." *Id.* at 1908–09. As *Molina-Martinez* explained:

> Where [] the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights. Indeed, in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder.

578 U.S. at 200–01; *accord Rosales-Mireles*, 138 S. Ct. at 1907. Here, the district court made no statement suggesting that it would have imposed the same sentence if the Guidelines range were lower,[4] and it repeatedly

4. Although the two-level mathematical Guidelines error was not raised at sentencing, and thus the district court had no

invoked the miscalculated Guidelines range as the anchor point in its sentencing analysis, thus demonstrating that it was relying on that miscalculated range when it sentenced Petitioner. *See, e.g.*, App. 139a. The error therefore affected Petitioner's substantial rights.

Lastly, the miscalculation "error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mirales*, 138 S. Ct. at 1905. A "plain Guidelines error that affects substantial rights . . . ordinarily will satisfy [this] fourth prong." *Id.*

> The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error . . . . Moreover, a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel.

Id. at 1907.

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occasion to comment on its specific effect on the ultimate sentence, Petitioner did raise other objections to the Guidelines calculation that would have resulted in a materially lower range. App. 135a. Despite these objections, the district court never suggested it would have imposed the same sentence had the applicable sentencing range been lower.

Petitioner's claim of sentencing miscalculation therefore meets each of the plain error factors set out in *Rosales-Mireles*, and under this Court's precedent, the Second Circuit could not rely on Petitioner's forfeiture to avoid "exercis[ing] its discretion to correct the forfeited error." *Id.* at 1905. This Court should grant review to clarify this important and recurring principle of criminal procedure to ensure that clear, unwaived, and fundamental errors do not go uncorrected.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 16, 2023

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of June, two thousand twenty-three.

PRESENT:

RICHARD J. SULLIVAN,
WILLIAM J. NARDINI,
MYRNA PÉREZ,
Circuit Judges.

No. 22-539

UNITED STATES OF AMERICA,

Appellee,

v.

DEVON ARCHER,

Defendant-Appellant.[*]

Appeal from a judgment of the United States District Court for the Southern District of New York (Ronnie Abrams, *Judge*).

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appendix A

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Devon Archer appeals from a judgment of conviction following a jury trial in which he was found guilty of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, and securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b-5, stemming from his involvement in a scheme to defraud the Wakpamni Lake Community Corporation of the Oglala Sioux Tribe (the "Wakpamni") of the proceeds of a series of bond offerings worth approximately $60 million. For his role in the scheme, Archer was sentenced to one year and one day in prison to be followed by one year of supervised release. On appeal, Archer raises several challenges to his conviction and sentence, each of which we address in turn. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. The Law-of-the-Case Doctrine

Archer argues that "the law of this Circuit has changed so substantially" since we reversed the district court's grant of his motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, *see United States v. Archer (Archer I)*, 977 F.3d 181 (2d Cir. 2020), that we must reinstate the district court's decision or remand to the district court for reconsideration of the motion. Archer Br. at 30. As a general principle, the law-of-the-case doctrine requires us to "adhere to [our] own decision at an earlier stage of the litigation." *United States v. Plugh*, 648 F.3d 118, 123 (2d Cir. 2011) (internal quotation

marks omitted). But we need not adhere to the law of the case in the face of an intervening change in controlling law, new evidence, or the need to prevent a clear error or a manifest injustice. *See Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983). In asserting that the law of the Circuit has changed since our prior opinion, Archer relies on *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021). That reliance is misplaced.

In *Archer I*, we clarified that a district court may not grant a motion for a new trial "based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand." *Archer I*, 977 F.3d at 187-88 (internal quotation marks omitted). To illustrate when it would be appropriate to grant a motion for a new trial under this standard, we provided two examples of when a district court need not "defer to the jury's resolution of conflicting evidence" – namely, (1) where the evidence was "patently incredible or defied physical realities," or (2) where an "evidentiary or instructional error compromised the reliability of the verdict." *Id.* at 188-89 (internal quotation marks and alterations omitted). Because *Archer I* is a published opinion, it binds all future panels of this Court "unless and until it is overruled by the Court *en banc* or by the Supreme Court." *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019). The *Landesman* panel thus had no authority to overrule our holding in *Archer I*.

Archer nevertheless argues that *Landesman* "retreated" from *Archer I*'s supposed position that there are only two situations where a district court may

disregard a jury's resolution of conflicting evidence. Archer Br. at 29. But this is wrong for two reasons. First, *Archer I* never said that the two examples it provided formed an exhaustive list. Second, *Landesman* never purported to walk back the holding in *Archer I*. For these reasons, Archer's contention that *Landesman sub silentio* reversed *Archer I*'s holding as applied to him defies logic and the clear law of this Circuit. We therefore decline to reinstate the district court's decision or remand to the district court for reconsideration of Archer's motion for a new trial.

II. Archer's Motion to Suppress

Archer next challenges the sufficiency of two nearly identically worded warrants used to seize records associated with two of his email accounts. Specifically, he contends that the warrants flunk the Fourth Amendment's particularity requirement because they included three catch-all phrases – "among other statutes," "evidence of crime," and "communications constituting crime" – that allowed law enforcement officers to search for evidence of *any* crime rather than evidence of the Wakpamni scheme alone. Archer Br. at 34-35 (quoting App'x at 211, 218) (emphasis omitted). We disagree.

"In an appeal from a district court's ruling on a motion to suppress, we review legal conclusions de novo and findings of fact for clear error." *United States v. Freeman*, 735 F.3d 92, 95 (2d Cir. 2013). The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be

searched, and the persons or things to be seized." U.S. Const. amend. IV. To satisfy the particularity requirement, a warrant must (1) "identify the specific offense for which the police have established probable cause"; (2) "describe the place to be searched"; and (3) "specify the items to be seized by their relation to designated crimes." *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017) (internal quotation marks omitted). But the Fourth Amendment does not demand "a perfect description of the data to be searched and seized." *Id.* at 100. Rather, "some ambiguity" is permitted "so long as law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to cover, and have insured that all those facts were included in the warrant." *Id.* (internal quotation marks omitted).

Here, both warrants specified the offenses for which the officers had established probable cause, *see* App'x at 211, 218 (listing 18 U.S.C. § 1348; 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. 240.10b-5; 18 U.S.C. § 371; and 15 U.S.C. §§ 80b-6 and 80b-17), identified the email accounts to be searched, *see id.* at 205, 216 (naming the accounts), and specifically described the material to be seized from those accounts, *see id.* at 205-13, 216-19 (authorizing the collection of email content, address book content, and transactional information, among other data).

Archer nevertheless contends that the warrants' inclusion of the phrase "among other statutes," *id.* at 211, 218, at the end of the list of specified crimes for which there was probable cause authorized an unlawful general search,

untethered to the Wakpamni scheme. But read in context, the warrants make clear that they were sufficiently tailored to permit "the rational exercise of judgment by the executing officers in selecting what items to seize." *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (internal quotation marks and alterations omitted).

Archer makes similar arguments with respect to the warrants' use of the phrases "evidence of crime" and "communications constituting crime." App'x at 212, 219. But once again, Archer's interpretation rests on his attempt to isolate those phrases from the rest of the warrant to suggest that law enforcement officers were authorized to collect evidence of *any crime whatsoever* without limitation. Considered in context, the warrants do no such thing; they authorized a search for evidence related to only one conspiracy. *See id.* at 211, 218 (authorizing the seizure of "evidence of the agreement to engage in a fraudulent scheme involving the issuance of bonds on behalf of the Wakpamni . . . and the misappropriation of the proceeds of those bonds"); *see also Andresen v. Maryland*, 427 U.S. 463, 479-82, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (concluding that the term "crime" had to be read in the context of the warrant, and that when so read, it clearly referred to the scheme at issue); *United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990) (upholding "broadly worded categories of items" in light of the warrant's "illustrative list" of items that could be seized). We therefore cannot say that the district court erred in concluding that the warrants were sufficiently particularized.

III. Archer's Severance Motion

Archer also argues that his joint trial with John Galanis subjected him to a substantial risk of "spillover prejudice." Archer Br. at 51. Again, we disagree. In federal courts, there is a preference for defendants who are indicted together to be tried together. *See Zafiro v. United States*, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Accordingly, severance is required "only if there is a serious risk that a joint trial would compromise a specific trial right" of a defendant or "prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. We review a district court's denial of a motion to sever for abuse of discretion. *See United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994).

Archer first contends that he was prejudiced because the evidence at trial "overwhelmingly" established Galanis's guilt, while the evidence against Archer was "entirely documentary and inferential." Archer Br. at 56 (internal quotation marks omitted). Perhaps. But we have "repeatedly recognized that joint trials involving defendants who are only marginally involved alongside those heavily involved are constitutionally permissible." *See United States v. Locascio*, 6 F.3d 924, 947 (2d Cir. 1993) (collecting cases). And so, while the quantum of evidence presented against Archer and Galanis may not have been equal, we see nothing in the record to suggest that the jury was unable to compartmentalize the evidence against each defendant.

Archer next asserts that the introduction of evidence of Galanis's prior conviction specifically subjected Archer to spillover prejudice. But the mere "fact that evidence may be admissible against one defendant but not another does not necessarily require a severance." *United States v. Spinelli*, 352 F.3d 48, 56 (2d Cir. 2003) (internal quotation marks omitted). Indeed, we have held that introducing evidence of one defendant's prior bad acts does not necessarily prejudice other defendants at trial, *see United States v. Cacace*, 796 F.3d 176, 192 (2d Cir. 2015), and we see no reason to take a different approach here. Moreover, the district court's charge — which expressly instructed the jury not to consider the evidence of Galanis's prior conviction against Archer — cured any risk of prejudice. *See Spinelli*, 352 F.3d at 55 (reasoning that any risk of prejudice in joint trial may be remedied where, as here, "the district court explicitly instructed the jury to consider the defendants individually").

IV. The District Court's Jury Instructions

Archer challenges the district court's jury instructions in two respects. First, he argues that the district court erred by failing to instruct the jury regarding multiple conspiracies. Second, he contends that the district court erred by advising the jury that it could infer Archer's knowledge of the scheme based on a theory of conscious avoidance. Archer is wrong on both counts.

Appendix A

A. Multiple-Conspiracies Charge

As a general matter, "a criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). Nevertheless, we will vacate a conviction for failure to give a requested instruction only when the defendant's proposed instruction "is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Doyle*, 130 F.3d 523, 540 (2d Cir. 1997) (internal quotation marks omitted). Here, Archer requested an instruction that the Wakpamni scheme consisted of two conspiracies – one to misappropriate the proceeds of the Wakpamni bonds, and another one to defraud the investors who purchased the bonds by failing to disclose material conflicts of interest.

A defendant is "not entitled to a multiple conspiracy charge" when "only one conspiracy has been alleged and proved." *United States v. Maldonado-Rivera*, 922 F.2d 934, 962 (2d Cir. 1990) (internal quotation marks omitted). To prove a single conspiracy, the government must show only that "each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). A cognizable single conspiracy thus does not transform into multiple conspiracies "merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence

and assistance" among the conspirators. *United States v. Berger*, 224 F.3d 107, 114-15 (2d Cir. 2000) (internal quotation marks omitted).

Here, the record demonstrates that there was only one conspiracy — to defraud the Wakpamni into issuing more than $60 million in debt and to misappropriate the bond proceeds for personal use. To be sure, the conspiracy involved two types of misrepresentations and two sets of victims. With respect to the first victim – the Wakpamni – one group of coconspirators lied to the tribe about how the bond proceeds would be invested. As for the other victims – the pension funds – a different set of coconspirators lied to them about the nature of their investment in the bonds. But the two purported conspiracies involved the same goal (to divert bond proceeds for personal use) and were hatched by the same individual (Jason Galanis). *See id.* at 115 (considering overriding goal, overlap of leadership, and common participants as evidence that several schemes fell within same conspiracy). We thus agree with the district court's conclusion that there was no factual basis for a multiple-conspiracies charge.

B. Conscious-Avoidance Charge

Archer also challenges the district court's conscious-avoidance instruction. A conscious-avoidance instruction is appropriate when (1) "a defendant asserts the lack of some specific aspect of knowledge required for conviction," and (2) "the appropriate factual predicate for the charge exists." *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). Both requirements are met here.

As to the first prong, Archer clearly disputed his knowledge of the object of the alleged conspiracy. While Archer did not testify, his knowledge of the goals of the conspiracy was plainly in dispute at trial, *see, e.g.*, App'x at 894 ("The money did move that way, it moved in a big circle, but *Devon didn't know it*." (emphasis added)), and in fact, remains disputed on appeal, *see, e.g.*, Archer Br. at 45 (arguing that Archer "had no idea" that the source of the funds used to purchase the second bond issuance came from the first bond issuance).

With respect to the second prong, there was a sufficient factual predicate for a conscious-avoidance instruction on the facts before the jury. In *Archer I*, we catalogued many of the red flags Archer received during the course of the scheme, including the "Ponzi-like" funding of the second bond purchase using the proceeds of the first and the circuitous routing of $15 million to make that purchase. 977 F.3d at 192-93. On this record, we see no reason to second-guess the district court's conscious-avoidance instruction. *See United States v. Eltayib*, 88 F.3d 157, 170 (2d Cir. 1996) (explaining that "if the defendant's participation in the conspiracy has been established, conscious avoidance may support a finding with respect to the defendant's knowledge of the objectives or goals of the conspiracy").

Archer counters that the charge was improper because the government affirmatively argued that Archer had "'*devised* a scheme, a scheme to use tribal bonds to fuel' his 'business empire.'" Archer Br. at 44 (quoting App'x at 248). But a conscious-avoidance instruction is

appropriate even where the government's primary theory is that the defendant had actual knowledge. *See United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (holding that a conscious-avoidance instruction is proper even when "the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain").[1]

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1. Archer also argues that the government improperly urged the jury to infer his "intent to participate in the alleged *conspiracy*" based on a theory of conscious avoidance. Archer Br. at 46 (emphasis added). As this argument does not relate to the district court's jury instructions, Archer must show that the government's arguments "resulted in substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018) (internal quotation marks omitted). Contrary to Archer's assertion, the government argued only that the jury could infer Archer's *knowledge of the object of the conspiracy* based on conscious avoidance. *See, e.g.*, App'x at 792 (arguing that "you can't put your head in the sand; you can't see all these red flags, all these things about these transactions that don't make any sense and not want to know," as "[t]hat is the same thing as acting knowingly"); *id.* at 1096 (arguing that the deal "is filled with red flags from Archer['s] . . . perspective" and that "you can't say you didn't know because you stuck your head in the sand"). It never argued that Archer's participation in the conspiracy itself was a product of his willful blindness. *Compare United States v. Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995) (holding that a conscious-avoidance charge may not be used on the issue of "membership in a conspiracy"), *with United States v. Tropeano*, 252 F.3d 653, 660 (2d Cir. 2001) (holding that a conscious-avoidance charge may "support a finding that a defendant knew of the objects of the conspiracy"). We thus discern no error on this score, plain or otherwise.

V. Sentencing Challenge

Archer also argues that the district court committed reversible error by refusing to engage in the requisite fact-finding at sentencing pursuant to the applicable preponderance-of-the-evidence standard. Specifically, he contends that this error infected the court's calculation of his offense level because the court added a twenty-two level enhancement for loss amount and a two-level enhancement for ten or more victims based on a "guess" as to what "facts a jury might have found." Archer Br. at 18.

While Archer may disagree with the district court's factual findings, there can be no doubt that the court properly understood its role in assessing Archer's offense conduct under the Sentencing Guidelines. Before calculating Archer's offense level, the district court stated that it would "evaluate the enhancements to Mr. Archer's sentence under the typical preponderance[-]of[-]the[-] evidence standard." App'x at 2130. The district court then reviewed the evidence showing Archer's knowledge of the full scope of the Wakpamni scheme. The court observed, for example, that Archer "personally purchased $15 million worth of bonds in the second issuance using money given to him by Jason Galanis, made representations to the [Wakpamni] that he was purchasing the bonds 'for his own account and for investment only,' transferred them to another entity controlled by his codefendants, [and] made false statements about the source of the money to Morgan Stanley and Deutsche Bank." *Id.* at 2132. The district court also highlighted evidence showing that Archer was "informed about the progress of the [investment advisers']

acquisitions" and that he was aware of the "possibility of placing the Wakpamni bonds with them." *Id.* Based on this evidence, the court found "by a preponderance of the evidence" that Archer was aware of the full loss amount and number of victims. *Id.* at 2132-33.

Against this clear record, Archer cherry-picks a handful of sentence fragments from the sentencing hearing transcript to argue that the district court shirked its fact-finding responsibilities and assumed "that it was required to defer to factual findings that it believed were 'implicit in the jury's verdict,' but which [actually] went far beyond the elements of the charged crimes." Archer Br. at 12 (quoting App'x at 2154). But the full transcript reveals that the district court did no such thing. *See, e.g.*, App'x at 2114 ("I don't think I need to accept every fact argued by the government at summation."); *id.* at 2116 ("I don't think I necessarily need to find that he was involved in every aspect of the scheme."). At bottom, the district court correctly exercised its discretion and engaged in its own independent fact-finding to support its calculation of Archer's offense level under the Sentencing Guidelines.[2]

* * *

2. At oral argument, counsel for Archer argued for the first time that the district court miscalculated Archer's Sentencing Guidelines range. While counsel initially represented that this issue was "less developed in the briefing," he ultimately conceded that it was, in fact, not developed at all. Oral Argument at 5:22-7:40. Because Archer failed to raise this argument in his opening brief or his reply brief, he has forfeited it. *See United States v. Cedeño*, 644 F.3d 79, 83 n.3 (2d Cir. 2011).

We have considered Archer's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of July, two thousand twenty-three.

Docket No: 22-539

UNITED STATES OF AMERICA,

Appellee,

v.

DEVON ARCHER,

Defendant-Appellant.

ORDER

Appellant, Devon Archer, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 18-3727

UNITED STATES OF AMERICA,

Appellant,

v.

DEVON ARCHER,

Defendant-Appellee,

JASON GALANIS, GARY HIRST, JOHN GALANIS, AKA YANNI, HUGH DUNKERLEY, MICHELLE MORTON, BEVAN COONEY,

Defendants.[*]

November 18, 2019, Argued;
October 7, 2020, Decided

Before: WALKER, SULLIVAN, *Circuit Judges*, NATHAN, *District Judge*.[†]

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* The Clerk of the Court is directed to amend the caption as set forth above.

† Judge Alison Nathan, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix C

RICHARD J. SULLIVAN, *Circuit Judge:*

The government appeals from an order of the United States District Court for the Southern District of New York (Ronnie Abrams, *J.*) vacating Defendant-Appellee Devon Archer's conviction and granting his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The operative indictment, filed March 26, 2018, charged Archer with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, and securities fraud, in violation of 15 U.S.C §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2. After a month-long trial, the jury found Archer guilty on both counts. On appeal, the government argues that the district court abused its discretion in setting aside the jury's verdict under Rule 33 as against the weight of the evidence. We agree.

I. BACKGROUND

A. Facts[1]

This case concerns a scheme engineered by Jason Galanis ("Galanis") and others to defraud a tribal entity,

1. "Because this is an appeal from a judgment of conviction entered after a jury trial, the . . . facts are drawn from the trial evidence and described in the light most favorable to the [g]overnment." *United States v. Litwok*, 678 F.3d 208, 210-11 (2d Cir. 2012). Since a key component of Archer's defense at trial and his argument on appeal is his intent (or lack thereof), this section provides only a broad overview of the scheme, focusing primarily on the undisputed facts. We discuss the details of Archer's role and what the jury could infer from the evidence regarding his knowledge and intent in the following section.

the Wakpamni Lake Community Corporation of the Oglala Sioux Tribe (the "Wakpamni"), of the proceeds of a series of bond offerings worth approximately $60 million. In doing so, the conspirators harmed not only the Wakpamni but also several investors upon whom they foisted the Wakpamni bonds — which had no secondary market — in order to generate cash for their own personal use.

In early 2014, Jason Galanis, Archer, Bevan Cooney, and others were working together to acquire financial services companies that they could "roll up" into a large financial conglomerate with Archer at the helm. They began by investing in Burnham Financial Group ("Burnham"), a well-established financial services company with a prominent name that they sought to leverage in building their own conglomerate. But to purchase additional so-called "roll-up" companies, they needed capital.

So, in February 2014, Galanis informed Archer and Cooney that he had been "brought a deal" for tax-free bonds from the Oglala Sioux Tribe, to which the Wakpamni belonged. App'x 848. The next month, John Galanis, Jason Galanis's father, met with a representative from the Sioux Tribe and convinced the Wakpamni to issue a series of bonds, promising that the proceeds from the sale of these bonds would be placed into an annuity. The Wakpamni understood that the annuity "would be like an insurance wrapper that would protect the principal investment and generate annual income to cover the interest on the bonds as well as generate income for" the Wakpamni's economic development projects. Tr. 1836; *see also* Tr. 1850. The

scheme had an air of legitimacy: John Galanis represented to the Wakpamni that Wealth Assurance-AG, a legitimate insurance company that Archer, Cooney, Jason Galanis, and others had acquired, would be the annuity provider. The transaction documents, however, listed Wealth Assurance Private Client Corp. ("WAPC"), a shell entity that John Galanis falsely represented to be a subsidiary of Wealth Assurance-AG, as the annuity provider. In June 2014, one of Archer's co-defendants opened a bank account in the name of WAPC (the "WAPC account") and designated Hugh Dunkerley, another of Archer's eventual co-defendants, as a signatory of that account. Finally, John Galanis represented to the Wakpamni that Burnham Securities Inc., a legitimate registered broker-dealer, would serve as the "placement agent" responsible for "undertak[ing] due diligence on the bonds, do[ing] a lot of legal [work] putting together . . . the contracts[,] and then finally find[ing] investors for the bonds." Tr. 1005.

Once John Galanis set up the Wakpamni scheme, Jason Galanis, Archer, and others went about finding buyers for the bonds. A company with which Archer was affiliated financed the purchase of an investment adviser, Hughes Asset Management ("Hughes"), and Galanis installed another one of the co-defendants, Michelle Morton, as Hughes's CEO. In August 2014, based on John Galanis's promise that the proceeds would be invested in an annuity, the Wakpamni issued their first set of bonds. Morton purchased the entire issue, worth $28 million, on behalf of Hughes's unsuspecting clients — without disclosing that the same individuals who induced the Wakpamni to issue the bonds also controlled Hughes and

the purported placement agent. Placing the bonds in this manner, without investor knowledge or permission, also violated several of Hughes's clients' investor agreements. Most importantly, the bond proceeds were then placed into the WAPC account — not an annuity.

Unaware that the proceeds from the first bond offering had been diverted to the WAPC account and not invested in an annuity, the Wakpamni launched a second issuance the following month. This time around, Archer and Cooney collectively purchased $20 million worth of bonds from the Wakpamni — with Archer doing so through his real estate company, Rosemont Seneca Bohai LLC ("RSB") — using proceeds from the first offering that had been diverted to the WAPC account. After buying the bonds, Archer and Cooney used them to satisfy the net capital requirements of two other Archer-controlled companies, without disclosing that the bonds were purchased with the proceeds of an earlier bond issuance. The Financial Industry Regulatory Authority ("FINRA") would later condemn Archer's use of the bonds in this way because the Wakpamni bonds had "no active market." Tr. 2097.

In April 2015, the Wakpamni issued their third and final set of bonds for $16 million. As with the first bond offering, Burnham Securities was selected as the supposed placement agent for the bonds. At around that same time, Archer and Cooney acquired a second investment adviser company, Atlantic Asset Management ("Atlantic"), which (like Hughes) was led by Morton. Ultimately, Morton and Atlantic arranged for the purchase of the entire $16 million in bonds by a single client of Atlantic, the Omaha

School Employees Retirement System ("OSERS"). As with the first bond offering, Morton did not seek or receive approval from OSERS for the transaction, which did not align with its investment goals, nor did she inform OSERS of the inherent conflicts of interest that permeated the transaction.

Once again, instead of being used to purchase an annuity for the Wakpamni, as John Galanis had promised, the proceeds from the third bond issuance were diverted to the WAPC account, where they were used by various conspirators for their own personal benefit and interests. Some, like Jason Galanis and his father, used the bond proceeds to purchase "jewelry and luxury cars," Tr. 58, and a new condo in New York City; others, like Archer and Cooney, used the bonds and the proceeds "to further their [own] schemes," Tr. 59, which included building "a big financial services company" that Archer was to control, Tr. 59-60.

In the fall of 2015, the Wakpamni scheme began to unravel when the first set of interest payments on the Wakpamni bonds became due. In September 2015, Archer transferred $250,000 from one of his companies to the WAPC account, which was then used to help pay the interest on the bonds from the first offering. Soon thereafter, Galanis was arrested on unrelated charges. In October 2015, some of the conspirators created a new entity named Calvert Capital ("Calvert") to cover up the scheme. As part of this effort, they fabricated backdated documents suggesting that WAPC invested in Calvert and that Calvert lent Cooney and Archer the $20 million to purchase the bonds from the second offering.

In the end, the Wakpamni were left with $60 million in debt, and the fund investors lost over $40 million.

B. Procedural History

On March 26, 2018, the government filed the operative, superseding indictment charging Archer and four others with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371 ("Count One"), and securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2 ("Count Two"). Count One alleged that the Defendants conspired to defraud the Wakpamni by inducing them to issue bonds on the false promise that the proceeds would be invested into an annuity, which the Defendants instead misappropriated for their own use. It also charged the Defendants with conspiring to defraud Hughes's and Atlantic's clients by "gaining ownership and control" of those investment advisers "and causing client funds to be invested in the [Wakpamni] bonds, without disclosing the material facts to these clients, including that the bonds did not fit within the investment parameters of certain clients' investment advisory contracts and that certain substantial conflicts of interest existed." App'x 136. Count Two accused the Defendants of substantive securities fraud for making false statements and omitting material facts while "engag[ing] in a scheme to misappropriate the proceeds of several bond issuances by the [Wakpamni]" and in "caus[ing] investor funds" of Hughes's and Atlantic's clients "to be used to purchase the bonds." App'x 134-56; *see also* Tr. 4146. Alternatively, Count Two alleged that the Defendants aided and abetted the securities fraud.

Appendix C

Four Defendants charged in the case — Jason Galanis, Gary Hirst, Hugh Dunkerley, and Michelle Morton — pleaded guilty prior to trial, with Dunkerley doing so pursuant to a cooperation agreement with the government.[2] Archer proceeded to a jury trial along with two of his co-defendants, John Galanis and Bevin Cooney. A key issue at trial, which forms the basis of this appeal, was whether Archer, a businessman with connections to high-profile business and political leaders, was a knowing participant in the scheme or was simply a victim of Jason Galanis's fraud.

Trial commenced on May 22, 2018 and ended on June 28, 2018, at which time the jury convicted Archer, John Galanis, and Cooney on both counts. After trial, Archer and his trial co-defendants moved for acquittal under Federal Rule of Criminal Procedure 29 or, in the alternative, for a new trial under Rule 33. The district court denied all motions except Archer's motion for a new trial. *See Galanis*, 366 F. Supp. 3d 477.

With respect to Archer's Rule 29 motion, the district court recognized that, "drawing every inference in the government's favor, as the [c]ourt is required to do under Rule 29, [it] [could not] conclude that no reasonable jury could have convicted [Archer], particularly because the primary issue was intent and the government presented a substantial amount of circumstantial evidence to that effect." *Id.* at 492. Nevertheless, in addressing Archer's

2. Jason Galanis was charged in the original indictment but pleaded guilty before the government filed the operative indictment.

motion for a new trial pursuant to Rule 33, the district court concluded that while "[t]he government's reliance on circumstantial evidence is of course perfectly appropriate" and "the government's case against Archer is not without appeal at first blush[,] . . . when each piece of evidence in this indisputably complex case is examined with scrutiny and in the context of all the facts presented, the government's case against Archer loses much of its force." *Id.*

Concerned that Galanis deceived many of those around him, including those knowingly involved in his schemes, the district court determined, as a factfinder would do, "that Galanis viewed Archer as a pawn to be used in furtherance of his various criminal schemes." *Id.* The district court was further troubled "by the government's inability throughout trial to articulate a compelling motive for Archer to engage in this fraud," noting that "Archer never received money from the purported annuity provider, nor did he profit directly from the misappropriation of the bond proceeds." *Id.* And while the district court acknowledged that the government's theory regarding Archer's motive — his "admitted interest in the roll up being successful" - could not be "dismiss[ed] . . . entirely," it nevertheless concluded that this motive was not "compelling" and was "mitigated" by the fact that Archer ultimately lost a significant portion of the funds that he himself had invested into the scheme. *Id.* at 492-93.

The district court stated that, because the evidence was subject to multiple interpretations, it "remain[ed]

unconvinced that Archer knew that Jason Galanis was perpetrating a massive fraud." *Id.* 493. It emphasized "the unique considerations pertaining to [Archer's] relationship with Jason Galanis" - namely, what it saw as Galanis's efforts to keep Archer in the dark while simultaneously touting Archer's political and business connections — as well as "potential juror confusion over a government summary chart admitted as an exhibit." *Id.* at 505. The district court announced that, "when viewing the entire body of evidence, particularly in light of the alternative inferences that may legitimately be drawn from each piece of circumstantial evidence, . . . [it] harbor[ed] a real concern" that Archer did not have the requisite intent and was instead "innocent of the crimes charged." *Id.* at 507. The district court therefore granted Archer's Rule 33 motion and ordered a new trial. *Id.* The government timely appealed.

II. Standard of Review

"We review the decision of the district court to grant a new trial for abuse of discretion." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). A district court abuses its discretion "when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions." *United States v. Forbes*, 790 F.3d 403, 406 (2d Cir. 2015).

Appendix C

III. Discussion

On appeal, the government argues that the district court abused its discretion in granting Archer's Rule 33 motion because the evidence did not "preponderate heavily against the verdict." Gov. Br. at 33. It further argues that in assessing the evidence, the district court inappropriately disregarded the jury's resolution of conflicting evidence and failed to consider the weight of the evidence in its entirety. We agree.[3]

A. To Grant a Rule 33 Motion Based on the Weight of the Evidence Alone, the Evidence Must Preponderate Heavily Against the Verdict

Under Rule 33, "the court may grant a new trial to [a] defendant if the interests of justice so require." Fed. R. Crim. P. 33. While we have held that a district court may grant a new trial if the evidence does not support the verdict, we have emphasized that such action must be done "'sparingly' and in 'the most extraordinary circumstances.'" *Ferguson*, 246 F.3d at 134 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). Nevertheless, we have not always been clear about what constitutes an "extraordinary circumstance" that can justify a district court's decision to overturn a jury's

3. The government also contends that the district court failed to consider that Archer's guilty knowledge could be proved by conscious avoidance, as the jury was instructed. Because we hold that the district court applied the incorrect standard and that the jury was entitled to conclude that Archer knowingly participated in the scheme, we need not reach this argument.

verdict. We now clarify that rule and hold that a district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be "manifest injustice" to let the verdict stand. *See Sanchez*, 969 F.2d at 1414.

The "preponderates heavily" standard finds support in our decision in *Sanchez*, 969 F.2d 1409. There, we considered the district court's grant of a Rule 33 motion based on what the district judge considered to be perjured testimony. We first concluded that the district court erred in finding that several police officers committed perjury simply because their recollection of the events at issue differed. *Id.* at 1415. Since the testimony shared many consistent aspects, "the differences in testimony" presented, at most, "a credibility question for the jury." *Id.* But even discounting that testimony, we emphasized that "[i]t surely cannot be said . . . that the evidence 'preponderate[d] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" *Id.* (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)).

The "preponderates heavily" standard is not limited to cases like *Sanchez* in which a district court, after discounting certain questionable evidence, must assess the weight of the remaining evidence supporting the conviction. It also applies with equal, if not stronger, force to cases in which a district court examines the weight of the evidence as a whole — all of which the jury reasonably and appropriately relied on in reaching its verdict. Our

clarification that the "preponderates heavily" standard applies in such cases is in accord with the standard used by several of our sister circuits. *See United States v. LaVictor*, 848 F.3d 428, 455-56 (6th Cir. 2017) ("A motion for a new trial . . . is . . . granted only in the extraordinary circumstances where the evidence preponderates heavily against the verdict." (internal quotation marks omitted)); *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) ("The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand."); *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992) (agreeing with the Eighth Circuit's conclusion that the district court, in granting a new trial based on the sufficiency of the evidence, should look to whether the evidence "preponderates sufficiently heavily against the verdict" (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)); *United States v. Reed*, 875 F.2d 107, 114 (7th Cir. 1989) ("[T]his is not one of those 'exceptional cases' where the evidence preponderates so heavily against the defendant that it would be a manifest injustice to let the guilty verdict stand."); *Martinez*, 763 F.2d at 1313 ("The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.").

We stress that, under this standard, a district court may not "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Robertson*, 110 F.3d at 1118; *see also Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (holding that a district court may not grant a new trial "simply because it believes other inferences and

conclusions are more reasonable"). To the contrary, absent a situation in which the evidence was "patently incredible or defie[d] physical realities," *Ferguson*, 246 F.3d at 134 (quoting *Sanchez*, 969 F.2d at 1414), or where an evidentiary or instructional error compromised the reliability of the verdict, *see id.* at 136-37, a district court must "defer to the jury's resolution of conflicting evidence," *United States v. McCourty*, 562 F.3d 458, 475-76 (2d Cir. 2009). And, as it must do under Rule 29, a district court faced with a Rule 33 motion must be careful to consider any reliable trial evidence as a whole, rather than on a piecemeal basis. *See, e.g., United States v. Middlemiss*, 217 F.3d 112, 117 (2d Cir. 2000).

Importantly, we do not find this standard to conflict with our holding in *Ferguson*. In *Ferguson*, the district court not only explicitly applied the preponderates heavily standard that we adopt today, *see United States v. Ferguson*, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), *aff'd*, 246 F.3d 129 (2d Cir. 2001), it did so following a trial infected by several errors, none of which are present here. In *Ferguson*, the defendant was convicted of committing a violent crime in aid of racketeering, which requires that one use or threaten violence for at least one of three possible purposes: (1) pecuniary gain, (2) "gaining entry" into an "enterprise," which in that case was a gang, or (3) "maintaining or increasing [one's] position" in that enterprise. 18 U.S.C. § 1959(a); *see Ferguson*, 246 F.3d at 134. Although the district court instructed the jury as to all three possible motives, *Ferguson*, 49 F. Supp. 2d at 324, it recognized, in granting the defendant's Rule 33 motion, that there was legally sufficient evidence

supporting only the pecuniary gain motive, *id.* at 327-30, and it was therefore "error to have charged on all three of the motivational alternatives," *id.* at 324 n.5. The district court further explained that the only evidence supporting the pecuniary motive was the vague, suspect testimony of an interested witness, which alone was simply "too slender . . . to support a guilty verdict." *Id.* at 328-29. Moreover, the district court stated that its denial of Ferguson's motion to sever his trial from that of his co-defendants was reversible error alone, as it exposed the jury to "weeks of testimony regarding successful murders and assaults, none of which involved" the defendant. *Id.* at 330.

In short, *Ferguson* was an "exceptional" case warranting a new trial. *Ferguson*, 246 F.3d at 134-35. While we did not explicitly acknowledge that the evidence preponderated heavily against the verdict, the standard we laid out in *Ferguson* is not in tension with the "preponderates heavily" standard that we explicitly adopt today. Moreover, the factual circumstances underlying our decision in *Ferguson* are simply not present here.

In sum, while we review a district court's decision to grant a new trial based on the weight of the evidence for abuse of discretion — not a "more stringent standard of review," *id.* at 133 n.1 - the district court's discretion in such cases is not without limit. Instead, the "preponderates heavily" standard circumscribes that discretion, and provides much needed guidance to district courts.

Appendix C

B. The Evidence Here Did Not Preponderate Heavily Against the Verdict

The evidence introduced at trial did not preponderate heavily against the jury's verdict. In ruling on Archer's Rule 33 motion, the district court found that it "was clear that material misstatements and omissions were made in connection with the sale of securities," and therefore focused on "[t]he only seriously disputed element" - Archer's intent. S. App'x 11. For Count Two, the substantive securities fraud charge, this was whether Archer acted "[w]illfully" and with the "[i]ntent to defraud," Tr. 4153, 4161-62, or, in the event the jury found him guilty of aiding and abetting, whether he "willfully, knowingly associated himself in some way with the crime and that he willfully and knowingly would seek by some act to help make the crime succeed," Tr. 4159. And with respect to Count One, the conspiracy charge, the government was required to prove Archer "willfully and knowingly became a member of the conspiracy, with intent to further its illegal purposes — that is, with the intent to commit the object of the charged conspiracy." Tr. 4165. Thus, the government was required to show that Archer had "at least the degree of criminal intent necessary for the substantive offense itself," *United States v. Feola*, 420 U.S. 671, 686, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), but was not required to show that he "knew all of the details of the conspiracy, so long as he knew its general nature and extent," *United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (internal quotation marks omitted) (quoting *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008)).

In concluding that the evidence did not support the jury's finding, the district court relied on this Circuit's prior case law on the proper standard, which we are clarifying today. But when the facts of this case are assessed under the preponderates heavily standard outlined above, we are left with the unmistakable conclusion that the jury's verdict must be upheld.

1. The Promise of an Annuity and Misappropriation of Funds

During trial, the jury reviewed a wealth of emails in which Archer, Cooney, and Galanis discussed the progression of the Wakpamni scheme, which the government argued reflected Archer's knowledge of the scheme and intent to misappropriate the bond proceeds.

Throughout the first half of 2014, Galanis ensured that Archer stayed up to date on the deal with the Wakpamni, including by informing Archer that the proceeds from the sale of the bonds were supposed to be placed into an annuity. Yet Galanis also repeatedly emphasized that the proceeds from the bonds would provide them with "discretionary liquidity" to use to further their financial empire. *See, e.g.*, App'x 862, 866. As the government argues, the idea that they could use bond proceeds however they chose stood in sharp tension with the conservative annuity investment that the Wakpamni were promised and about which Archer was fully apprised.

Nonetheless, in setting aside the jury's verdict, the district court found that this evidence did not reflect

Archer's intent, contending that the language in the emails was "facially innocuous or, at best, most naturally subject to innocent interpretations." *Galanis*, 366 F. Supp. 3d at 495. But while much of the language in these emails, such as the term "discretionary liquidity," could be subject to both legitimate and nefarious interpretations, the jury did not "misinterpret[]" the emails in concluding the latter. *Id.* at 496. One email, the import of which the parties hotly disputed during oral argument, provides a key example: On July 20, 2014, Galanis sent Archer an email alerting him that "the indians signed . . . our engagement" and sending him the contact information of the lawyer advising the Wakpamni on the deal. App'x 786. Galanis instructed Archer that while there was "[n]othing for [Archer] to do at this point," it "may[ ]be good for [the Wakpamni's counsel] to know that you [(Archer)] are associated with the insurance company at the right moment," which "might be nice icing on the cake." *Id.* He further added that "[t]he use of proceeds is to place the bonds into a Wealth Assurance annuity," which would then be "invested by an appointed manager on a discretionary basis." *Id.* While the district court concluded that this email was better read as "exculpatory because Galanis is specifically representing that the bond proceeds would be placed in an annuity," *Galanis*, 366 F. Supp. 3d at 497, it could also reasonably be read as Galanis providing tacit instructions to Archer regarding their cover story. Either way, it was not the province of the district court to reweigh the evidence in that regard. *See Van Steenburgh*, 171 F.3d at 1160 ("On a motion for new trial, the district court is entitled to interpret the evidence and judge the credibility of witnesses, but it may not usurp the role of

the jury by granting a new trial simply because it believes other inferences and conclusions are more reasonable.").

Moreover, the government did not present this email to the jury in isolation. Instead, it introduced a string of emails connecting the bond deal with Galanis's apparent intent to spend the funds as he saw fit — not only on other financial services companies but also on a condo in Manhattan's Tribeca neighborhood. For instance, on July 11, 2014, Galanis and Archer emailed about the closing date of the Wakpamni deal. In the course of this same email chain, Galanis stated they were "[s]o close" and that he was "[m]assively motivated" because his attorney, Clifford Wolff, was "running the stall for [him] on [his] nyc mansion," and he did not want to live in a "1750 square foot cage." App'x 869. Once the deal closed, Galanis did in fact purchase a new condo in Tribeca — in the name of an LLC bearing Archer's name and business address — using approximately $1 million of funds from the WAPC bank account.

While the district court discounted the email evidence linking Galanis's purchase of a Tribeca condo with the closing of the bond deal because it was "not convinced" that this showed Archer's knowledge, *Galanis*, 366 F. Supp. 3d at 499, it was not for the district court to second guess the jury's clear choice of a different inference — namely, that Archer knew Galanis diverted the money meant for the purported annuity for his own personal use.

These emails can reasonably be read to demonstrate both that Archer knew the proceeds were supposed to be

invested into an annuity and that Galanis demonstrated no restraint in spending the funds for personal gain. Thus, when taken as a whole, they provided strong support for the jury to find that Archer knew that the bond proceeds were being misappropriated. We are therefore confident that the trial evidence, while circumstantial, did not "preponderate[] sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Alston*, 974 F.2d at 1211 (internal quotation marks omitted).

2. Hughes and Atlantic

The evidence also strongly supported an inference that Archer intended to help the conspirators defraud Hughes's and Atlantic's clients by purchasing the bonds without informing them of the conflicts of interest that riddled the transactions — in violation of the terms of the clients' investment agreements.

As even the district court acknowledged, there was ample evidence showing that Galanis, Archer, and Cooney acquired control of Hughes and Atlantic specifically to place the Wakpamni bonds with their clients so that they could generate funds to acquire various roll-up companies. *See Galanis*, 366 F. Supp. 3d at 498. For instance, Jason Galanis emailed Archer and Cooney in May 2014, alerting them to the possibility of acquiring Hughes, which he said would be "possibly useful," App'x 854, and he kept Archer updated about the deal to acquire Hughes as it progressed, repeatedly alluding to the Wakpamni bonds in doing so. Galanis told Archer that he "believe[d] Hughes would take

$28 million" of the Wakpamni bonds. App'x 871-72. And that is precisely what transpired: The Hughes acquisition closed on or about August 11, 2014, and on August 22, 2014, Hughes purchased the entire first Wakpamni bond offering, worth $28 million, on behalf of its clients.

The email evidence told a similar story with respect to the Atlantic acquisition. Before the deal had closed, Morton sent Galanis an email — which Galanis forwarded to Archer — stating that she was reviewing Atlantic's portfolio to determine where the Wakpamni bonds could be placed. Atlantic then bought $16 million in Wakpamni bonds on behalf of one of its clients, OSERS.

The district court stressed that there was "nothing inherently illegal or illegitimate about these transactions;" rather, the fraud was that "bonds were purchased for their clients without disclosure of all of the potential conflicts of interest and [that] the bonds fell outside certain clients' investment parameters." *Galanis*, 366 F. Supp. 3d at 498. And it found that Archer had "no indication . . . that the individuals in control of the investment advisers . . . would fail to disclose the conflicts of interest or violate the terms of the clients' investor agreements." *Id.* at 498-99.

But direct evidence was not required, as "[b]oth the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence." *United States v. Stewart*, 485 F.3d 666, 671 (2d Cir. 2007). The jury was entitled to credit the circumstantial evidence that Archer knew that his co-

defendants — with whom he had worked to acquire these companies specifically to offload the Wakpamni bonds — would then place the bonds into their investors' accounts without disclosing the conflicts of interest. The very nature of the transactions was surely suspect, particularly in light of Galanis's questionable reputation and regulatory troubles, of which Archer was well aware. Indeed, while Galanis had not yet been charged criminally at the time of the scheme, he had previously been barred from serving as a director of a public company "due to accounting irregularities" with another organization with which Galanis was involved. Tr. 905. There was testimony at trial that this fact was readily available on the internet, and Archer specifically acknowledged how "challenging" it was to "defend[]" Galanis in light of his questionable reputation. App'x 905-08. And the record clearly demonstrates that the companies were acquired specifically to offload the bonds. For instance, the trial evidence included the email — which Galanis forward to Archer — in which Morton sought to place the bonds in the investor accounts before the bond deals had even closed. Additionally, just days before the OSERS purchase, Galanis noted the need to "finesse" an Atlantic managing director who would have to be "marginalized," prompting Archer to inquire how they could "get ahead of" the director. App'x 900.

At a minimum, the email exchange reflected Archer's awareness that Galanis and Morton were investing in ways that would be objectionable to the directors — which can reasonably support a finding of his nefarious intent. When considered together and as a whole, there was ample circumstantial evidence from which the jury

could conclude that Archer knew that Galanis and the other conspirators were dumping Wakpamni bonds on unsuspecting investors who were oblivious to the serious conflicts of interest that infected the transactions. More to the point, the evidence certainly did not preponderate heavily against such a finding.

3. The Source of Funds for the Second Bond Purchase

The jury was also entitled to find that Archer, in Ponzi-like fashion, intended to promote the scheme by knowingly purchasing the bonds from the second issuance with proceeds from the first. Soon after the initial offering, John Galanis advised the Wakpamni to issue a second set of bonds worth $20 million, falsely assuring them that additional investors wanted to invest "right away." Tr. 1853-54; *see also* Tr. 221. After again saying that the proceeds would be used to purchase an annuity, John Galanis represented that a "Burnham client who was excited about what had occurred with the first bond issue" wanted to purchase the additional bonds. Tr. 221. In reality, there was no "Burnham client" interested in purchasing the bonds; instead, Archer, through his real estate company RSB, purchased $15 million in Wakpamni bonds with funds that originated in the WAPC account — the proceeds from the first bond offering, which were supposed to be invested in an annuity.

To accomplish this, Archer represented to the Wakpamni in a letter that he was a sophisticated investor purchasing the bonds "for [his] own account and for

investment only," App'x 618-19; Cooney signed a similar letter. And while the parties vigorously disputed whether this was a material misstatement in its own right, the jury was certainly entitled to endorse the government's view "that these statements were themselves deceptive, given that, in making them, Archer portrayed himself (through RSB) as a legitimate investor . . . using its own funds to invest." (16-cr-371, Doc. No. 623 at 54 n.16.) The jury's conclusion was amply supported by the fact that the funds used to purchase the bonds were not Archer's at all; instead, the $15 million came from Jason Galanis, who transferred the bulk of the proceeds from the first bond offering out of the WAPC account, through numerous intermediaries, to an account controlled by Archer's company, RSB. Significantly, the last link in the chain of intermediaries was Galanis's attorney, Clifford Wolff, whom Archer knew to be the lawyer involved in Galanis's Tribeca condo purchase.

Focusing on the circuitous route by which the funds reached RSB's account, the district court drew the opposite inference to conclude that Archer was a victim of Galanis's deception, unaware that the funds were derived from the misappropriated bond proceeds. *Galanis*, 366 F. Supp. 3d at 493-94. But while the complex transaction and use of intermediaries strongly suggested that Galanis intended to conceal the source of the funds, the jury was not required to conclude that he intended to conceal the source of the funds from *Archer*. At the very least, Archer knew that the money he was using to purchase Wakpamni bonds "for [his] own account and for investment only" came from Galanis; he also had some insight into the complex

route the money would take, and knew that Galanis would be transferring funds into one of his own accounts and sending them through Wolff so that Wolff could transfer them to Archer's RSB account. From this constellation of facts, the jury was certainly free to draw the inference that Archer knew that the transactions were part of a fraudulent scheme.

The district court also emphasized that Dunkerley, despite being more involved in the fraud than Archer, did not realize that the funds used for the RSB purchases were from the misappropriated proceeds of the first bond offering. *Id.* But Dunkerley's knowledge had no bearing on Archer's, particularly since Galanis shared with Archer — and not Dunkerley — concerns about his lack of capital prior to transferring the $15 million to Archer. The sudden appearance of $15 million — just weeks after Galanis had repeatedly told Archer that he needed "discretionary liquidity," App'x 866, and money to buy his "nyc mansion," App'x 869 - supported a finding that the $15 million came from the first bond offering. There would, of course, typically be a distinction between one's personal liquidity and the liquidity of the company that person manages. But here the jury could justifiably conclude that there was no such distinction for Galanis, and that, instead of investing the proceeds, he was diverting the funds for his own personal use, including the purchase of a luxury New York condominium in the name of "Archer Diversified TRG, LLC." S. App'x 914; *see also* App'x 869 (discussing the closing of the deal and the condo purchase in the same chain). The jury could also, then, conclude that the $15 million that appeared in Archer's account just one

month later, from the same attorney who was handling Galanis's condo purchase, was from the same source — the proceeds from the first bond offering that had been diverted to the WAPC account.

The jury was certainly entitled to rely on this evidence to conclude that Archer knew the source of the $15 million he received from Galanis to purchase the second set of Wakpamni bonds. Absent exceptional circumstances, a district court confronted with a Rule 33 motion may not act as the factfinder, discounting substantial circumstantial evidence or making contrary factual findings based on inferences that the jury clearly rejected. *See McCourty*, 562 F.3d at 475-76 ("Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, '[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.'" (quoting *Sanchez*, 969 F.2d at 1414)); *see also Robertson*, 110 F.3d at 1118. No such exceptional circumstances were present here.

4. Archer's Lies During the Conspiracy

Perhaps the strongest evidence of Archer's guilty knowledge were his lies to two banks and the board of directors of the Burnham Investors Trust (the "BIT Board") concerning the source of the funds for the second bond purchase and his relationship with Galanis. *See United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014) ("[A]cts that exhibit a consciousness of guilt, such as false exculpatory statements, may . . . tend to prove

knowledge and intent of a conspiracy's purpose . . . ." (internal quotation marks omitted)). In late September and early October 2014, Archer made several false representations regarding the source of the funds used to purchase the bonds from the second bond offering. Specifically, he told Deutsche Bank that his company had "come to own these bonds" through a "Real Estate Sale." App'x 781. Similarly, he told Morgan Stanley, where he ultimately deposited the bonds, that the $15 million used to purchase the bonds was "generated through [the] sale of real estate." App'x 658-59. At trial, the government introduced a "Client Representation Letter" completed by a Morgan Stanley employee who communicated with Archer in connection with the bonds; the business record summarized Archer's statement that the "funds used to purchase the bonds were from real estate sales through [his] business, Rosemont Seneca Bohai, LLC." App'x 663. That same employee testified at trial that she "would not have written something [in that document] that a client did not say." Tr. 867. And Archer told that employee in an email that he came to know of the purchase because he was a "shareholder" of Burnham Financial, which "packaged the issuance." App'x 658-59. Later, after depositing his bonds at a different bank "without a hitch," Cooney told Archer that Archer "[n]eed[ed] to get . . . out of Morgan Stanley," App'x 787, which could reasonably be read to suggest that Archer should move the bonds to a bank that would less closely scrutinize his transactions.

The district court stated that it "remain[ed] unconvinced" that these lies reflected Archer's knowledge that Galanis was stealing the bond proceeds, *Galanis*, 366

F. Supp. 3d at 493, speculating that Archer "may well have repeated a lie told to him by Galanis," *id.* at 501, or that perhaps the Morgan Stanley employee who completed the form indicating the source of the funds simply assumed they came from Archer's real estate transactions. But the first explanation is not supported by the record, as there was no evidence that Galanis ever told Archer that the bonds were from real estate transactions. And the second explanation is at odds with the employee's testimony that she would not have written such information down unless it came from the client. The district court also speculated that Archer may have been trying to hide that Galanis sent him the bonds because of Galanis's "well-documented checkered past," which made him a "highly controversial figure." *Id.* But the jury was the factfinder, and the district court was not permitted to create a different narrative by crediting inferences that the jury clearly rejected.

And Archer not only lied to the banks. Around this same time, he also misled the BIT Board about Galanis's involvement with the Burnham companies. Again, Archer and the others sought to acquire control of various Burnham companies in order to leverage the prominent Burnham name in building their own conglomerate. When Archer requested the BIT Board's approval to acquire another Burnham subsidiary, the BIT Board sought certain assurances. Then, during a BIT Board meeting on October 1, 2014, Archer warranted that Galanis "w[ould] not be involved with any of the Burnham entities[,] their 'affiliated persons[,]'" or "their successors or assigns." App'x 748. He further pledged that Galanis "w[ould] have no interest of any kind, direct or indirect, in any of the

Burnham entities," and that "the Burnham entities will not invest with or in, directly or indirectly, any business or enterprise in which Mr. Galanis has any association, affiliation, or investment, pecuniary or otherwise, directly or indirectly." App'x 748.

While Archer did not make this warranty in the context of the Wakpamni scheme directly, his response, at a minimum, was misleading. Galanis, of course, spearheaded the Wakpamni scheme, and Burnham entities, including the placement agent, Burnham Securities Inc., were intimately involved in that scheme. Galanis also supplied money for Archer to buy the bonds from the second offering, which Archer would use to support the net capital of companies he controlled, including a Burnham entity.

The district court nevertheless "remaine[d] unconvinced" that Archer made these statements "because he knew that Jason Galanis was stealing the bond proceeds." *Galanis*, 366 F. Supp. 3d at 501. But a trial court "must defer to the jury's resolution of the weight of the evidence," *Sanchez*, 969 F.2d at 1414 (internal quotation marks omitted), and may not weigh the competing inferences and choose the one it finds "[m]ore likely," *Galanis*, 366 F. Supp. 3d at 501. And the mere fact that competing inferences existed does not compel a finding that the evidence preponderated heavily against the verdict.

Appendix C

5. The Cover-up

Finally, there was persuasive evidence that Archer knowingly performed two key actions in furtherance of a cover-up designed to delay discovery of the scheme. First, on September 1, 2015, he transferred $250,000 to WAPC — the purported annuity provider — when the first set of interest payments were due. These funds were then used to help pay the interest on the bonds, thereby delaying disclosure of the fraud. Jason Galanis later repaid Archer in part, which he did using money from entities that had received proceeds from the third offering.

The district court found the "inference urged by Archer" — that he was simply providing needed short-term liquidity — "equally if not more compelling" than the government's contention that Archer intended to prop up the scheme to forestall the revelation that would come with defaulting on the payments. *Id.* at 503. But even Archer does not dispute that he had no legitimate affiliation with WAPC, which, despite the similar name, was not connected to Wealth Assurance Holding, with which Archer *was* affiliated and which had been falsely represented to the Wakpamni as the annuity provider. Thus, while it may have been true, as the district court observed, that Archer often infused cash into his companies for legitimate purposes, WAPC was *not* one of Archer's companies. Whether or not Dunkerly or Galanis ever discussed the true nature of WAPC with Archer, the jury was certainly entitled to infer that Archer's transfer of $250,000 to a company with which he was not affiliated, completed shortly before the interest on the first bonds

was due, reflected his knowledge of the scheme and was designed to prevent it from unraveling in the event of a default.

Second, Archer made false statements concerning Calvert, the fraudulent entity created to cover the conspiracy's tracks and delay discovery of the scheme. While the government acknowledges that it did not present any direct evidence showing that Archer created any fake Calvert documents or gave any to regulators, as Cooney had done, it did present clear evidence that Archer explicitly used Calvert's name in furtherance of the scheme. Specifically, on November 25, 2015, Archer sent an email to an employee at a roll-up company that had taken possession of some of the bonds from the second offering, stating that the bonds needed "to be replaced/returned to Calvert" as "the lender and beneficial owner" of the bonds. App'x 912. Obviously, Calvert was not the "lender and beneficial owner" of the bonds, as Archer claimed, since it had not even existed when Archer purchased the bonds and never lent Archer money for the bond purchases or anything else.

The district court downplayed this email, reasoning that "a single reference to Calvert in an email does not establish" Archer's knowledge. *Galanis*, 366 F. Supp. 3d at 504. It further concluded that "the weight of the evidence undercuts the notion that Archer was aware of the Calvert cover-up" since "Jason Galanis and Hugh Dunkerley came up with the idea for the entity," "Dunkerley testified that neither he nor anyone else discussed Calvert with Archer," and Archer was not involved in backdating the Calvert

forms. *Id.* But Archer clearly knew that Calvert was not the beneficial owner of the bonds, as he was involved in the bond issuance. Perhaps "a single reference" to Calvert would be insufficient if the record were otherwise devoid of evidence, but it was not, and the jury was entitled to draw inferences as to Archer's knowledge and intent from his explicit lie to a third party made during the course of and in furtherance of the cover-up.

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The review of the evidence above illuminates two broader concerns we have with the district court's ruling. First, the preponderates heavily standard specifically requires that the district court make a comprehensive assessment of the evidence. While the district court acknowledged that the "case must be assessed as a whole, rather than taking each piece of evidence in isolation," *id.* at 507, its analysis veered into a piecemeal assessment of the evidence that understated the weight of the proof in its totality. Indeed, in rejecting Archer's Rule 29 motion, the district court recognized that there was "a substantial amount of circumstantial evidence" showing Archer's intent, which was subject to competing inferences. *Id.* at 492. This evidence, when viewed as a whole, strongly supported that Archer knew at least the general nature and extent of the scheme and intended to bring about its success. At a minimum, that evidence did not preponderate heavily against the verdict in this regard.

Second, the preponderates heavily standard does not permit a district court to elevate its own theory of

the evidence above the jury's clear choice of a reasonable competing theory. Specifically, the district court here adopted the defense's theory that Archer was duped by Galanis, and in doing so improperly discredited the competing arguments regarding Archer's reasons for participating in the fraud. The district court noted that "Jason Galanis operated to keep people in the dark, even those who were undoubtedly willful participants in his various crimes." *Id.* at 505. It noted that "his efforts as to Archer were even more concerted," citing Galanis's attempts to keep Archer away from Dunkerely and how "the members of the conspiracy spoke of Archer when he was not present, burnishing his credentials to others and describing him, among other things, as 'the biggest show pony of all time' whose involvement would 'add layers of legitimacy' to the various deals." *Id.* It noted that, "[a]t the same time Archer was spoken of in this manner, Galanis was simultaneously operating to ingratiate himself with Archer," which "further suggests that Archer was not a party to this conspiracy but was instead being manipulated by a skillful con artist." *Id.* While this theory was by no means outlandish and does find some support in the record, the fact remains that defense counsel promoted it at length during trial, and the jury rejected it. Moreover, while there assuredly was evidence that Galanis paraded Archer's credentials to facilitate the fraud, there was also evidence that Archer both knew this and willingly allowed Galanis to do so.

The government, by contrast, presented a competing theory regarding Archer's motive to engage in the fraud that the jury found "compelling" even if the district court

did not. *Id.* at 492. In its opening statement, the government argued that the Defendants "needed money . . . to fund their business empire," Tr. 54, and that they "planned to use [the $60 million bond purchase] for themselves and for their own businesses," Tr. 56. Although the prosecution contrasted John Galanis's goals with those of Archer and Cooney — that is, while John Galanis spent money on "jewelry and luxury cars, . . . Archer and Cooney planned to make that money work for them quietly," Tr. 58 - the distinction was hardly exculpatory. The government's theory that Archer and Cooney intended "to use the bonds for themselves to further their schemes," Tr. 59, which included building "a big financial services company under the Burnham name," Tr. 59-60, was fully consistent with the evidence in the case.

During summation, the government again emphasized that "[t]he Wakpamni bonds were a massive fraud, a scam, a scheme . . . to fund the luxurious lifestyles of the few, [and] to fund personal business ventures" of others. Tr. 3595. It repeated, yet again, that Archer and Cooney benefited from using the $20 million worth of bonds "for their own business purposes" and to support their "financial empire." Tr. 3650. Although Archer may not have received an envelope of cash or a condo from the scheme, the district court's finding that there was no "compelling" motive presented to the jury was simply incorrect. While the district court placed considerable emphasis on the extent to which Archer knew of Galanis's personal gain from the fraud, it is clear that the fraud had multiple motivations, and it was not necessary that Archer be fully versed in all of them. The jury had before

it considerable evidence from which it could conclude that a second motive, more personal to Archer, existed and was furthered by the scheme.[4]

In sum, the preponderates heavily standard requires that the district court determine whether all the evidence at trial, taken as a whole, preponderated heavily against the verdict. It does not, however, permit the district court to elect its own theory of the case and view the evidence through that lens. Having now clarified the standard to be applied by a district court in assessing a Rule 33 motion, we find that the evidence here did not preponderate heavily against the verdict. Because we conclude that there is only one result available upon proper application of the preponderates heavily standard — reinstatement of the jury verdict — there is no need to remand for further consideration of this issue by the district court.

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4. Although the district court further concluded that the summary chart reflecting the chain of payments in the scheme was so misleading that it supported overturning the jury's verdict and granting a new trial, we are unpersuaded. The summary chart showed a payment that was accidentally made to Archer's company, RSB, and reversed twelve days later. Even if arguably somewhat confusing, the chart was accurate, as it explicitly listed that this payment was reversed. *See United States v. Citron*, 783 F.2d 307, 316 (2d Cir. 1986) (recognizing that a chart must "fairly represent and summarize the evidence upon which [it was] based" to avoid misleading the jury). And as the district court recognized, the threat of prejudice was mitigated by the cross-examination, which highlighted the payment reversal. Consequently, the error, if there was one, was harmless, and not a basis to take the "exceptional" step of granting a new trial.

Appendix C

CONCLUSION

For the reasons stated above, we reverse the district court's grant of the Rule 33 motion, reinstate the conviction, and remand the case to the district court for sentencing.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 15, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 16-CR-371 (RA)

UNITED STATES OF AMERICA,

v.

JOHN GALANIS, BEVAN COONEY,
AND DEVON ARCHER,

Defendants.

OPINION AND ORDER

RONNIE ABRAMS, United States District Judge:

INTRODUCTION

Following a six-week jury trial, defendants John Galanis, Bevan Cooney, and Devon Archer were convicted of securities fraud and conspiracy to commit securities fraud. Now before the Court are the defendants' motions for judgment of acquittal and a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.[1] After careful consideration and a thorough review of the

1. John Galanis initially moved only pursuant to Rule 29, but later submitted a supplemental Rule 33 motion predicated on newly discovered evidence.

record, the Court grants Archer's Rule 33 motion, but denies the others.

BACKGROUND

It is undisputed that a massive fraud was perpetrated by Jason Galanis, the admitted mastermind of the conspiracy and a serial fraudster. It is also not in dispute that these defendants undertook actions that had the effect of assisting Galanis in this endeavor. The primary question for the jury was whether the defendants knowingly and willfully participated in the charged scheme, or, as they each have claimed, were themselves deceived by Jason Galanis. As the Court will detail, there was ample evidence demonstrating that John Galanis and Cooney were willful participants. The Court harbors substantial concern, however, that Archer lacked the requisite intent and is thus innocent of the crimes charged in this indictment.

I. Overview of the Conspiracy

This single conspiracy had two components critical to its overall success, with distinct groups of victims. First, the Wakpamni Lake Community Corporation ("WLCC") was induced into selling approximately $60 million worth of bonds. Tr. 156:17-24. The bond proceeds were to be invested in an annuity on behalf of the WLCC. Tr. 147:3-13. This investment was intended to generate sufficient returns to pay the interest and principal due to bondholders, with additional revenue remaining for the WLCC to fund certain economic development projects. Tr. 147:3-13. Instead, all of the proceeds were

misappropriated at the direction of Jason Galanis, in part for his personal benefit.

The second group of victims consisted of certain clients of two SEC-registered investment advisers, Hughes Capital ("Hughes") and Atlantic Asset Management ("Atlantic"). The conspirators gained control of Hughes and Atlantic, which in turn purchased approximately $40 million worth of bonds on behalf of certain of their clients. This purchase violated the terms of certain clients' investor agreements and further failed to disclose that some individuals were involved on both sides of the transactions. *See* Tr. 1610:5-1614:13, 1617:3-13, 1680:9-1687:10; GX 927, GX 2632, GX 4016. Because the bond proceeds were not invested as intended (with the exception of the initial interest payment on the first set of bonds) these clients never received the interest to which they were entitled and never recovered their principal. *See* Tr. 752:20-753:4. Furthermore, as expected, there was no secondary market for the bonds and the clients of Hughes and Atlantic were thus unable to sell them. *See* Tr. 751:15-25.

II. The Relevant Entities and Individuals

The WLCC scheme took place during the course of a legitimate plan by Jason Galanis, Bevan Cooney, Devon Archer, and Jason Sugarman, among others, to conduct a "roll up" of various businesses with the goal of creating a financial services conglomerate that could be sold for a

sum larger than the value of Its parts. *See* Tr. 906:9-15.[2] One of the entities they sought to acquire was Burnham Financial Group, which was intended to increase the value of the conglomerate by virtue of its reputation. *See* Tr. 1321:17-22; DX 4733 at 8. There is no indication that the roll up plan itself was illegal or otherwise suspect. Indeed, in pursuit of this plan the defendants and their business partners acquired numerous legitimate companies, which collectively managed assets in the billions of dollars. *See* Tr. 1324:18-24. But the complexity of the evidence in this case stems, in part, from the tangled web of related transactions involving the legitimate companies and those entities that were created at the direction of Jason Galanis solely to further the bond scheme and which were purposefully given names to make them appear related to the legitimate entities.

Before turning to the details of how the WLCC scheme was executed, the Court will provide an overview of the corporate entities and actors central to this case. Two companies, in particular, are implicated in many of the transactions: Burnham Financial Group ("Burnham") and Wealth Assurance Holdings. Burnham was the parent company of two other entities: Burnham Securities, Inc. ("BSI"), a registered broker-dealer, and Burnham Asset Management ("BAM"), an investment adviser with approximately $1,5 billion in assets during the relevant period. Tr. 1071:24-1072:22. Wealth Assurance Holdings was a special holding company created specifically to acquire Wealth Assurance-AG ("WAAG"), a European

2. Although he was not charged in this case, Jason Sugarman has been characterized by the government as an unindicted co-conspirator.

insurance company. Tr. 911:13-16, 1327:17-20. During the relevant period, Wealth Assurance Holdings also acquired another insurance company, Valor life, and was subsequently renamed Valor Group. Tr. 1314:14-20. For the sake of clarity, the Court will, refer to the Wealth Assurance Holdings/Valor Group entity only as Wealth Assurance Holdings ("WAH"). There was another entity, COR Fund Advisers ("CORFA"), created by Jason Sugarman, the purpose of which was to raise money for corporate acquisitions and which was intended to play a role in the anticipated purchase of Burnham. Tr. 1333:15-19,

As the Court will describe, many of these entities touched, at least tangentially, the WLCC scheme. There were also a number of entities created at the direction of Jason Galanis for the sole purpose of furthering the scheme and which were given names to make them appear related to these companies, thus providing a veneer of legitimacy. For instance, one entity involved in the acquisitions of Hughes and Atlantic, BFG Socially Responsible Investing ("BFG SRI"), was in no way related to Burnham or its subsidiaries despite its name and was instead formed and owned by WAAG. Tr. 1384:8-13, 1386:4-16.[3] Similarly, the provider of the so-called annuity for the WLCC was a company called Wealth Assurance Private Client Corporation ("WAPC"). Tr. 367:8-10. Again, it bore no relationship to WAH or WAAG, but was named to give a misleading impression. Tr. 1014:18-21. Galanis

3. The name given this entity was "BFG Socially Responsible Investing"—not "Burnham Financial Group Socially Responsible Investing" as Hugh Dunkerley initially testified before correcting himself on cross-examination. *Compare* Tr. 936:5-6 *with* 1384:8-13.

even created a fake subscription agreement to perpetrate the lie that WAPC was in fact affiliated with WAH. Tr. 1459:8-20. While Dunkerley knew that WAPC and WAH did not enjoy a legal relationship, to his knowledge he was the only board member of WAH, including Archer, who was aware. Tr. 1460:11-1461:12. A third entity, Calvert Capital ("Calvert"), was later created to leave a paper trail of backdated, fraudulent documents in order to make certain of the WLCC transactions appear legitimate. Tr. 1057:14-1058:2.

Turning to the individuals who lie at the center of this case, Devon Archer was a principal of the Rosemont Group, a $2.4 billion private equity firm. DX 4733 at 12. During the relevant period, he was also the Chairman of Burnham, sat on the investment committee of BSI, and was on the board of WAH. Tr. 1033:24-1034:1, 1327:5-9, 1409:20-23. Jason Galanis, the admitted mastermind of the criminal scheme who was the first of the defendants to plead guilty in this case, did not have a formal role at any of the Burnham entities but was nonetheless involved in their affairs. Tr. 1071:2-5. He was also considered an adviser to the boards of WAH and WAAG. Tr. 912:8-10. Despite being involved in the roll up plan, including as an investor, *see* Tr. 907:3-9, Cooney, a friend of Galanis', did not have a formal role at any of these entities, while John Galanis, Jason's father, apparently was not involved in any capacity.

The other members of the alleged conspiracy were Michelle Morton, Gary Hirst, and Hugh Dunkerley. Morton, who pleaded guilty the week before trial, was recruited to purchase and operate the two registered

investment advisers, Hughes and Atlantic. *See* Tr. 1032:20-24. Hirst, who also entered a guilty plea shortly before trial, was installed as the Chief Investment Officer of Hughes following its acquisition, created WAPC, and possessed signatory authority over that entity's bank account. Tr. 946:25-947:1, 1011:20-1013:12. Dunkerley, a cooperating witness, occupied a variety of roles. He sat on the Boards of WAH and WAAG, was a director of CORF A, and was the sole managing member of both WAPC and BFG SRI, the previously discussed entities created solely to further the criminal scheme. Tr. 897:23-898:3, 937:21, 1327:10-16.[4] He also became an employee of BSI, the placement agent for the bonds. 897:23-898:3, Hirst and Dunkerley were responsible for transferring the bond proceeds out of the WAPC account. *See* Tr. 1020:1-13,1022:5-7. The government's case was also assisted by Francisco Martin, who testified pursuant to a safe passage letter. His role was to advise the WLCC on the investments that would comprise the annuity by virtue of his alleged employment at an entity called Private Equity Management. Tr. 1015:13-21. He was also tasked with creating Calvert. Tr. 2181:14-19.

III. The Genesis of the WLCC Bond Offerings

Jason Galanis and the defendants seem to have first contemplated becoming involved in the sale of Native American bonds in early 2014, with the intention, the

4. Dunkerley pleaded guilty to two counts of securities fraud relating to the WLC scheme, as well as three counts for other crimes, including his production of fraudulent documents to cover-up the WLCC scheme and for his participation in a separate fraud relating to an entity called Ballybunion. *See* Tr. 927:7-21.

government argues, of obtaining liquidity necessary to execute the roll up. On February 12, 2014, Jason Galanis emailed Archer and Cooney to inform them that he had been "brought a deal" involving a tax-free bond issuance by a Native American tribe that "need[ed] an underwriter for ... municipal bonds." GX 2003. The email attached a letter from an employee of the U.S. Department of Treasury to Raycen Raines, a member of the Oglala Sioux Tribe, regarding its application to issue tribal economic development bonds. *Id.* The WLCC is operated by the Wakpamni Lake Community, a division of the Oglala Sioux. Tr. 155:15-21.

In March 2014, John Galanis met Raycen Raines at a Native American development conference in Las Vegas, Nevada. Tr. 1834:9-1835:11. Raines had not previously met John Galanis. Tr. 1834:22-23.[5] Beginning at that meeting and continuing for several months, John Galanis proposed that the WLCC issue bonds, the proceeds of which would be placed in an annuity. *See* Tr. 1835:24-1835:17. Based on certain representations made by John Galanis, Raines believed that the annuity "would be like an insurance wrapper that would protect the principal investment and generate annual income to cover the interest on the bond as well as generate income" for the WLCC's various development projects. Tr. 1836:9-14. John Galanis initially informed Raines that WAAG, the subsidiary of WAH, would serve as the annuity provider. Tr. 1840:7-14. Instead, the annuity provider ended up being WAPC (Wealth Assurance Private Client), which, contrary

5. Instead of using his legal name, John Galanis introduced himself as "Yanni." *See* Tr. 1834:9-13.

to John Galanis' representations to Raines, was in no way affiliated with WAH (Wealth Assurance Holdings) or WAAG (Wealth Assurance AG) despite its apparent affiliation based on its name. *See* Tr. 897:25-898:1, 1014:18-21. John Galanis further represented (accurately) that the placement agent for the bonds would be BSI, the previously mentioned subsidiary of Burnham, and where Archer sat on the investment committee. Tr. 1838:8-14.

On June 16, 2014, John Galanis emailed Tim Anderson, a lawyer representing BSI, copying Jason Galanis. GX 1304. Attached to the email was a document setting forth the details of the anticipated transaction that were very similar to the final terms: the bonds were intended to create a revenue stream for the WLCC to fund economic development projects; BSI would be the placement agent and a company called Private Equity Management the portfolio manager; the initial offering was for $28 million, with all but $500,000 of that amount going to purchase an annuity from WAPC; the WLCC would receive annual payments ranging from $250,000 to $350,000 for the following twenty-five years; and the bondholders would receive annual interest payments, with the principal being recovered at the ten-year mark at which point the bonds would be retired. GX 1304; Tr. 170; 13-177:9.

IV. The WLCC Issues Bonds and the Proceeds are Misappropriated

The WLCC eventually conducted three separate bond issuances, worth differing amounts but otherwise structured similarly. The first and final issuances were purchased in their entirety by clients of Hughes and

Atlantic, respectively. The second issuance was purchased by Archer and Cooney using misappropriated proceeds provided by Jason Galanis. A central issue at trial was whether Archer and Cooney knew that the money they used to purchase the second issuance was misappropriated from the proceeds of the first set of bonds.

At the time that John Galanis began discussions with Raines, the conspirators did not yet control either Hughes or Atlantic. On May 9, 2014, Jason Galanis forwarded Archer and Cooney an email concerning the potential acquisition of Hughes, which he described as "possibly useful." GX 2018; *accord* Tr. 1582:18-1583:7. The primary motivation underlying the acquisition was to secure purchasers of the first bond issuance. Tr. 933:8-11. Jason Galanis also attached the resumes of Michelle Morton and Richard Deary. GX 2018. The acquisition, financed by wiring $2,76 million to Hughes from WAAG, closed on August 11, 2014. GX 2034; Tr. 1594:6-9. The funds went from WAAG to BFG SRI, which as previously discussed was not related to Burnham, then to an entity called GMT Duncan, before finally being provided to Hughes. Tr. 935:25-936:25. As a result of this transaction, Hughes became wholly owned by GMT Duncan. *See* Tr. 1383:18-20.[6] Hirst was installed as Hughes' Chief Investment Officer. Tr. 946:20-947:1.

6. GMT Duncan was comprised of two classes of shareholders: voting Class A and non-voting Class B. The Class A shareholders were Morton and Deary while the sole Class B shareholder was BFG SRI, *see* Tr. 1385:1-19, a wholly owned subsidiary of WAAG (Wealth Assurance AG), Tr. 1386:14-20, which was itself a subsidiary of WAH (Wealth Assurance Holdings). As noted earlier, Archer sat on the board of WAH and Dunkerley on the boards of both WAH and WAAG.

Appendix D

On August 22, 2014, Hirst signed trade tickets effecting the purchase of the entirety of the first WLCC bond offering on behalf of clients of Hughes. *See* GX 813. In the following days, approximately $24 million from Hughes' clients was deposited into the WAPC account to fund the purchase of the annuity. GX 512 at 1; GX 4003 at 4.[7] Hughes' clients were not informed of the purchase, which presented a conflict of interest in light of the presence of the same parties on both sides of the transaction and which violated the terms of certain clients' investor agreements. *See* Tr. 1610:5-1614:13, 1617:3-13, 1680:9-1687:10; GX 927, GX 2632, GX 4016. Upon learning of this transaction, Hughes' clients responded negatively, with many demanding that the transaction be rescinded. Tr. 2049:21-2050:2.

Once the funds reached the WAPC account, they were not in fact used to purchase an annuity. Instead, through a series of transactions, the money was transferred to various individuals and corporations, with approximately $7 million being spent for the personal benefit of Jason and John Galanis. *See* GX 4003 at 4. For example, $1 million was sent to the law firm representing the seller of a Tribeca apartment that Jason Galanis was in the course of purchasing. GX 512 at 2, GX 4013. An additional $2.35 million was sent to a bank account belonging to Sovereign Nations Development Corporation ("Sovereign Nations"), which was created at the direction of John Galanis days before the first bond issuance. GX 4013. The money wired

7. An additional $4 million of the clients' money was used to pay fees associated with the transaction and to provide $2.25 million immediately to the WLCC, which was earmarked for the construction of a warehouse. GX 4003 at 4.

to that account, which John Galanis characterizes as a legitimate commission he earned for his work on the deal, was ultimately disbursed to him for the purchase of luxury items, as well as to several of his family members. *Id.* An additional $4 million was sent from WAPC to Thorsdale Fiduciary and Guaranty ("Thorsdale"), an entity controlled by Jason Galanis that was a vehicle for investing his purported family money. GX 4003 at 4. Among other things, Jason Galanis distributed this money to members of his family and purchased luxury cars and jewelry. *Id.*

The remaining proceeds were used to purchase the second tranche of WLCC bonds by Archer and Cooney. This money was transferred out of the WAPC account at the direction of Jason Galanis, shuffled through various intermediaries, and finally transferred to Archer and Cooney. *See* GX 4006. On October 1, 2014, Archer purchased $15 million of bonds through an entity of which he was the sole managing member, Rosemont Seneca Bohai ("RSB"). GX 4004 at 7. Cooney purchased the remaining $5 million of the second issuance on October 9, 2014. GX 4005 at 6. The bonds purchased by Archer and Cooney were eventually used by entities with which the two were associated to satisfy net capital requirements set by the Financial Industry Regulatory Industry ("FINRA"). *See* GX 2075, GX 4004, GX 4005.[8]

8. FINRA ultimately determined, however, that bonds of this nature may not be used to satisfy net capital requirements. Tr. 2093:1-2094:24. There is no evidence, however, that anything was amiss with this aspect of the transactions. The entities seemed to have engaged with FINRA in good faith and ceased using the bonds

As with the first offering, the proceeds from the second issuance were not invested on behalf of the WLCC. In November 2014, $3.8 million was wired from WAPC to Cooney, who allegedly intended to use it to purchase Jason Galanis' home in Bel Air. *See* GX 4007 at 4, GX 3224. Instead, the money was ultimately used by WAH to purchase the aforementioned Valorlife, a subsidiary of an entity called Vaudoise, in furtherance of the roll up. *See* GX 4007 at 4. The remaining portion of the proceeds were transferred to Thorsdale, Jason Galanis' entity. *See* GX 4006. Archer did not receive any transfers from the WAPC account. *See id.*

Meanwhile, Jason Galanis was pursuing the acquisition of another investment adviser, Atlantic. On August 28, 2014, Jason Galanis emailed Archer and Cooney, with the subject line "we have a decent shot of adding this one to the family." GX 2303. Negotiations over this merger continued through the fall and winter of 2014-2015. *See* GX 828 at 1. Again, the acquisition was motivated by a desire to facilitate the purchase of WLCC bonds, this time for the third and final offering. *See* GX 2062; Tr. 1037:20-25.

Atlantic was eventually purchased for approximately $6.1 million in cash. *See* GX 828 at 4; Tr. 1033:15-1035:10. The structure was similar to the previous acquisition of Hughes—with the exception that the funds originated with WAH instead of WAAG—and Atlantic was merged into Hughes, with the resulting combined entity being known

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to satisfy net capital requirements upon receipt of the agency's final decision. *See* Tr. 2117:16-2126:9

as Atlantic and remaining a subsidiary of GMT Duncan. See Tr. 1032:18-1037:13, 1383:18-20. Furthermore, WAH agreed to provide a guarantee for an additional $4,854,420 million of Atlantic's debts. Tr. 1035:5-10; GX 828 at 4. During this time, John Galanis approached Raines and suggested yet another bond issuance. Tr. 1858:13-21. On April 15, 2015, Morton purchased $16 million of the third and final WLCC bond issuance on behalf of the Omaha School Employees Retirement System ("OSERS"), which was a client of Atlantic. *See* GX 962; GX 4009. As with Hughes' clients, OSERS was not provided advance notice of the purchase, which violated certain aspects of its agreement with Atlantic, and was unable to liquidate the bonds due to the absence of a secondary market. *See* Tr. 656:3-25, 746:5-753:4.

The proceeds of the final issuance were similarly misappropriated: Cooney received $75,000, GX 4009; Jason Galanis used approximately $5.4 million to purchase Fondinvest, a European fund of funds, with Dunkerley being installed as the owner, *see id.*, Tr. 1042:9-17; $4.6 million was sent to VL Assurance, another WAH subsidiary, GX 4009, Tr. 913:6-8; $305,000 went to Hughes, GX 4009; and millions more went to Seymour Capital and Thunder Valley, entities established at Hirst's direction and which were eventually used to purchase shares of Code Rebel in that company's IPO, *see id.*, Tr. 2160:19-2162:24. Again, Archer did not receive any proceeds from WAPC. *See* GX 4009.

V. Procedural History

The operative indictment in this case charged each of the three defendants with two counts: substantive securities fraud and conspiracy to commit securities fraud.[9] Trial commenced on May 22, 2018. The government rested on June 20, at which point the Court reserved ruling on the defendants' motions for acquittal, pursuant to Rule 29(b). Tr. 3131:13-22. Defendants Archer and Cooney then presented cases before resting on June 25. Following five weeks of testimony and nearly 800 documents being admitted into evidence, the jury began deliberations on June 28. *See* Tr. 4192:3-4. In spite of the undisputed complexity of this case, the jury did not ask a single question or request that any testimony be read back before finding all three defendants guilty of both counts. *See* Tr. 4195:2-4196:11. In total, the jury deliberated for less than three hours. *See* ECF No. 541-4.

DISCUSSION

As mentioned above, the defendants were convicted of both securities fraud and conspiracy to commit securities fraud. It was clear that material misstatements and omissions were made in connection with the sale of

9. As noted previously, the initial indictment charged seven individuals, four of whom pleaded guilty, including two, Michelle Morton and Gary Hirst, who entered pleas the week before trial. As a result of those two pleas, the third and fourth counts of the indictment, which charged investment adviser fraud and conspiracy, were rendered moot because none of the three remaining defendants were charged in either of those counts.

securities. The only seriously disputed element was thus the intent of each of the defendants.

With respect to the required mental state for the substantive securities fraud offense, the Court charged the jury as follows: "Knowingly means to act voluntarily and deliberately rather than mistakenly or inadvertently. Willfully means to act knowingly and purposefully, with an intent to do something the law forbids; that is to say, with bad purpose, either to disobey or to disregard the law. Intent to defraud in the context of the securities laws means to act knowingly and with intent to deceive." Tr. 4153:8-17.[10] Regarding intent in the context of the conspiracy charge, the Court further instructed: "An act is done knowingly and willfully if it is done deliberately and purposefully; that is, a defendant's acts must have been the product of that defendant's conscious objective, rather than the product of a mistake or accident, or mere negligence, or some other innocent reason. . . . [T]he government must prove beyond a reasonable doubt that the defendant knew that he was a member of an operation or conspiracy to accomplish that unlawful purpose [to commit the charged substantive securities fraud], and that his action of joining such an operation or conspiracy

10. The Court also instructed the jury on aiding and abetting liability: "In order to aid or abet another to commit a crime, it is necessary that you determine that he willfully, knowingly associated himself in some way with the crime and that he willfully and knowingly would seek by some act to help make the crime succeed. Participation in a crime is willful if action is taken voluntarily or intentionally, or in the case of a failure to act, with a specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose, either to disobey or to disregard the law." Tr. 4159:15-23.

was not due to carelessness, negligence, or mistake." Tr. 4169:12-4170:4.

I. Rule 29

Each of the defendants challenges the sufficiency of the evidence pursuant to Rule 29. These motions are denied.

Rule 29 requires a court, "on the defendant's motion," to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). When a court reserves its decision until after the jury returns a verdict, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). On such a motion, a court "must view the evidence in a light that is most favorable to the government, and with all reasonable inferences resolved in favor of the government." *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014) (citation omitted). "The question is not whether this Court believes that the evidence at trial established guilt beyond a reasonable doubt, but rather, whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Mi Sun Cho*, 713 F.3d 716, 720 (2d Cir. 2013) (per curiam) (citations omitted). In a close case, where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (citation omitted). It is not the trial court's role to "substitute its own determination of. . . the weight of the evidence and the reasonable inferences to be drawn for

that of the jury." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) (ellipsis in original) (citation omitted).

This strong "deference . . . to a jury verdict is especially important when reviewing a conviction of conspiracy" because conspiracies "by [their] very nature" are "secretive" and thus are "rare[ly] . . . laid bare in court." *Anderson*, 747 F.3d at 72-73 (citations omitted). "A conspiracy need not be shown by proof of an explicit agreement but can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct," *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001), *abrogated on other grounds by United States v. Huezo*, 546 F.3d 174, 180 n. 2 (2d Cir. 2008), and can be shown based on circumstantial evidence alone, *United States v. Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

As noted earlier, at the time the government rested the Court reserved judgment on the defendants' motions pursuant to Rule 29(b), with each of the defendants filing written submissions after the verdict, in which at least Archer also moves pursuant to Rule 29(c). The practical difference is that Rule 29(c) permits the Court to consider all of the evidence presented at trial as opposed to the evidence in the record at the time the Court reserved decision. *See* Fed. R. Crim. P. 29. The Court's conclusion, however, is the same under either approach, With one exception pertaining to John Galanis, which the Court will address in due course, the evidence introduced after the government rested either has no bearing on the analysis or was beneficial to the defense case.

Appendix D

A. John Galanis

There is no basis to disturb the jury's verdict with respect to John Galanis. In urging the Court to do so, he ignores both the governing legal standards and the evidence presented at trial, which overwhelmingly established his guilt.

The primary thrust of John Galanis' argument is that he only made two representations to the WLCC, neither of which was inaccurate in his view. As an initial matter, this argument mistakenly assumes that a defendant may only be liable if he personally made an actionable misrepresentation. But even assuming, *arguendo*, that John Galanis accurately states the law, his argument is unavailing because he did in fact make material misrepresentations to members of the WLCC. First, John Galanis acknowledges discussing his son's work at Burnham with members of the WLCC. He claims, however, that he merely said Jason "had a position at Burnham wherein he had great influence on deciding what investment opportunities Burnham would become involved in." Galanis Mot. at 2, ECF No. 564. It is of course true that Jason Galanis, despite not holding a formal position at Burnham or its subsidiaries, was actively involved in their affairs. *See* Tr. 1071:2-5. But the evidence at trial showed that John Galanis made a different and very specific representation to the WLCC: that Jason was an employee of Burnham. Tr. 1838:15-17; *see also* Tr. 154:3-8.[11] This was

11. John Galanis does not appear to contest the materiality of this misstatement. Even if he did, however, the jury could have reasonably concluded that it was material by providing the

indisputably false.[12]

There were additional misrepresentations, moreover, which John Galanis does not acknowledge in his moving papers. Most notably, he told members of the WLCC that the proceeds from the bond offerings would be placed in an annuity on its behalf. Tr. 1839:10-1840:6. Indeed, this was the entire motivation for the WLCC to participate in the transaction in the first place, It is undisputed that no such annuity was ever purchased. Instead, the proceeds were placed in the account of a shell company created specifically to facilitate the ensuing misappropriation.[13]

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representations made by John and Jason Galanis to the WLCC some veneer of legitimacy, particularly because it was John who was so intimately involved in structuring the deal in its early stages and he bore no formal relationship with Burnham. In any event, even if this statement was not material, as the Court will explain there were ample other bases on which the jury could have convicted John Galanis.

12. The second representation identified by John Galanis is that he told the WLCC that sovereign immunity would shield them from any liability related to the bond offerings. It is unclear to the Court where in the record John Galanis made this representation, which, in any event, would not have been true in light of the clause in the governing documents partially waiving the WLCC's sovereign immunity. *See* Tr. 207:3-208:1.

13. The government correctly notes that John Galanis initially told members of the WLCC that WAAG would be the annuity provider, presumably because it had a positive reputation. Tr. 1840:7-14. It is also undisputed, however, that John Galanis eventually informed members of the WLCC that instead WAPC would serve as the annuity provider. Tr. 1852:15-23. Whatever probative value this series of events may have with respect to John Galanis' intent,

Based on this representation, therefore, the jury could have easily concluded that John Galanis was guilty.

But equally as important, Galanis ignores the requirements for liability. There was ample evidence presented at trial of John Galanis' central role in the criminal enterprise, on which the jury could have concluded that he willfully participated in the scheme.[14]

John Galanis asserts that the government's case turned on the mere fact that he was related to Jason. Not so. The government even reminded the jury in its summation of the obvious principle that being related to a person who has committed a crime does not give rise

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it cannot serve as the misrepresentation of material fact giving rise to liability.

14. Unlike his co-defendants, John Galanis does not argue that the indictment alleges two distinct conspiracies. He does, however, make a related argument: that a prejudicial variance ensued because the evidence at trial failed to establish the single conspiracy alleged by the government. This argument lacks merit. It was well-established at trial that the conspirators made these two sets of misrepresentations—to the WLCC and the clients of Hughes and Atlantic—in a concerted effort in pursuit of a single goal: to steal the bond proceeds. *See United States v. Payne*, 591 F.3d 46, 61 (2d Cir. 2010) ("[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." (citation omitted)). In any event, to the extent the evidence did in fact establish two separate conspiracies, any such variance did not affect John Galanis' substantial rights. *See United States v. Gonzalez*, 399 F. App'x 641, 645 (2d Cir. 2010).

to criminal liability. Tr. 3619:23-24. Rather, the evidence established that they were a father and son working in tandem in the context of this criminal scheme.

The jury could have reasonably inferred from the record that John Galanis did not by happenstance meet Raines in Las Vegas but specifically targeted him. Indeed, weeks earlier Jason Galanis had emailed Archer and Cooney about an opportunity to work with the WLCC, mentioning Raines by name. GX 2003. Moreover, there was at least one occasion on which Tim Anderson, an attorney who helped structure the WLCC issuances, contacted Jason Galanis seeking certain information about WAPC, a request to which John Galanis responded. Tr. 184:16-20. Finally, when Raines suggested that the WLCC explore alternative annuity providers in order to compare rates, John Galanis discouraged him from doing so, Tr. 1854:23-1855:10. If another entity had served as the annuity provider, it would not have been possible to misappropriate the proceeds.[15]

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15. The one piece of evidence introduced after the Court reserved judgment on the Rule 29 motions that harmed any of the defendants was that regarding John Galanis' participation in a prior securities fraud scheme orchestrated by his son. The Court had precluded the government from introducing this Rule 404(b) evidence unless counsel for John Galanis argued that his client had been duped by Jason in the context of this conspiracy. In spite of the Court's explicit warnings, counsel did just that in his summation, at which point the Court briefly re-opened the evidentiary record to permit the government to introduce a stipulation that John Galanis had pled guilty to that previous fraud. Tr. 3 829:2-l 6. The Court provided a robust limiting instruction that neither Archer nor Cooney were imp licated in that conduct and that the jury was permitted to consider

John Galanis also grossly mischaracterizes the record concerning the money he received for his assistance in executing the WLCC scheme. It is undisputed that he received $2.35 million, which he describes as a commission. Galanis is of course correct that commissions are not per *se* illegal. He also rightly notes that BSI received $250,000 for its role as the placement agent for the bonds. GX 214 at 5. Raines even believed that Galanis might receive a portion of the payment due to Burnham. Tr. 1947:17-21. But the circumstances under which John Galanis received this money belie the notion that it was payment for anything but his participation in the criminal scheme.

First, unlike the payment to Burnham, the $2.35 million distributed to John Galanis was not provided for in the schedule setting forth the payments of expenses owed at closing. *See* GX 214 at 5. Indeed, unlike the payment to BSI, which was made at closing, the funds given to John Galanis came at a later time out of the WAPC account. *See* GX 4013. At trial, he failed to identify any authority for such a distribution to be made to him in the context of these transactions. Second, the size of the payment further undermines his argument. It stands to reason that if BSI was receiving $250,000 for its role as placement agent, John Galanis should not have received nearly ten times

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the evidence only against John Galanis for the purpose of assessing his intent in the present case. Tr. 3829:25-3831:11. Needless to say, this evidence was highly probative of whether John Galanis was a willing participant in the scheme at hand. But as the Court's analysis demonstrates, the jury had ample bases for convicting him based on the evidence that had been introduced at the time the government rested and the Court reserved judgment on his Rule 29 motion.

that sum for whatever services he allegedly provided. To the extent John Galanis suggests that his payment was a finder's fee, that argument is contradicted by the trial record, which, as previously discussed, established that Jason Galanis and the other defendants at trial were aware of this potential transaction prior to John Galanis ever "meeting" Raycen Raines. *See* GX 2303. Finally, the manner in which the funds were disbursed to John Galanis is perhaps most probative of the fact that this payment was not legitimate. John Galanis was not simply wired the funds. Instead, mere days prior to the first issuance, he directed an associate to create Sovereign Nations. *See* Tr. 2820:1-2822:16; *see also* GX 623, GX 1112. The incorporation and account opening documents for this company are bereft of any mention of John Galanis, even though he was the one effectively exercising control over the bank account. *See* GX 623, GX 1112, Tr. 2826:3-2828:1, 2831:5-2837:5. The $2.35 million was wired to Sovereign Nations, at which point John Galanis directed distributions, using a fake email account, to himself and family members. *See* GX 3400, GX 4009, Tr. 2822:23-2823:24.

On this record, the jury's conclusion, supported by ample evidence, was eminently reasonable.

B. Devon Archer and Bevan Cooney

The Rule 29 motions submitted by Archer and Cooney are similarly denied. With respect to Archer, as will become clear in the course of the forthcoming Rule 33 analysis, when drawing all inferences in the government's

favor, there is not a valid basis to grant his Rule 29 motion. As the Court will further explain, Cooney's insufficiency of the evidence argument fails even under the more lenient Rule 33 standard.

II. Rule 33

As mentioned above, Archer and Cooney both attack the sufficiency of the evidence in advancing motions for a new trial under Rule 33.[16] The defendants also make various other Rule 33 arguments. For reasons the Court will detail, Archer's motion based on the sufficiency of the evidence is granted, while all others are denied.

Rule 33 permits courts to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Courts have "broad discretion ... to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (ellipsis in original) (citation omitted). Motions for a new trial pursuant to Rule 33 "are disfavored in this Circuit" and "should be granted only in the most *extraordinary circumstances* ." *United States v. Figueroa*, 421 F. App'x 23, 24 (2d Cir.2011) (emphasis in original) (citations omitted).

16. As previously noted, John Galanis does not attack the sufficiency of the evidence under Rule 33. Cooney has made several arguments for a new trial without explicitly attacking the sufficiency of the evidence, as he does under Rule 29. Nonetheless, particularly to the extent Cooney joins in Archer's motions, the Court construes Cooney's papers as also arguing that the evidence is insufficient under Rule 33.

Appendix D

A. Sufficiency of the Evidence

"In deciding whether to grant a Rule 33 motion [predicated on sufficiency of the evidence], a judge may weigh the evidence and determine the credibility of witnesses" and "is not required to view the evidence in the light most favorable to the Government." *United States v. Tarantino*, No. 08-CR-655 (JS), 2012 U.S. Dist. LEXIS 159850, 2012 WL 5430865, at *2 (E.D.N.Y. Nov. 7, 2012) (citations omitted), *aff'd*, 617 F. App'x 62 (2d Cir. July 10, 2015). "The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *Ferguson*, 246 F.3d at 134 (citations omitted). The Court, however, must "strike a balance between weighing the evidence and credibility of witnesses and not wholly usurping the role of the jury." *Id.* at 133 (citation omitted). "The ultimate test [on a Rule 33 motion] is whether letting a guilty verdict stand would be a manifest injustice. To grant the motion, there must be a real concern that an innocent person may have been convicted." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013) (citations omitted).

1. Devon Archer

The Court has been mindful of the deference appropriately accorded juries and does not grant Archer's motion for a new trial lightly or absent careful consideration. As noted above, when drawing every inference in the government's favor, as the Court is required to do under Rule 29, the Court cannot conclude that no reasonable

jury could have convicted him, particularly because the primary issue was intent and the government presented a substantial amount of circumstantial evidence to that effect.

The government's reliance on circumstantial evidence is of course perfectly appropriate. And the government's case against Archer is not without appeal at first blush. He did, after all, purchase WLCC bonds using misappropriated proceeds that he received from Jason Galanis. But when each piece of evidence in this indisputably complex case is examined with scrutiny and in the context of all the facts presented, the government's case against Archer loses much of its force,

First, the government's overwhelming reliance on circumstantial evidence is coupled with Jason Galanis' deception, including of those who intentionally aided his crimes. His *modus operandi* was to compartmentalize his schemes, such that each participant knew only that which was essential to his or her narrowly defined role. Indeed, the trial record is replete with acknowledgements by accomplices of Jason Galanis that he was intentionally deceptive, rendering them unaware of various aspects of his illegal conduct—including those central to the WLCC scheme—and that sometimes they did not learn the truth until they reviewed the indictment in this case or were otherwise informed by the government. *See* Tr. 932:7-14, 933:17-20, 1028:4-10, 1120:17-1121:10, 1126:5-1128:17, 1142:12-21, 1311:24-1312:6, 1339:10-24, 1425:1-15, 1557:2-6, 2142:6-13, 2144:1-22, 2159:8-21, 2296:9-18, 2326:8-15, 2329:16-23, 2332:21-2333:17, 2335:2-4, 2336:5-7, 2345:15-2346:2.

This ignorance extended so far as to specific transactions in which they were involved. For example, the government's cooperating witnesses only learned that the WLCC deal was fraudulent by virtue of their independent observations. Dunkerley, despite his close relationship with Galanis and after already having performed discrete acts in furtherance of the conspiracy, arrived at this realization only when he noticed that the bond proceeds in the WAPC account, to which he had access, were not being used to purchase an annuity. *See* Tr. 1310:13-21. There were no such clues for Archer. Moreover, the evidence demonstrated that Galanis viewed Archer as a pawn to be used in furtherance of his various criminal schemes. *See, e.g.*, DX 4078. The role of Jason Galanis as it pertains to the defendants' intent is all the more vexing in light of the legitimate roll up plan, which involved many of the same entities and actors. It is through this prism that the evidence in this case must be assessed.

The Court's concerns are further exacerbated by the government's inability throughout trial to articulate a compelling motive for Archer to engage in this fraud. Although the government is of course not required to prove motive, it is notable that Archer never received money from the purported annuity provider, nor did he profit directly from the misappropriation of the bond proceeds.[17] The theory on which the government now relies

17. At trial, the government advanced a theory that Archer profited by way of $700,513 in misappropriated proceeds he received from Thorsdale, the entity controlled by Jason Galanis. *See* GX 4012. Cross-examination established, however, that this was not the case. The evidence on which the relevant government chart was based

is that Archer's admitted interest in the roll up being successful—due, principally, to his ownership interest in Burnham and the shares of WAH stock he received for serving on the board—created a motive for him to participate in the WLCC fraud, which, the government contends, provided funds critical to the roll up's success. The Court cannot dismiss this possibility entirely, though it is mitigated by the fact that Archer's commitment to the roll up also resulted in him spending substantial amounts of his own money, with one calculation offered by Archer estimating that he lost approximately $800,000 during the relevant period. *See* Tr. 3567:21-23; DX 9003. Nonetheless, the fact that Archer did not profit by virtue of retaining bond proceeds that he received, either directly or indirectly, from the purported annuity provider is a significant distinction between him and his co-defendants. *See* GX 4013 (entity controlled by John Galanis received $2.35 million directly from WAPC); GX 4009 (Cooney received $75,000 directly from WAPC); *cf.* GX 4012 (documenting the many millions of misappropriated funds Jason Galanis spent on himself); Tr. 1005:14-18, 1096:1-5 (Dunlcerley received $125,000 at close of first bond issuance for being the placement agent even though he did not actually have to locate purchasers of the bonds); Tr.

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consisted of two wires from Thorsdale to RSB: one for $100,000 and a second for $600,513. The transfer for $100,000 appears to have been repayment of a loan made to Thorsdale by RSB one month earlier while the second wire was soon thereafter returned to Thorsdale. *See* Tr. 3002:25-3028:16. Indeed, the government seems to have abandoned its argument that these transfers are evidence of motive, instead describing the money as being "funneled" through RSB's account in the course of the conspiracy. *See* Govt Opp. at 51.

2143:20-25, 2147:6-18, 2149:3-8 (Martin received $150,000 for serving as the investment manager for the annuity even though one was never purchased).

While some of Archer's conduct is troubling—particularly his repeated failure to disclose his involvement with Jason Galanis—the Court remains unconvinced that Archer knew that Jason Galanis was perpetrating a massive fraud. In short, when permitted to weigh the evidence on its own, as Rule 33 allows, the Court is left with an unwavering concern that Archer is innocent of the crimes charged.

The government's case as to Archer's intent was comprised primarily of the following evidence: (1) his purchase of $15 million of WLCC bonds; (2) emails involving him, Cooney, and Jason Galanis; (3) purported lies he told Morgan Stanley and Deutsche Bank in the course of custodying the WLCC bonds and to the Board of Trustees of the Burnham Investors Trust ("BIT Board"); and (4) various alleged efforts to cover up the WLCC scheme. The Court will address each in turn.

i. Archer's Purchase of the Second Tranche

The primary aspect of the government's case against Archer was his purchase of WLCC bonds using proceeds from the first issuance. This $15 million represented approximately one-fourth of the total amount misappropriated during the course of the conspiracy. It is undisputed that Archer knew Jason Galanis supplied the

money. *See* GX 2228, What is disputed, however, is whether he knew the funds Galanis gave him were misappropriated bond proceeds.

It is imperative to understand the nuances of these transactions, which were structured intricately by Jason Galanis, presumably, to aid his deception. It is clear from the record that Archer knew Jason Galanis was providing the money for him to purchase his portion of the second tranche. But critically, the funds were not transferred to Archer from WAPC, as when John Galanis received misappropriated proceeds. *See* GX 4013. Instead, the money took a circuitous route. Hugh Dunkerley, operating at the direction of Jason Galanis, transferred $15 million to Thorsdale, the entity controlled by Galanis, at which point it was wired to Clifford Wolff, an attorney who represented Galanis in various transactions. *See* GX 4006. It was only then that Wolff sent the funds to an account belonging to RSB, an entity that, as previously discussed, was controlled by Archer. *See id.* RSB in turn purchased $15 million of WLCC bonds. *See id.*

Despite his involvement, the government presented no evidence that Archer knew that these funds came from WAPC, which presumably would have operated as a red flag. Moreover, the first transaction in this series was effected in a manner intended to prevent anyone from realizing that the funds were coming from the purported annuity provider. Instead of merely wiring the money, pursuant to an explicit instruction by Jason Galanis, Dunkerley went to a bank and withdrew $15 million from the WAPC account and then separately deposited

it into Thorsdale's account. Tr. 1514:1-12, 1516:10-1517:15, As opposed to when a transfer is effected by wire, it is only possible to connect these two transactions by simultaneously examining the records for the two accounts and because a bank employee wrote on the withdrawal slip that the money was being deposited into Thorsdale's account. *See* GX 565; Tr. 1525:12-24. This was the only occasion on which Dunkerley effected a transfer from the WAPC account in this manner, Tr. 1517:13-17. The transfer from Thorsdale to the Wolff Law Firm was also accompanied by an email from Francisco Martin, ghost-written by Jason Galanis, in which Martin "[t]hank[ed]" Wolff for his "assistance in helping to settle this investment for your client." DX 4795; *accord* Tr. 2339:24-2340:22.

Perhaps most critically, even Dunkerley, who the evidence showed was privy to more aspects of Jason Galanis' various criminal acts than virtually anyone else—including frauds in which Archer is not alleged to have played any role—did not realize either (1) that the $15 million from the WAPC account was ultimately being sent to Archer or (2) that Archer ultimately purchased bonds with misappropriated proceeds. *See* Tr. 1028:5-10, 1312:8-13. Instead, Jason Galanis told Dunkerley, who was an active participant in this series of transactions, that Archer had a contract from China to make investments in the United States, which required him to use the money by a certain date. *See* Tr. 1025:2-7. Archer, according to Galanis, was going to buy the bonds in order to "effectively park the money so that he could use it for future investments as they came up." Tr. 1025:8-10. The fact that Dunkerley knew only the details of the one transaction

of this series in which he was directly involved—sending the money from WAPC to Thorsdale—counsels strongly against concluding that Archer had insight into the entire sequence, which would be necessary for him, as the recipient of the final transfer, to know where the money originated from, namely the WAPC account.

In sum, there was no evidence presented that Archer was aware that the money being provided by Jason Galanis constituted proceeds from the first issuance. As the Court has described, moreover, other aspects of the record suggest that he did not know. Indeed, Jason Galanis' measures to hide that he was sending Archer money from the WAPC account stands in stark contrast to other occasions on which Jason Galanis misappropriated proceeds, such as when money was sent directly to the account of an entity effectively controlled by his father and other funds were wired directly to Thorsdale. *See* GX 4003 at 4. And as previously noted, Dunkerley, who was instrumental in transferring the funds in question to Archer, only realized that bond proceeds were being misappropriated at all due to his access to the WAPC account, which obviously revealed that the funds were not being used to purchase an annuity. *See* Tr. 1310:13-21. The evidence indicates that Archer had no such access. *See* Tr. 1339:25-1340:3.[18]

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18. Related to this transaction, the government asserts in a footnote in its opposition papers that the letter submitted by Archer to the WLCC indicating that he was a sophisticated investor could itself be an actionable misstatement. *See* Govt Opp. at 54 n.16 (citing GX 281). Assuming that the letter in fact contained a material misstatement, the government would still need to demonstrate that it

ii. Emails Involving Jason Galanis, Archer, and Cooney

The government next argues that emails between Archer, Cooney, and Jason Galanis, particularly those sent by Galanis, demonstrate an intention to steal the bond proceeds and defraud the clients of Hughes and Atlantic. These emails were read into evidence by law enforcement agents without any accompanying testimony. Indeed, the government's two witnesses who were participants in the scheme—Hugh Dunkerley and Francisco Martin—were not parties to these messages and could not interpret or explain the statements made therein. The government is, of course, not required to offer testimony accompanying such evidence. As the Court will explain, however, the language in the emails is facially innocuous or, at best, most naturally subject to innocent interpretations. Thus, although the government urged the jury to construe these emails as evidence of the defendants' intent to perpetrate fraud, the Court views them as more probative of Archer's innocence.

Broadly speaking, the emails concern two topics: (1) the genesis of the WLCC bond offerings, including planning the first issuance, and (2) the acquisitions of Hughes and Atlantic. The Court will address each in turn.

As for the emails regarding the structuring of the WLCC bond deal, the government points to terms such as

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was made with the requisite intent and the Court's Rule 33 analysis thus remains applicable.

"liquidity" and "discretionary" as if they are necessarily evidence of criminal intent. But the government interprets these communications with the benefit of hindsight, knowing that Jason Galanis in fact misappropriated the proceeds. Instead, the critical question is what these emails say about Archer's intent at the time they were made. As the government rightly notes, evidence must be interpreted in context, which also requires the Court to consider that these communications were sent among three individuals attempting to complete the previously discussed roll up plan, a primary goal of which was to increase assets under management. *See* DX 4733 at 13. That the defendants, by virtue of the WLCC bond deal, may have increased, or wanted to increase, the assets over which they had discretion to invest is not evidence of criminal intent. Furthermore, the annuity was intended to include private equity investments. *See* GX 209 at 10, GX 210 at 11 (agreements providing for the annuity to include private equity investments); Tr. 370:17-19, 372:9-15, 500:22-504:6 (Anderson, the attorney who represented BSI, the placement agent for the bonds, understood that the bond proceeds would be invested in private equity, agreeing that such investments "typically involve taking a substantial stake or even control of a company"). Therefore, that certain communications may indicate a hope or belief that the defendants would benefit from the WLCC bond deal by virtue of it helping to advance the roll up does not mean that such benefit was mutually understood to result from *stealing* the bond money. In fact, consistent with these agreements, Dunkerley and Galanis even planned to cover up the theft of the proceeds by telling the WLCC that the bond money had been invested

in various companies acquired in the course of the roll up and that the returns on their ownership stake in these entities were sufficient for the annuity to generate the expected returns. *See* Tr. 1057:5-10.

For instance, one of the first emails connecting Archer to the WLCC scheme, and on which the government places much weight, is an April 2014 message from Jason Galanis regarding a transaction that never came to fruition, in which he wrote "$20mm bond approved. Proceeds are 15mm to us and 5mm to them for a winery investment they want to make." GX 2011. In the government's view, Galanis was communicating that he and the defendants were free do as they wished with the $15 million. But a more reasonable interpretation of this message is that Galanis was conveying that $5 million of the bond proceeds would be immediately distributed to the WLCC while the remaining $15 million was to be invested on its behalf, thereby increasing assets under management. Indeed, this was similar to the structure of the deal that was eventually consummated, where $2.25 million was distributed immediately to the WLCC and roughly $24 million was earmarked for investment. *See* GX 4003. This interpretation also comports with the opinion letter from a law firm attached to the message. *See* GX 2011. Moreover, Cooney replied, asking, "[w]hat do we get to do with the 15mm." GX 2120. While the government argues that this is further probative of criminal intent, a more natural inference is that Cooney did not understand Galanis to mean that they would steal the money but instead that there would be limitations of some sort on how the funds could be used, presumably pursuant to the agreements that would govern the contemplated transaction.

Appendix D

The Court is similarly concerned about a possible misinterpretation of Galanis' response that the funds were "discretionary." *Id.* Archer could easily have understood Galanis to be referring to the fact that the group would be able to invest the money for the WLCC as they saw fit, so long as they complied with any restrictions put in place by the client. This is not a novel concept. Discretionary liquidity is frequently referenced in the course of discussing perfectly legitimate transactions and entities, including the sorts at issue in the case at hand. *See* GX 2029 (noting that Hughes "manages $900 million on a *discretionary* basis for 29 institutional clients (pensions and endowments)" (emphasis added)); GX 2303 (noting that Atlantic "managed on a *discretionary* basis approximately US $1.8869 billion of client assets and provides advisory services on a *non-discretionary* basis with respect to US $7.1457 billion of client assets" (emphasis added)); DX 4733 at 13 (Burnham pitch deck emphasizing its discretionary assets under management); Tr. 650:19-651:8; 855:2-14; 1397:18-1398:4; 1605:20-1606:2; 1635:22-163.6:4; 1660:8-12; 1673:13-20.

The foregoing analysis similarly applies to other emails in which Galanis emphasized the need for discretionary liquidity. *See* GX 1221 (June 2014 email correspondence in which Galanis informed Archer that he was working with "dan and Hugh on capital vehicles that result in us controlling discretionary funds" which would provide them with "money to invest," to which Archer responded that "[w]e need discretionary funds at our command soonest," and to which Galanis replied that he was focused on "discretionary"); GX 2025 (Galanis writing "with some dry powder in our control soon, we will be

scary effective"); GX 2026 (Galanis providing an update on the progress towards closing the transaction, adding "shooting for the end of month, lots to accomplish to finesse this over the line, im not counting the money yet . . . my primary objective is to get us a source of discretionary liquidity, sick of begging."); GX 2031 (on eve of closing of first issuance Galanis writes "[i]f I get this $28mm, I have 12-15mm to put into WAH [Wealth Assurance Holdings]"); GX 2065 (November 20, 2014 email from Galanis in which he lays out the details of a potential future bond deal, including that proceeds would be placed in a WAH annuity, with returns being "generated by a diversified private equity portfolio in order to grow Tribal assets"); GX 2216 ("Dan and Hugh have locked [Fondinvest] up and came to me for the money, which I have agreed to arrange/provide (probably Indians).").[19]

19. The government rightly notes in its opposition papers that Jason Galanis in fact later used $5.4 million in proceeds from the final bond issuance to purchase Fondinvest. *See* GX 4009. Archer contends that he plausibly understood this to mean that proceeds would have been used in the acquisition of Fondinvest, with the WLCC enjoying a stake in the company, *i.e.*, as a private equity investment. The government's counter to this argument appears to be the conclusory statement that Archer knew he and his alleged co-conspirators were instead using the bond proceeds for themselves. *See* Govt Opp. at 33 n.13 ("There was no annuity, and Archer knew that he and others were using the proceeds of the bond issuances for themselves and not, as promised to the WLCC, to an annuity."). But as the Court has noted, it was specifically contemplated that investments on behalf of the WLCC would include private equity. *See* GX 209 at 10, GX 210 at 11; Tr. 370:17-19, 372:9-15, 500:22-504:6

The Court's concern is further exacerbated when, as it must, the evidence is construed cumulatively and not in isolation. On June 20, 2014, Jason Galanis emailed Archer and Cooney, writing "Arch[,] the Indians signed two hours ago our engagement. . . Nothing for you to do at this point, but giving you a heads up. The use of the proceeds is to place the bond proceeds into a Wealth Assurance annuity . . . . btw, annuity proceeds get invested by an appointed manager on a discretionary basis on a 20 year contract. Hercules has been appointed." GX 1235. Far from being inculpatory, this email appears exculpatory because Galanis is specifically representing that the bond proceeds would be placed in an annuity. It further seems clear that when these individuals used the word discretionary in this context they were referencing the ability of an asset manager to exercise discretion in selecting investments for a client, in this case the WLCC. Galanis' response supports Archer's argument that this is probative of his belief that the proceeds could be legitimately invested on behalf of the WLCC while simultaneously advancing the roll up. Although Jason Galanis likely intended to steal the bond proceeds by this point, the Court remains unconvinced that he communicated such intent in these messages, or, more critically, that Archer understood him so. As noted earlier, during this period even Dunkerley and Martin believed the WLCC deal was legitimate. *See* Tr. 1139:24-1140:5, 2296:9-18.

Other emails regarding the first bond issuance are simply status updates, which appear facially innocuous. *See* GX 1220 (Galanis forwarding email correspondence with Tim Anderson and writing that he was "moving the

$20MM sovereign nation debt issued"); GX 1267 ("closing soon" in reference to the first issuance); GX 2026 ("we got US Bank to act as trustee for the bond issue," "GT is issuer counsel," and "Tribe counsel met and approved the issue"); GX 2027 (Galanis writing that they were "close" and "target close is July 31"); GX 2031 (Galanis stating he was "in closing docs on $28mm with GT. Close. Could fall apart but close."); GX 2217 ("Wilma Standing Bear and Geneva Lone Hill have fully executed the agreements").

Finally, the government cites to various messages from Archer and Cooney in which they express enthusiasm in response to the information provided by Jason Galanis. *See* GX 2024 (Cooney responding with a picture of a Jack playing card and writing "The Greek! [which was a nickname for Galanis]"); GX 2026 (Archer responding "Unreal! This is just a testament to taking a portfolio approach to pursuing opportunity (aka the ping pong method). Unreal as you never know where the nuggets pop up."); GX 2026 (Archer responding "Appreciate that Jack! And completely correct!"); GX 2028 (Archer writing "[f]rom your lips to Gods ears! July 31 is right around the corner."); GX 2031 (Archer stating "I'm not sure I can take anymore of the precious. It's incredibly capital intensive greenfield work. But let's discuss because there's also a lot of blue sky!"). In the Court's view, these emails simply do not give rise to the inference urged by the government.

The same is true of the emails related to the acquisitions of Hughes and Atlantic. There was nothing inherently illegal or illegitimate about these transactions, even though they were motivated by a desire to locate

purchasers of the WLCC bonds.[20] Rather, the fraud as it pertains to the investment advisers is that bonds were purchased for their clients without disclosure of all of the potential conflicts of interest and the bonds fell outside certain clients' investment parameters.[21]

The emails relied on by the government make it clear that Archer was aware of the acquisitions of Hughes and Atlantic, as well as the goal that these transactions would facilitate the sale of WLCC bonds. *See* GX 1229 (in reference to acquisition of Atlantic closing, Galanis noting that it "will be nice to have dry powder to fire"); GX 2018 (Galanis emailing Archer, Cooney, and Andrew Godfrey regarding Hughes, noting that firm has "$1.0 billion AUM [assets under management], all fixed income. 52 clients, all institutional."); GX 2029 (Galanis forwarding executed term sheet for acquisition of Hughes and noting that it "manages $900 million on a discretionary basis for 28 institutional clients (pensions and endowments)"); GX 2034 ("WAAG wired $2.78 million today to close Hughes."); GX 2242 (discussing how acquisition of Atlantic would provide

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20. The one caveat is that the acquisition of Hughes was financed through the so-called Ballybunion fraud, *see* DX 4060 at 2 (conditioning $2.76 million for acquisition of Hughes on release of Ballybunion proceeds), a separate crime committed by Jason Galanis and Hugh Dunkerley in which none of these defendants are implicated, *see* Tr. 1151:4-8 (Dunkerley was told by Jason Galanis not to tell anyone else about the Ballybunion fraud).

21. The Court notes that certain of the conflicts were apparently disclosed. *See* Tr. 508:15-509:8 (Dunkerley's involvement in both WAAG and BSI was disclosed in private placement memorandum); GX1334.

"more liquidity and sources for the various projects" and that it could be used to purchase WLCC bonds, months before its acquisition); GX 2303 (email from Galanis indicating that "we have a decent shot of adding [Atlantic] to the family"); *see also* GX 1224, GX 1228, GX 1282, GX 2037, GX 2063, GX 2076, GX 2078. There is no indication, however, that the individuals in control of the investment advisers, Morton and Hirst, would fail to disclose the conflicts of interest or violate the terms of the clients' investor agreements. Indeed, certain emails to which the government points support the opposite inference, namely that there existed a hope that clients of Hughes and Atlantic would purchase WLCC bonds, but no intent to unilaterally foist the bonds upon them. *See* GX 2029 (Galanis writing that "[w]e have agreed to give" Hughes "*an opportunity to participate* in Native American new bond issues" and asserting his belief that it would take "$28 million of the Wakpamni/Ogala [*sic*] Sioux issue" (emphasis added)).

The government, finally, places much emphasis on two emails related to Jason Galanis' purchase of a condominium in New York City, which was made in part with bond proceeds. On July 9, 2014, Clifford Wolff emailed Archer and his assistant, Sebastian Momtazi, that Galanis was going to "purchase a condo using the above name [Archer Diversified TRG, LLC] and Devon's cache [*sic*]. The company is using your office address." GX 2122. Later that month, Galanis, in an email thread in which he had previously specified that the closing date for the WLCC deal was July 31, commented "so close. Cliff is running the stall for me on nyc mansion[.] I want to be here and won't

live in a 1750 square foot cage[.] Massively motivated." GX 2028. The inference urged by the government is that Archer knew Galanis was going to later use bond proceeds to purchase the condominium.

The Court is not convinced that this correspondence leads to the inference urged by the government. It is true that these emails suggest that Archer permitted Galanis, with whom he was working at the time, to effectively trade on his name in attempting to purchase a condominium. But that misleading impression is not probative of whether Archer knew Galanis was going to steal the bond proceeds. Moreover, that Galanis expressed the desire to make this real estate purchase in an email in which he also addressed the WLCC bond deal does not lead to the inference that he would ultimately finance this purchase, in part, with misappropriated bond proceeds. As Archer notes, it can also be read as merely affirming that Galanis was going to purchase the property if the deal went through (*e.g.*, in part using money he might legitimately earn from the bond deal or fees later generated as a result of the anticipated investment on behalf of the WLCC). Burnham, a subsidiary of which was set to be the placement agent for the bonds, also maintained its offices in Manhattan, making the discussion of Galanis' anticipated move to New York City in the context of discussing the closing of the WLCC deal not illogical.

But the more critical point is this: because this email was admitted with no accompanying testimony or other evidence probative of its meaning, the Court (as the jury was) is left to speculate as to whether Galanis

was implicitly conveying criminal intent to Archer. The Court is hesitant to conclude from this correspondence that Galanis was effectively stating that he intended to steal the bond proceeds, which is simply too large an inferential leap. The inference urged by the government is further undercut by the fact that Galanis financed the rest of this purchase by diverting money from Valorife, under the pretense that it was purchasing WLCC bonds. *See* GX 4015, DX 4127, DX 4824, Tr. 3539:4-3541:1. There is no indication that Archer was involved in that conduct.

One final point bears mentioning: the government attempts to read nefarious intent into certain of these messages by suggesting that the defendants knew that Jason Galanis intended to steal the bond proceeds because he was short on money but nonetheless discussed extravagant expenditures, such as a condominium in New York. This suggestion is unpersuasive, however, in light of the extensive evidence presented at trial demonstrating that Jason Galanis successfully misled virtually every person he met into thinking he was immensely wealthy and successful. *See, e.g.*, Tr. 2306:1-2303:17.

In sum, the Court does not view this body of evidence as tending to show that Archer was in fact aware of Galanis' theft. Indeed, certain emails, most notably Government Exhibit 1235, tend to show the opposite, namely that Archer had good reason to believe the WLCC bond deal was legitimate. At a bare minimum, the inferences urged by Archer are more closely tethered to the actual language used in these communications.

iii. Purported Lies to Morgan Stanley, Deutsche Bank, and the BIT Board

The most damaging evidence against Archer, in the Court's view, were the purported lies he told three entities: Morgan Stanley, Deutsche Bank, and the BIT Board. While certain of these statements were clearly misleading, as the Court will explain the primary manner in which they were deceptive—hiding the involvement of Jason Galanis—does not lead to the ultimate conclusion necessary for Archer's guilt: that he was misleading because he knew Galanis was stealing the bond proceeds.

Archer's statements to Morgan Stanley and Deutsche Bank occurred in the course of identifying an institution to custody the WLCC bonds he purchased in the second tranche, which simply entails storing them. *See* Tr. 833:3-11. The government argues that Archer lied about the source of the $15 million he used to purchase the bonds when he told both entities that the money was generated via real estate sales. *See* GX 344, GX 1226. Archer contends that these statements were accurate in his view at the time because he was merely repeating lies Jason Galanis had told him about the source of the funds. There were also two pieces of evidence, however, that indicate the funds were generated by real estate sales specifically completed by RSB, as opposed to a third party, which would constitute statements that Archer clearly knew to be false. *See* GX 345, GX 352 at 4. Archer asserts that he did not actually provide this information because the statements in question were made by a Morgan Stanley employee, who must have assumed that any transactions

generating the funds had been completed by the entity on whose behalf the bonds would be custodied, RSB. The appropriate inference, in the government's view, is that Archer lied about the source of the money because he knew that it constituted bond proceeds recycled from the first issuance.

The communications with the BIT Board, on the other hand, were not related to the WLCC bond deal. Instead, these statements arose in the course of Archer's pursuit of the roll up plan. The Burnham Investors Trust, managed by the BIT Board, was the largest client of BAM, which, as previously discussed, was a subsidiary of Burnham. Tr. 2666:13-2667:9. Archer wished to retain the Trust as a client. The BIT Board and Archer engaged in a prolonged negotiation, each advised by legal counsel, in the course of which Archer made certain representations about the involvement of Jason Galanis, or rather, his lack of involvement in various entities related to Burnham. *See* GX 762 at 1-2, GX 763 at 3, Tr. 2765:1-2778:20. The government argues that Archer lied, which, it contends, is probative of his intent with respect to the WLCC scheme. Archer counters that the very technical statements with which he agreed to comply, with the advice of counsel, were in fact true, despite the involvement of Jason Galanis in certain capacities.

There are fair arguments by both the government and Archer about the statements he made to these entities and whether they were literally true, false, or technically true but nonetheless misleading. At the very least, it is a fair inference that even if Archer's various statements were

technically true, he misled these entities and violated the spirit of his representations. Indeed, when crediting Archer's arguments as to the statements he made to the banks, his failure to acknowledge that a third party (Jason Galanis) provided the money is what led to Morgan Stanley's allegedly faulty assumption that the transactions generating the funds had been completed by RSB. The Court remains unconvinced, however, that this evidence, even considered with the rest of the government's case, establishes the only issue that matters for purposes of establishing Archer's guilt: that he was misleading because he knew that Jason Galanis was stealing the bond proceeds.

With respect to Morgan Stanley and Deutsche Bank, there are two possible inferences to be drawn from Archer's statements that the money used to purchase the bonds came from real estate sales: (1) he hid the fact that the funds constituted recycled bond proceeds and (2) he hid the involvement of Galanis. The probative value of the evidence with regard to the first inference, however, hinges on the assumption of the very fact for which it is offered. It is undisputed that the funds constituted misappropriated proceeds, rendering the statement false. It is only probative of Archer's intent, however, if he knew the statement was false. For all the reasons the Court has and will articulate, it does not find that particular inference persuasive. The inference is further weakened by the fact that Galanis specifically held himself out as having made money from real estate, bolstering the notion that Archer may well have repeated a lie told to him by Galanis. *See* Tr. 480:6-15; 924:3-14; 1417:18-20;

1418:1-18; 2305:19-22. More likely, in the Court's view, is that Archer was hiding the involvement of Galanis, whose role in supplying the money was indisputably a fact of which Archer was aware. There were other reasons, however, Archer may not have wanted to disclose Galanis' involvement that, while deceptive, are not probative of his intent with respect to the charged conspiracy.

Galanis, even during the relevant period, had a well-documented checkered past. Although he had never been charged criminally, he had been barred by the SEC from serving on the board, or as an officer, of a public company, though it had expired by the time of these events. Tr. 1332:3-8. In spite of this, the evidence at trial demonstrated that Galanis had many admirers in addition to his critics. *See* Tr. 904:10-16 (Dunkerley testifying that he had been told by Jason Sugarman that Galanis "had a mixed reputation, that fifty percent of the people who knew him didn't like him and fifty percent of the people who knew him did like him"). It is thus reasonable to believe that Archer misled the banks not because he knew Galanis was stealing the bond proceeds, but instead because he simultaneously viewed Galanis as a business asset while realizing that he was a highly controversial figure. Indeed, in an email from Archer to Matt Nordgren on December 19, 2014, Archer specifically noted, in regard to Galanis' involvement in Burnham, that there were "regulatory issues with [Galanis] so [he couldn't] mention his name." GX 2066. Bolstering the strength of this inference, the communications at issue occurred in October 2014 on the heels of the aforementioned negotiations with the BIT Board, in which one of the primary concerns expressed

by the Board was the involvement of Jason Galanis. *See* GX 762 (Archer's representation letter dated September 26, 2014).

The ultimate inference advocated by the government—that Archer knew about Galanis stealing the bond proceeds is further undercut when Archer's statements are viewed in light of Dunkerley's testimony, the witness who provided the greatest insight into Jason Galanis' methods. Dunkerley definitively established that even Galanis' co-conspirators were ignorant about the details and import of transactions with which they were intimately involved. As noted earlier, Dunkerley had no idea that proceeds were being recycled to buy more bonds or that proceeds were being sent to Archer. *See* Tr. 1028:5-10,1312:8-13. What is clear from his testimony is that his knowledge of the illegal nature of the WLCC scheme derived from what he personally observed—not what Galanis communicated to him. It was Dunkerley's access to the WAPC account that informed him of the bond misappropriation. *See* Tr. 1310:13-21. Archer was not privy to such information. *See* Tr. 1339:25-1340:3. The inference advanced by the government, therefore, depends largely on the assumption that Galanis had a conversation or correspondence with Archer that he never had with Dunkerley (or Martin, the other cooperating witness) proactively informing him that the WLCC deal was a fraudulent scheme. In light of the substantial evidence in the form of the government's own witnesses undercutting that notion, as well as the absence of any evidence that Galanis ever admitted as much to Archer—not to mention the other reasons Archer had for being deceptive, which are not probative of his

intent in the context of the charged crimes—the Court remains concerned that Archer did not mislead Morgan Stanley and Deutsche Bank because he knew Galanis was misappropriating bond proceeds.

The inference urged by the government is even less persuasive with respect to the BIT Board evidence, which, as the Court noted, did not concern the WLCC bond deal. Assuming the factual predicate of the government's argument, Archer did not fully disclose the involvement of Jason Galanis in various entities related to the Board, primarily his role as an adviser to the boards of WAH and WAAG and his actively working with Archer on the WLCC deal. The probative value of this evidence is that Archer was misleading about Galanis' involvement. And yet again the conclusion necessary to deem Archer guilty requires one more inferential leap: that Archer misled the BIT Board because he knew Galanis was stealing the bond money. As discussed above, there is substantial evidence cutting against this inference.

Relatedly, the government further alleges that Archer lied to the BIT Board when he denied being involved in the events described in a complaint filed by the SEC against Atlantic and being one of the anonymous defendants described therein. *See* GX 784 at 1-2. As an initial matter, the government conceded at trial that Archer is not in fact one of the defendants described in the complaint. Tr. 3239:12-13. While the government alleges that Archer was a member of the conspiracy here, which included defrauding the clients of Atlantic, it has never alleged that he personally failed to disclose the material conflicts of interest or violated the clients' investor agreements. Those

duties were instead within the province of other members of the alleged conspiracy, namely Morton and Hirst.

The Court recognizes that Archer made statements intended to mislead these various entities, which is of course troubling. In light of the contexts in which Archer was deceptive, however, this evidence is not directly probative of his guilt with respect to the crimes charged in this indictment. Particularly bearing in mind the very plausible reasons for Archer to otherwise hide Galanis' involvement and the unique features of this case stemming from Galanis' deception, the Court thus continues to harbor a concern that Archer is innocent.

iv. Archer's Alleged Involvement in the Cover-Up

The government, finally, presented several pieces of evidence that, it claims, show Archer tried to cover up the scheme: (1) he made a $250,000 payment to the WAPC account shortly before the initial interest payment was due on the first set of bonds; (2) he sent an email referencing a fake entity, Calvert Capital, that was created to cover-up the bond scheme; and (3) he sent an email to Cooney and others discussing the next steps forward in light of Jason Galanis' arrest on unrelated charges in September 2015. This evidence does not alter the Court's doubt that Archer was unaware of Jason Galanis' fraud.

Archer does not dispute that he transferred $250,000 to the WAPC account, which, again, belonged to the purported annuity provider and was the account from which proceeds were wired in the course of the

misappropriation. *See* GX 4010. The import of this evidence, in the government's view, is that Archer provided this money so that it could be used to make the initial interest payment to the bondholders who acquired bonds in the first issuance, thus delaying discovery of the fraud. But when construed in light of the roll up plan, the inference urged by Archer is equally if not more compelling.

Indeed, there are a variety of reasons, other than that the bond proceeds were being misappropriated, that could explain why Archer would make such a transfer. First, the evidence showed that it was relatively common for Archer to supply liquidity to entities with which he was affiliated. *See* DX 9003 at 5; Tr. 3562:12-3568:1. Critically, even Dunkerley testified that although he knew WAPC was not actually affiliated with WAH, to the best of his knowledge he was the only member of the WAH Board, which included Archer, to realize this because Jason Galanis had created a fake subscription agreement between the two companies. Tr. 1459:8-1461:12. And the governing documents of the bond transaction were unambiguous that the anticipated investment on behalf of the WLCC entailed risk, as all investments do. As noted earlier, this one possessed an even greater risk profile than a typical annuity by virtue of including private equity investments. *See* GX 209 at 10, GX 210 at 11; Tr. 515:9-516:15. It is thus just as consistent with Archer's transfer of money that he was intending to assist what he believed to be a legitimate transaction by providing liquidity needed in the short-term.[22]

22. Of the amount that Archer and others transferred into the account in early September 2015, $240,000 was transferred to Thorsdale, presumably for Jason Galanis' personal affairs. *See* GX

Next, the government places great emphasis on an email in which Archer references Calvert, a sham entity that was created by Hugh Dunkerley, Francisco Martin, and Jason Galanis to assist in the cover-up of the WLCC scheme. In writing to Mark Waddington, who is not alleged to have been a member of the conspiracy, Archer noted that the bonds he purchased in the second tranche, then held by VL Assurance, were "to be replaced/returned to Calvert," adding in a subsequent message in the exchange that "the consensus is we would like to return these bonds to the lender and beneficial owner in the quickest orderly manner possible." GX 2119. The inference urged by the government is that Archer knew about the Calvert cover up, which would obviously be probative of his intent with respect to the WLCC scheme.

On this record, however, a single reference to Calvert in an email does not establish Archer's knowledge that it was a sham entity and that he was thus a willful participant in the conspiracy. Indeed, the weight of the evidence undercuts the notion that Archer was aware of the Calvert cover-up. Jason Galanis and Hugh Dunkerley came up with the idea for the entity, Tr. 1450:2-1453:3, which Francisco Martin created, Tr. 2181:14-19. Dunkerley testified that neither he nor anyone else discussed Calvert with Archer, Tr. 1464:1-13, 1509:6-8, whom Martin never even met, Tr. 2381:15-18. While Galanis, Dunkerley, and

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4010, GX 512 at 66. These events serve to further illustrate that Jason Galanis and Archer were not as closely aligned as the government claims and also further undercuts the notion that Archer was aware that the money he supplied was being used for illegitimate purposes because Galanis was simultaneously stealing from Archer.

Cooney all participated in backdating Calvert forms related to certain of the bond transactions, *see* Tr. 1464:17-1465:16, 2181:14-17, GX 1577, GX 2298, Archer did not participate in this backdating even though the conspirators created a fraudulent document describing a purported loan Calvert made to RSB, *see* GX 1577. Tellingly, this document was signed only by Dunkerley, *see* GX 1577, in contrast to other fraudulent forms relating to Calvert, *see* GX 2298 (document signed by both Dunkerley and the purported recipient of the "loan," Cooney). Finally, it bears mentioning that even Martin was unaware that Calvert was a fake entity intended to deceive even though he was the one who created it. Tr. 2295:10-25; 2348:2-7. This further highlights the extent to which Galanis did not disclose the true import of discrete acts he directed others to take, even those who were clearly willing participants in his criminal schemes.

The government's final strand of evidence relates to Archer's conduct after Jason Galanis' arrest on unrelated charges. It cites an email Archer sent Cooney, Jason Sugarman, and Andrew Godfrey. GX 2102. This email included a list of "immediate issues" to address in light of Galanis' arrest. *Id.* But there is nothing nefarious about the included items. *See id.* The import of this evidence, in the government's view, appears to be that Archer was aware of certain aspects of the bond transactions. But he has never argued otherwise.[23] The issue, rather, is

23. In a footnote, the government also reminds the Court that Archer received an email from Galanis after his arrest from the "clean" email account set up for him by Dunkerley. *See* GX 1453, Tr. 2180:21-2181:13. The Court does not deem this evidence to be

whether he knew that Jason Galanis was stealing the bond proceeds.[24]

v. Final Considerations

Exacerbating the Court's concern about Archer are two additional considerations that further weigh in favor of granting a new trial: (1) the unique considerations pertaining to his relationship with Jason Galanis and (2) potential juror confusion over a government summary chart admitted as an exhibit.

As the Court has previously described, Jason Galanis operated to keep people in the dark, even those who were undoubtedly willful participants in his various crimes. But his efforts as to Archer were even more concerted. Galanis, for instance, explicitly instructed Dunkerley not to attend WATT board meetings where Archer would also be present, a demand with which Dunkerley complied. Tr. 1328:19-23. This acknowledgement by Dunkerley is all the more striking because it was he—not Jason Galanis—who was on the board with Archer, and Dunkerley further

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especially probative. The email did not concern anything inherently illegal—merely appointment of directors to Atlantic's board—and was also sent to Andrew Godfrey, who is not alleged to have been a member of the conspiracy. *See* GX 1453. Moreover, there is no evidence that Archer ever responded.

24. The government also urges an inference against Cooney on the basis that he responded to Archer's message, indicating that it was a "[g]ood prelim checklist." GX 2102. For the same reasons as those discussed with respect to Archer, the Court does not rely on this evidence in denying Cooney's Rule 33 motion.

testified that he specifically wanted to meet Archer due to his various business connections. *See* Tr. 1328:19-1330:13. Even more telling is the manner in which those who were members of the conspiracy spoke of Archer when he was not present, burnishing his credentials to others and describing him, among other things, as "the biggest show pony of all time" whose involvement would "add layers of legitimacy" to the various deals. *See, e.g.*, DXs 4908-09 (Cooney bragging, while being surreptitiously recorded, that Archer is "the biggest whale of anyone," the "biggest show pony of all time," and "a total fucking whale," explaining that "[y]ou don't get any more politically connected [than Archer is] and make people more comfortable than that," and Archer's involvement would thus provide "layers of legitimacy with all the deals we're doing now"); Tr. 1864:8-24 (Raycen Raines had heard from others "more than once or twice" that Archer was business partners with Hunter Biden); Tr. 1867:12-15 (Raines acknowledging that Galanis "did in fact boast about Mr. Archer and Mr. Biden's involvement"); DX 4078 (Galanis writing to Cooney that "the alternative is to pimp devon and see how quickly he stops responding . . . it will happen"); DX 4836 (Galanis instructing Dunkerley that it may be worthwhile to clarify in Archer's bio that two of his business partners "are Chris Heinz and Hunter Biden, the step son of the Secretary of State John Kerry and the son of the Vice President Joe Biden, respectively"); Tr. 2159:22-2160:3 (Martin testifying that Galanis had told him that Archer "was a business partner and a very well connected individual politically and also in the business world").

At the same time Archer was spoken of in this manner, Galanis was simultaneously operating to ingratiate himself with Archer. There was anecdotal evidence, for instance, of an elaborate dinner held in New York by Galanis and his then-wife where he presented a toast to Archer, his "new" friend. *See* Tr, 3291:25-3293:7, 3299:6-12. This evidence further suggests that Archer was not a party to this conspiracy but was instead being manipulated by a skillful con artist.[25]

Second, the Court harbors some concern that the jury was confused by the testimony of the government's final witness, FBI Special Agent Kendall, who prepared and testified about a number of summary charts. The evidentiary portion of this trial was protracted and tedious. The summary charts gave the jury a relatively straightforward view of the numerous related transactions. There was one chart in particular that troubled the Court: Government Exhibit 4011. This exhibit detailed

25. The notion that Archer lacked the requisite knowledge and intent is all the more plausible in light of Archer's numerous commitments during the relevant time period. As the Court discussed in the background section, Archer's involvement in the WLCC deal came in the context of his substantial role in the overall roll-up, which involved numerous entities that collectively managed assets worth billions of dollars. There was also evidence about his other business—and personal—commitments during this time. *See, e.g.*, DX 4733 at 12; Tr. 3287:18-3288:19. Archer's relative lack of involvement in the WLCC deal is perhaps best demonstrated by the fact that none of the witnesses who took part in the deal had substantial interactions with Archer. While this consideration ultimately does not weigh heavily in the Court's mind, it is relevant in light of the nature of this case and Archer's defense.

the interest payment on the second tranche of bonds, those purchased by Archer and Cooney. As previously discussed, RSB, the entity controlled by Archer, and Cooney transferred the bonds to other entities, meaning they were no longer in possession of them at the time the interest payment became due. The money to make this payment was transferred from VL Assurance to Burnham, which then sent it to the WLCC. Due to an internal error at Morgan Stanley, however, $903,000 was then accidentally wired to RSB. *See* Tr. 3063:22-3064:8; DX 4523 at 6. Realizing the mistake, Morgan Stanley corrected the error twelve days later, reversed the wire, and then sent the money to the intended recipients, BSI and VL Assurance. *See* GX 301 at 190; DX 4523 at 1. Agent Kendall agreed with the government that the chart depicted the conspirators "basically pa[ying] themselves the interest on the bonds[.]" Tr. 2970:20-21.

The issue arises because, although the chart had text indicating that the wire to RSB, Archer's entity, was reversed, there was no explanation as to what that meant and the arrows indicating the flow of money from entity to entity showed that the funds went directly from RSB to BSI and VL Assurance. *See* GX 4011. This gave the impression that RSB was involved in the transaction by which the conspirators were allegedly paying themselves the interest due on the second set of bonds. Indeed, immediately after Agent Kendall testified that $903,000 went to RSB, she further explained that at this point in time it no longer owned any of the bonds, further suggesting impropriety on the part of RSB and by extension Archer. *See* Tr. 2969:25-2970:4.

Any prejudice was certainly mitigated by the manner in which counsel for Archer elicited on cross-examination that the "wire reversal" really meant that RSB had received the money in error, accompanied by Morgan Stanley emails showing that it was an internal mistake later rectified by the bank. *See* Tr. 3063:1-3080:16. Given the persuasive power of summary charts, however, particularly in a highly complex, tedious case such as this one, and the manner in which the flow of money was visually depicted in the government exhibit, there is a real concern that the jury was confused by this aspect of Agent Kendall's testimony. This concern is exacerbated by the relatively limited nature of Archer's involvement in the universe of relevant transactions.[26] While this consideration is by no means a sufficient basis on which to grant Archer's motion, the Court of Appeals has recognized the power that such summary charts have on juries, even when, as here, they are not emphasized by the government on summation. *See United States v. Groysman*, 766 F.3d 147, 163 (2d Cir. 2014).

vi. Conclusion

As is readily apparent, the government presented a good deal of circumstantial evidence concerning

26. Indeed, the acquisition of bonds in the second tranche aside, the primary other connection Archer had to the conspiracy, as displayed in the government summary charts, was the purported profit of $700,513 that he received from Thorsdale. As discussed earlier, however, while there were transfers of funds, Archer did not actually enjoy any profit, as part of that money was repayment of a loan and the rest was returned to Thorsdale. *See supra* n. 17.

Archer's intent. This is, as the Court previously stated, a perfectly appropriate way to prove a defendant's guilt. The government is also right to note that its case must be assessed as a whole, rather than taking each piece of evidence in isolation. It is primarily for this reason that the Court, when drawing every inference in favor of the government, denies Archer's Rule 29 motion.

After scrutinizing the evidence and giving the various issues their due attention, however, the Court harbors substantial doubt about Archer's guilt. Neither of the government's cooperating witnesses ever communicated with Archer about the WLCC scheme. Most of the government's witnesses never communicated with Archer at all. Unlike his co-defendants at trial, he never received misappropriated proceeds directly from the purported annuity provider for the WLCC. Indeed, although the government need not prove motive, the Court is left wondering why Archer would have engaged in this scheme, especially in light of the illegal gains reaped by his alleged co-conspirators but not by him.

In hindsight, it now appears obvious that it was Jason Galanis' intent to misappropriate the bond proceeds from the inception of his plan to sell Native American bonds. And, as the evidence relating to the statements made to Morgan Stanley and the BIT Board demonstrates, Archer's behavior was troubling in some respects. But being misleading in contexts unrelated to the sale of securities does not render Archer guilty of the securities fraud offenses alleged in this indictment, unless such behavior establishes that he knew of the object to steal

the bond money and/or defraud the clients of Hughes and Atlantic.

In sum, when viewing the entire body of evidence, particularly in light of the alternative inferences that may legitimately be drawn from each piece of circumstantial evidence, the degree to which Jason Galanis manipulated even those who were members of the conspiracy together with his desire to benefit from Archer—the person who "add[ed] layers of legitimacy"—and the intertwined web of legitimate and illegitimate transactions, the Court harbors a real concern that Archer is innocent of the crimes charged and accordingly orders a new trial.

2. Bevan Cooney

In many respects, Cooney is similarly situated to Archer. Indeed, there is substantial overlap in the government's evidence against them, namely their purchase of the second tranche of bonds and the email communications involving them and Jason Galanis. The Court's analysis above with respect to those pieces of evidence is similarly applicable to Cooney. It may well be that Cooney—like Archer, Dunkerley, and Martin—was unaware of the criminal object of the WLCC deal at the time he participated in the vast majority of the email communications with Archer and Galanis. *See supra* Discussion, II.A.1.ii. But other evidence demonstrates that—also like Dunkerley and Martin—he at some point became a member of the conspiracy. Indeed, the compelling consideration that requires the denial of Cooney's Rule 33 motion is the other circumstantial evidence unique to

him, primarily regarding his receipt of money from the WAPC account, his participation in the Calvert cover-up, and purported lies he told various entities about subjects that were indisputably within his realm of knowledge.

Specifically with respect to Cooney, the government introduced the following additional evidence; (1) his receipt of money directly from the WAPC account, consisting of $75,000 from the final issuance and $4 million purportedly to purchase Jason Galanis' home in Bel Air; (2) his participation in backdating forms related to the previously referenced fake entity, Calvert; and (3) his purported lies to City National Bank ("CNB") regarding his purchase of the second tranche of bonds.[27] The Court addresses each in turn.

i. Cooney's Receipt of Funds from the WAPC

The flaw most fatal to Cooney's motion, and which is the most substantial distinction between the evidence against him and Archer, is that Cooney received money directly from the purported annuity provider for the WLCC. After the final bond issuance, Cooney was wired $75,000 directly from the WAPC account, consisting of money provided by OSERS, Atlantic's client. *See* GX

27. Cooney at times suggests that none of this evidence may support a conviction because these acts did not constitute material misstatements or omission in connection with the sale of a security. This is of course true. However, the government does not rely on this evidence for that purpose, but rather because it is probative of effectively the only question at issue in this case: whether Cooney acted with the requisite intent.

4009. While defendants have argued that they believed WAPC to be a subsidiary of Wealth Assurance, which it was not, there has never been any suggestion that they were unaware that WAPC was to provide the annuity on behalf of the WLCC. Indeed, the only context in which WAPC, legitimate or not, was referenced at trial was in the context of it being the purported annuity provider.

It is unclear how Cooney could have received money from WAPC for legitimate reasons. It is true that the mere receipt of money from WAPC does not necessarily mean that such a transfer was part and parcel of the bond misappropriation. For instance, Tim Anderson received $50,000 from the WAPC account when, following the closing of the deal, his law firm performed additional work that had not been contemplated. Tr. 490:13-491:23. But there is no such apparent basis for Cooney to have received a payment for services rendered, nor has he suggested otherwise. He even argues throughout his moving papers that he was only a passive investor in relation to the bond offerings. Assuming that Cooney was the beneficial owner of the bonds he purchased, it is of course true that as an investor he would have been entitled, as all bondholders were, to periodic interest payments. But this $75,000 transfer occurred before any interest payments on the second tranche of bonds were due, which he did not even own at the time that particular payment was made. *See* GX 4005 at 6, GX 4011. Indeed, it occurred even prior to the first interest payment on the initial tranche. *Compare* GX 4010 *with* GX 4011.[28]

28. Moreover, while Cooney purchased the second tranche of bonds, any suggestion that he would have been entitled to an interest

Further probative of the illegitimate nature of this transfer are Cooney's statements to his accountant concerning how to classify the payment. On April 28, 2015, Cooney's business manager at Fulton & Meyer emailed him, asking if the $75,000 wire from WAPC was a loan. GX 3250.[29] Cooney confirmed that it in fact was a loan and asked his manager to add up all of the loans from Wealth Assurance and Thorsdale from the previous couple of years. GX 3250. Not only did Cooney lie, it belies reason to suggest that WAPC could have provided legitimate loans to Jason Galanis' friends and business partners.

And this was not the only payment Cooney received directly from WAPC. On November 12, 2014, he also received a wire for $3.895 million. GX 4007 at 1. This money was allegedly earmarked for the purchase of Jason Galanis' home in Bel Air before ultimately being used to acquire Valorlife by WAH. *See id.* at 4, GX 3224. At trial and again in his moving papers, Cooney asserts that contrary to the government's contention, he

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payment would be dubious as he was not the beneficial owner of the bonds. As discussed above, it is undisputed that Cooney knew the money to purchase the bonds came from Jason Galanis. And as the Court will discuss below, he later acknowledged that he did not actually own the bonds he acquired.

29. Consistent with Jason Galanis' lie that WAPC was a subsidiary of Wealth Assurance, Cooney's business manager refers to the loan as coming from "Wealth Assurance." GX 3205. Cooney, however, was aware that the money came from WAPC, which as discussed above, was the annuity provider for the WLCC regardless of whether Cooney honestly believed it to be a subsidiary of the legitimate Wealth Assurance entity.

genuinely intended to use the money to purchase Jason Galanis' home. The government rightly notes evidence that undermines this argument, namely that the day after the funds were deposited into the escrow account associated with the purchase of Galanis' home, Cooney requested that they be transferred out. *See* GX 4007 at 2; DX 3056(a). At the very least, it is not unreasonable to credit the government's evidence on this point.

But even assuming, *arguendo*, that Cooney is correct about his intended use of the funds, his argument remains unavailing. In fact, Cooney's contention that he intended to use the money to purchase Jason Galanis' home in certain respects is more damaging to his defense than the purpose for which the money was ultimately used, *i.e.*, to acquire a subsidiary for WAH.[30] Regardless, Cooney's intent as to the use of the money is of no moment. The critical point is that Cooney personally received nearly $4 million in funds directly from the annuity provider for the WLCC. Moreover, Cooney later falsely informed his accountant that this money was a loan from Thorsdale, the entity controlled by Jason Galanis. *See* GX 3272; Tr. 2028:21-2029:2. On this record, as with the $75,000 transfer, the natural inference to draw is that Cooney knew this money constituted misappropriated bond proceeds.

30. Indeed, it is probative of the relationship enjoyed by Cooney and Jason Galanis that it was Cooney whom Galanis asked to participate in this transaction related to his residence. Dunkerley also testified that they were the "best of friends" who had known each other since childhood. *See* Tr. 909:4-6, 2171:13-21.

ii. Cooney's Participation in the Calvert Cover-Up

Further probative of Cooney's intent is his use of fraudulent documents related to Calvert Capital, which, as discussed, was created in order to cover up the WLCC scheme. On February 28, 2016, Cooney emailed his business managers at Fulton & Meyer a secured loan agreement purportedly showing that Calvert Capital had loaned the Bevan Cooney Trust $5 million days before he purchased the second tranche. *See* GX 2298; Tr. 2028:21-2030:3. This occurred just two days after Cooney similarly provided a letter from Thorsdale purporting to show that Calvert had loaned him the roughly $4 million he received directly from WAPC and which was ultimately used to purchase Valorlife. *See* GX 3272; Tr. 2028:21-2030:3, Cooney does not dispute that Calvert was a fraudulent entity created to cover up the scheme, nor could he credibly do so. Indeed, Calvert did not even exist on October 2, 2014 and November 12, 2014, when it allegedly provided Cooney with these two "loans." *Compare* GX 2298 and GX 3272 *with* Tr. 2182:3-4, The backdated form regarding the $5 million used to purchase a portion of the second tranche of bonds was signed by both Jason Galanis, the alleged managing partner of Calvert, and Cooney. *See* GX 2298. Although Cooney did not sign the document regarding the loan for the $4 million used to acquire Valorlife, he gave it to his accountant while clearly aware that its substance was false because he received that money from WAPC—not Thorsdale, the purported agent, or Calvert. *Compare* GX 4007 *with* GX 3272. Therefore, the fact that Cooney, unlike Archer, signed one of these fraudulent forms and

later distributed both of them is highly probative of his intent.

iii. Cooney's Purported Lies to CNB

The final category of evidence against Cooney concerns various statements he made to CNB, specifically as they pertain to his ownership of the bonds he purchased. As the government rightly notes, upon his receipt of $5 million from Thorsdale he recognized the amount as a loan. *See* GX 3216. In January 2015 he then applied for a loan from CNB, in conjunction with which he personally completed a financial statement. *See* GX 405. He acknowledged owning the $5 million worth of bonds while omitting any reference to a loan. *See id.* In May of that year, Cooney transferred the bonds to an entity called Bonwick. Tr. 1741:15-19. The next month, in pursuit of a separate loan from CNB for $1.2 million, he signed an affirmation that the previously submitted financial statement remained accurate. *See* GX 414 at 2. It was not until Cooney was unable to repay the $1.2 million loan that CNB learned he no longer possessed the bonds and that he had financed their purchase with a loan. Tr. 1749:12-17; 1813:3-13; 1819:2-9.

On the basis of this evidence, the government urges the following inferences: (1) Cooney lied about the source of the funds used to purchase the bonds in order to hide the fact that the transaction was effected with recycled bond proceeds; (2) Cooney's inconsistent statements regarding his ownership of the bonds reveal that he was a strawman for the purchase; and (3) Cooney financially benefited from his participation in the scheme. Although the first

two inferences have some probative value, it is true that Cooney could just have easily told these lies in order to mislead CNB into providing him a loan. More critically, in the Court's view, is the final inference. Although proof of motive is not legally required, and Cooney obviously had no burden at trial, this evidence undermines one of the primary defenses advanced by Cooney, namely that he did not profit from this criminal scheme. It is clear from the trial record that Cooney's "ownership" of the bonds was one factor considered by CNB in electing to provide him with the $1.2 million loan, most of which he never repaid. *See* Tr. 1742:4-16.

Cooney asserts several arguments in an attempt to undermine this evidence: (1) he did not personally complete the various forms submitted to CNB; (2) a representative of CNB completed a medallion guarantee[31] effecting the transfer of the WLCC bonds to Bonwick; and (3) he made good faith efforts to repay the $1.2 million loan after he defaulted.[32] None of these arguments is persuasive.

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31. A medallion guarantee "is a signature guarantee on a marketable security, a stock or a bond. So, similar to what a notary would do on real estate documents or other kinds of documents where you are guaranteeing somebody's signature, you use a medallion guarantee to guarantee somebody's signature on a stock or bond-related matter." Tr. 1740:3-8.

32. Cooney also re-iterates, in conclusory fashion, his arguments regarding the admissibility of the CNB evidence, namely that unfair prejudice and potential for juror confusion substantially outweigh any probative value. The Court rejected this argument in permitting the government to introduce this evidence, and Cooney offers no new arguments. The Court remains of the opinion that inaccurate

First, while Fulton & Meyer may have submitted these forms to CNB, the forms were personally signed by Cooney and whatever information contained therein would have been provided by him. The inaccuracies contained in the forms are not administrative in nature but instead go to the very heart of Cooney's finances. Second, the issue relating to the medallion guarantee is a red herring. The import of this argument, in Cooney's view, is that prior to issuing the $1.2 million loan a representative of CNB guaranteed the document by which the WLCC bonds were transferred to Bonwick. Therefore, according to Cooney, CNB was well aware that he no longer possessed the bonds. But Steven Shapiro, the CNB representative who signed the medallion, testified at trial that (1) he was unaware that it was the WLCC bonds being transferred and (2) he similarly was not required to verify whether the bonds were being sold or, as was the case here because Cooney apparently never actually owned them, transferred absent consideration. *See* Tr. 1742:17-22, 1808:9-25. Finally, Cooney's contention that he made good faith efforts to repay the $1.2 million loan is irrelevant. The fact remains that he repaid only approximately $80,000 and it thus serves as powerful evidence of one way in which he profited from the scheme. *See* Tr. 1750:14-17.

Viewing the government's entire case, therefore, the Court is not persuaded that a manifest injustice

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statements Cooney made regarding his ownership of the bonds he purchased from the second tranche are probative of his intent, which is the critical issue in this case, and were not substantially outweighed by the danger of unfair prejudice, potential for juror confusion, or any other factor enumerated in Rule 403.

results from permitting this guilty verdict to stand and accordingly denies Cooney's motion.[33]

B. Remaining Rule 33 Arguments

The defendants also make various other arguments under Rule 33. None have merit.

1. The Introduction of John Galanis' Guilty Plea in *Gerova*

First, Archer and Cooney each contend that the introduction, following summations of the government and John Galanis, of evidence of John Galanis' prior participation in a securities fraud scheme with his son prejudiced them. They rightly note that the duty to sever a trial continues throughout its duration. But neither has made the requisite showing that a severance was required in light of the introduction of this evidence or that the manner in which it was introduced otherwise ran afoul of Rule 33.

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33. The government also introduced testimony by Francisco Martin that upon Jason Galanis' arrest for unrelated conduct in September 2015, Cooney called Martin to inform him that Jason Galanis had been arrested but that it did not concern the WLCC bonds. *See* Tr. 2176:17-2177:22. The obvious inference, according to the government, is that Cooney's statement evinced his knowledge that the WLCC bond scheme was illegal because he was apparently concerned that Galanis may have been arrested for conduct relating to the bonds. The Court, however, did not view this as an especially compelling inference and does not rely on this evidence in denying Cooney's Rule 33 motion.

Appendix D

Following proper joinder, which is not contested, severance is required only where the prejudice "is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *United States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011) (citation omitted). The Supreme Court has instructed that severance should be granted only where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Zafiro*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Indeed, a defendant is not entitled to a severance merely because he may have a better chance of acquittal at a separate trial. *See id.* at 540. Notably, the introduction against one defendant of Rule 404(b) evidence by no means requires severance:

> Courts have distinguished between the adverse inference a jury may draw against a co-defendant because of his association with a prior criminal conviction, which can typically be cured by a limiting instruction and the potential for unfair prejudice in instances in which the submission of prior-act evidence against one defendant tends to prove directly or implicate another defendant's involvement in the prior act.

United States v. Catapano, No. 05-CR-229 (SJ) (SMG), 2008 U.S. Dist. LEXIS 121693, 2008 WL 2222013, at *19 (E.D.N.Y. May 22, 2008) (citation omitted), *adopted by* 2008 U.S. Dist. LEXIS 70460, 2008 WL 3992303 (E.D.N.Y. Aug. 28, 2008).

In the matter at hand, the Court had barred the government from introducing evidence of John Galanis' prior guilty plea for securities fraud due to his participation in a scheme orchestrated by his son because, although probative of his intent in this matter, it ran afoul of Rule 403. *See* Tr. 7:25-8:1, May 16, 2018. The parties agreed, however, that counsel for John Galanis could open the door to such evidence if he argued that his client was duped by his son in the context of the WLCC scheme. *See* Tr. 8:8-9:10, May 16, 2018. On June 14, 2018, the government moved to introduce this evidence, arguing that the door had been opened. The Court denied this request, but warned counsel for John Galanis that he could still open the door during his summation. *See* Tr. 2457:9-2458:4. That is precisely what transpired.

Consistent with the procedure followed in *United States v. Alcantara*, 674 F. App'x 27 (2d Cir. Dec. 22, 2016), the Court permitted the government to briefly re-open the evidentiary record. *See* Tr. 3829:2-5. The evidence of John Galanis' plea was introduced by way of stipulation:

> It is hereby stipulated and agreed between the parties that on July 20, 2016, John Galanis pled guilty to conspiring with Jason Galanis and others to commit securities fraud in or about 2009 through in or about 2011, in that John Galanis and others openly managed brokerage accounts of an individual and effected the sale of Gerova stock, and received and concealed proceeds derived therefrom, knowing that this activity was designed to conceal from the

> investing public the true ownership and control of that Gerova stock.

Tr. 3829:8-16.

The Court immediately gave the following limiting instruction as the evidence pertained to Archer and Cooney:

> It is also important for you to know that John Galanis' guilty plea was to charges stemming from the investigation that resulted in Jason Galanis' arrest in September 2015 [,] which you have already heard about. I reiterate to you now that the conduct for which Jason Galanis was arrested and John Galanis pled guilty was entirely unrelated to this case.
>
> I further instruct you that Mr. Archer and Mr. Cooney were not subjects of that investigation, and there is no evidence that either of them knew about Jason or John Galanis' fraudulent conduct in that matter or the investigation of it until after Jason Galanis was arrested in September of 2015. You are not to consider this evidence in any way against either Mr. Archer or Mr. Cooney.

Tr. 3830:23--3831:11. The Court also permitted the government and counsel for John Galanis to offer brief supplemental summations, prior to proceeding with the remaining summations of counsel for Archer and Cooney,

as well as the government's rebuttal. *See* Tr. 3831:12-3837:20.

Based on this record, the Court is not persuaded that either Archer or Cooney were prejudiced, and certainly not to the extent requiring severance or otherwise giving rise to a manifest injustice. While Archer accurately notes that the Court had previously found the introduction of this evidence to run afoul of Rule 403, that was with respect to John Galanis. *See* Tr. 7:25-8:1, May 16, 2018; *cf.* Tr. 330:2-332:3. It is well-established that the introduction of Rule 404(b) evidence against a co-defendant does not require severance. *See Catapano*, 2008 U.S. Dist. LEXIS 121693, 2008 WL 2222013, at *19. That is especially true given the circumstances of the case at hand. Although there had been evidence about Cooney's friendship with Jason Galanis, there was no evidence indicating that either Archer or Cooney enjoyed a relationship with John Galanis. The Court also gave a robust limiting instruction, specifying that Archer and Cooney were not involved in the previous conduct and that there was no evidence they were even aware of it until Jason Galanis was arrested in September 2015. Therefore, the fact that John Galanis was also implicated in one of Jason Galanis' prior crimes, which the jury was already aware of, did not operate to prejudice either Archer or Cooney. The Court remains of the view that this acted as a legitimate basis on which Archer and Cooney could distinguish themselves from John Galanis in summations, aided by the Court specifically instructing the jury that they were not involved in that prior conduct. There is simply no basis to conclude that a severance was required.

To the extent Archer and Cooney were prejudiced by the specific manner of introduction of this evidence, it was by virtue of the fact that, they claim, their trial strategy would have been different. Most notably, they argue that would have sought to introduce evidence that Jason Galanis, John Galanis, and Hirst had previously committed securities fraud together, thus highlighting who the "real" conspirators were in the context of the WLCC scheme. The Court is dubious of this argument, as the mere fact that certain participants had histories of engaging in fraudulent activity with Jason Galanis did not foreclose the possibility that either Archer or Cooney were guilty in the case at hand. The issue before the jury was whether they had the requisite intent with respect to the WLCC scheme, and this other evidence they may have presented, assuming its admissibility, would likely have been of limited probative value, if any. They also contend that the introduction of this evidence exacerbated the prejudicial effect of earlier evidence of Jason Galanis' September 2015 arrest and undercut the Court's instruction that his arrest in that instance was for conduct unrelated to the case at hand. Such arguments, however, fly in the face of the Court's robust limiting instruction.

Accordingly, on this record no manifest injustice occurred.

2. Challenges to Jury Instructions

Archer and Cooney fare no better with their various arguments as to the jury instructions. The Court considered and rejected each of these arguments prior

to giving the charge. The defendants have not raised any new considerations. Moreover, they have not provided any authority for the proposition that alleged instructional errors of this sort are a valid basis on which to order a new trial under Rule 33. Indeed, in the current posture the question is not whether the rulings were in error but whether any errors resulted in a manifest injustice. *See United States v. Soto*, No. 12-CR-556 (RPP), 2014 U.S. Dist. LEXIS 60191, 2014 WL 1694880, at *5 (S.D.N.Y. Apr. 28, 2014), *aff'd sub nom., United States v. Ramos*, 622 F. App'x 29 (2d Cir. 2015).

First, contrary to Archer's argument, there was an adequate factual predicate to give a conscious avoidance charge. The entire thrust of Archer's argument is that there is no evidence that he "saw a red flag *and* took specific action to avoid learning it." Archer Mot. at 94, ECF No. 567 (emphasis in original). The Court of Appeals has instructed, however, that such charges are appropriate where involvement in an offense was "so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003); *accord United States v. Goffer*, 721 F.3d 113, 127-28, 531 Fed. Appx. 8 (2d Cir. 2013). Given the extensive involvement of Archer and Cooney in transactions that were central to the execution of the criminal conspiracy and in light of the various misleading statements they made, it was appropriate to provide such a charge to the jury.

It similarly was not a manifest injustice for the Court to decline to give the requested multiple conspiracies

charge. Throughout this case, Archer and Cooney have contended that the government has alleged the existence of two conspiracies instead of one. Under their theory, there was one conspiracy to defraud the WLCC and another directed at the clients of Hughes and Atlantic. As the Court previously reasoned in rejecting this argument, however, the operative indictment was unambiguous in setting forth an overarching conspiracy with a single goal: to misappropriate the WLCC bond proceeds. That this single conspiracy may have had multiple components or spheres does not mean that the government instead alleged the existence of two conspiracies. *See Payne*, 591 F.3d at 61 ("[A] single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." (citation omitted)).

The final argument relating to the charge is the Court's decision not to provide Archer's requested unanimity instruction or, in the alternative, a more detailed verdict form. This argument is also without merit. Tellingly, the defendants have not provided any authority for the proposition that either of these steps were required. Instead, general unanimity instructions are considered sufficient unless there exists "a genuine danger of jury confusion." *United States v. Ferguson*, 676 F.3d 260, 279 (2d Cir. 20.11) (citation omitted). On this record, the Court cannot conclude that a specific instruction was required, particularly in light of the repeated warnings to the jury that they were required to be unanimous in order to convict any of the defendants on either count, *See* Tr. 4123:23-25, 4183:7-10, 4185:6-9, 4185:15-17. Moreover, that

certain aspects of the record in this case were complex did not require the Court to give such an instruction. *See Ferguson*, 676 F.3d at 280.

3. Newly Discovered Evidence

Finally, each of the defendants in their reply briefs argues for a new trial on the basis of newly discovered evidence that was produced to them after they filed their initial motions. Archer also argues, in the alternative, for an evidentiary hearing. The Court rejects these arguments.

When the import of newly discovered evidence is that a witness committed perjury, "the threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury." *United States v. White*, 972 F.2d 16, 20 (2d Cir. 1992). If the answer is yes, the standard for assessing materiality differs based on when the government learned of the material contradicting the witness's testimony. "[I]f the prosecution was not aware of the perjury [at the time of trial], a defendant can obtain a new trial only where the false testimony leads to a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *United States v. Stewart*, 433 F.3d 273, 296--97 (2d Cir. 2006). "If instead the prosecution knew or should have known about the perjury, then the conviction will be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Torres*, 128 F.3d 38, 49 (2d Cir. 1997) (citation omitted). Where the newly discovered evidence is impeachment

material, however, a new trial "may be granted only upon a showing that . . . the evidence is not merely cumulative or impeaching; and . . . the evidence would likely result in an acquittal." *United States v. Forbes*, 790 F.3d 403, 406-07 (2d Cir. 2015).

The purportedly newly discovered evidence consists of [TEXT REDACTED BY THE COURT],[34] there is not a sufficient basis to grant a new trial for the following reasons: (1) with respect to the substance of the alleged perjury, the defendants cannot make the requisite showing, even under the more forgiving standard applicable when the government knew or should have known of the perjury and (2) as impeachment material it was cumulative and would not have affected the jury's verdict.

When considered as substantive testimony, the defendants cannot carry their burden. [TEXT REDACTED BY THE COURT]

Bearing these considerations in mind, there is no basis to conclude that this additional material, if known to the defendants at trial, would have had any possibility to affect the jury's verdict.

[TEXT REDACTED BY THE COURT]

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34. In light of an ongoing investigation, at the government's request, portions of this opinion are redacted. An unredacted copy of the opinion will be provided to the parties and filed under seal.

Accordingly, the Court declines to grant a new trial on the basis of newly discovered evidence. For substantially the same reasons, the Court also denies the requests for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, Archer's motion for a new trial is granted, while all others are denied. The Clerk of Court is respectfully directed to terminate the motions pending at docket entries 563, 564, 565, and 566.

Archer and the government are directed to confer and propose next steps within forty-five days of this opinion.

SO ORDERED.

Dated: November 15, 2018
New York, New York

/s/ Ronnie Abrams
Ronnie Abrams
United States District Judge

APPENDIX E — TRANSCRIPT EXCERPT FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 28, 2020

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 CR 371 (RA)

UNITED STATES OF AMERICA,

v.

DEVON ARCHER,

Defendant.

New York, N.Y.
February 28, 2022
12:00 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

* * *

[23]THE COURT: I just want to note that the 2X1.1 only applies when one has been convicted of a conspiracy and his or her specific offense is not covered by another guideline section. So, in this case, Mr. Archer was both convicted of conspiracy and the specific substance offense of securities fraud, for which the applicable guidelines is 2B1.1.

Does the government disagree with that?

MS. MERMELSTEIN: No. I think it's academic here.

THE COURT: Okay.

I'm going to, therefore, evaluate the enhancements to Mr. Archer's sentence under the typical preponderance of the evidence standard.

As to loss amount, there's no dispute that the actual losses to the victims exceeded $25 million.

Under the guidelines, Mr. Archer is responsible for pecuniary harm that he knew or, under the circumstances, reasonably should have known was a potential result of the offense.

In addition to his own conduct, he's also responsible for all acts and omissions of others that were (1) within the scope of the jointly undertaken criminal activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity.

Mr. Archer argues that no loss amount was reasonably foreseeable to him. He further contends that the Court could [24]conclude for sentencing purposes that the evidence was sufficient to show that he participated in a scheme to defraud, but insufficient to show that he could reasonably foresee any loss to any victims.

I disagree. As I said earlier, the jury convicted Mr. Archer not just of any scheme to defraud, but the

particular scheme to defraud alleged here; in other words, given that the jury found him guilty of these charged crimes, as alleged in the indictment, I have to accept that he had the requisite intent to commit those crimes, and in doing so, I believe I must also accept that he knew that the investment advisor clients were being defrauded and that the tribal bond proceeds were being misappropriated. And I do so by a preponderance of the evidence, which leads me to believe that the entire $43 million in losses was reasonably foreseeable to him.

I'm going to quote a little bit from the circuit's opinion, but I agree — and I think we all agree — that I'm not bound by the facts as the circuit characterized them, but they referred to "a wealth of emails in which Archer, Cooney, and Galanis discussed the progression of the Wakpamni scheme," and what I'll say — I'm no longer quoting — is that those emails go back to early 2014 in the communications, and I'm quoting again now from the circuit, "Galanis ensured that Archer stayed up to date on the deal with the Wakpamni, including by informing [25]Archer that the proceeds from the sale of the bonds were supposed to be placed into an annuity."

Other emails sent to Archer did keep him informed about the progress of the Hughes and Atlantic acquisitions and specifically referenced the possibility of placing the Wakpamni bonds with them. For example, in one email, Galanis told Archer that he believed Hughes would take 28 million of the bonds, which is what transpired after the first bond issuance.

There was also evidence introduced at trial to the effect that Mr. Archer personally purchased $15 million worth of bonds in the second issuance using money given to him by Jason Galanis, made representations to the WLCC that he was purchasing the bonds "for his own account and for investment only," transferred them to another entity controlled by his codefendants, made false statements about the source of the money to Morgan Stanley and Deutsche Bank, and stated that Calvert was the "lender and beneficial owner" of the bonds from the second offering. Later on, he also misled the BIT Board as to Galanis's involvement with the Burnham companies.

Thus, accepting the factual findings I believe were implicit in the jury's verdict, there is sufficient evidence to establish by a preponderance of the evidence that Mr. Archer got involved with the WLCC scheme from the start and either did foresee, or reasonably should have foreseen, the entire amount of the losses from the scheme, thus, I find that a 22-level [26]enhancement is appropriate.

I also find that the ten or more victims enhancement is appropriate. Mr. Archer urges me to find that he was unaware that the clients of Atlantic and Hughes would be defrauded, but, again, I must assume his knowledge of the objects of the conspiracy in order to be faithful to the jury verdict. Given the involvement of ten pension funds and the WLCC, a two-level increase is appropriate.

The parties agree that a two-level minor-role reduction is warranted, and I do as well. Even assuming that Mr. Archer played an important role in the fraudulent scheme,

as made clear by Amendment 794 to the sentencing guidelines, "relatively culpability" is now to be assessed "only by reference to one's co-participants in the case at hand" and not as the Second Circuit had previously held, "as compared to the average participant in such a crime." Here, I believe that Mr. Archer is substantially less culpable than the average participant in the criminal activity at issue, and there's no doubt that the loss amount greatly exceeded his personal gain.

As I said at Bevan Cooney's sentencing, it's undisputed that Jason Galanis was the mastermind behind and orchestrator of the fraud. As for John Galanis, he induced the Wakpamni tribe to issue its bonds in the first place, something which was undoubtedly at the heart of the fraudulent scheme. Hugh Dunkerley served as the placement agent for the tribal [27]bond issuances and as the sole managing member of the WAPC, roles which were pivotal in misappropriating the bond proceeds. And Michelle Morton and Gary Hirst, as investment advisors, caused client funds to be invested in the WLCC bonds without disclosing conflicts of interest.

I thus find that a two-level minor-role reduction is warranted here. Again, the government doesn't disagree.

I don't agree with Mr. Archer that a four-level minimal role reduction is applicable. A minimal role participant is defined as a defendant whose lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minor participant, but this enhancement is inapplicable,

in my view, for the reasons I already stated regarding the proof of Mr. Archer's knowledge.

Accordingly, I find that his offense level is 31, his criminal history category is I, and his recommended guideline sentence is 108 to 135 months in prison.

As I said earlier, that range is only advisory. Courts may impose a sentence outside of that range based on one of two legal concepts — a departure or a variance.

A departure allows for a sentence outside the advisory range based on some provision of the guidelines themselves. I understand that Mr. Archer is making motions for departures based on aberrant behavior and the offense level overstating [28]the seriousness of the offense.

Is that right, Mr. Schwartz?

MR. SCHWARTZ: That's correct.

THE COURT: Okay.

I'm going to deny those motions, although I'm going to consider the substance of the arguments when evaluating the 3553(a) factors.

With respect to aberrant behavior, a court may depart downward for aberrant behavior only if a defendant committed a single criminal occurrence or a single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3)

represents a marked deviation by the defendant from an otherwise law-abiding life.

Application Note 2 to 5K2.20 notes that a departure for aberrant behavior in a fraud case is generally not available because such a scheme usually involves repetitive acts rather than a single occurrence or a single criminal transaction and significant planning. In the *Barber* case, 132 F. App'x at 895, the Second Circuit held that an aberrant behavior departure was unwarranted where the defendants' fraud offenses "required sophisticated financial forethought, were not of limited duration and involved significant planning." I find here, similarly, that a departure from aberrant behavior is not warranted. This was a complex scheme that was carried out over at least two years, and Mr. Archer's actions, [29]accepting the facts implicit in the jury's verdict, required significant financial forethought and planning.

I also find that a downward departure is not warranted on the basis that the offense level substantially overstates the seriousness of the offense per Application Note 21(C) to 2B1.1. This is not the kind of exceptional securities fraud case contemplated by the guidelines in which a fraud produces an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. As I said, I will, though, consider this argument in assessing the 3553(a) factors.

In short, I've considered whether there is an appropriate basis for departure from the advisory range within the guideline system and conclude that no grounds

exist, but I also, of course, can impose a nonguideline sentence based on what we call a variance, which is what I've been talking about pursuant to 18, United States Code, Section 3553(a).

Would the government like to be heard with respect to sentencing?

MS. MERMELSTEIN: Yes, your Honor.

There's really no question here that this was a serious and large-scale offense. And I think that in thinking about what the right sentence is for this defendant, the two most serious considerations are really just punishment and respect for the law.

* * *

[43]Mr. Archer did.

So, Mr. Archer, please rise for the imposition of sentence.

It's the judgment of this Court that you be committed to the custody of the Bureau of Prisons for a term of one year and one day, to be followed by a term of supervised release of one year on all counts to run concurrently.

I believe that this sentence is sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in the law.

You may be seated.

I'll also note that this is consistent with sentences imposed by other judges from this district in financial fraud cases with either similar guidelines range, roles, and/or loss amount, including *U.S. v. Casper*, 19 CR 337; *U.S. v. Cervino*, 15 CR 171, and *U.S. v. Antoine*, 16 CR 763.

Now I'm going to impose financial penalties and inform you of the conditions of your supervised release.

With respect to supervised release, it's going to be for one year instead of three because you have been on release for six years already.

All the standard conditions of supervised release shall apply.

Mr. Schwartz, do you waive the public reading of the standard mandatory conditions, or would you like me to read

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APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22-539

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-three.

UNITED STATES OF AMERICA,

Appellee,

v.

JASON GALANIS, GARY HIRST, JOHN GALANIS, AKA YANNI, HUGH DUNKERLEY, MICHELLE MORTON, BEVAN COONEY,

Defendants,

DEVON ARCHER,

Defendant-Appellant.

IT IS HEREBY ORDERED, on the Court's own motion, that the government and Defendant-Appellant

Devon Archer shall file supplemental letter briefs, not to exceed two double-spaced pages in length, addressing whether the district court miscalculated the applicable Sentencing Guidelines range, and if so, whether Defendant-Appellant has forfeited his claim of error by raising the issue for the first time at oral argument. See *United States v. Pascarella*, 84 F.3d 61, 73 (2d Cir. 1996) (declining to consider a point first made at oral argument). The parties shall file their briefs by Friday, May 12, 2023.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe