18-3727

To Be Argued By:
BRENDAN QUIGLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 18-3727

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

DEVON ARCHER,

Defendant-Appellee,

JASON GALANIS, GARY HIRST, JOHN GALANIS, also known as Yanni, HUGH DUNKERLEY, MICHELLE MORTON, BEVAN COONEY,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Jurisdictional Statement

The United States of America appeals from an order, entered on November 15, 2018, in the United States District Court for the Southern District of New York, by the Honorable Ronnie Abrams, United States District Judge, granting defendant Devon Archer's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33.

The Government filed a timely notice of appeal on December 13, 2018. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 3731. The Solicitor General has authorized the prosecution of this appeal.

Statement of Issue Presented for Review

Whether the District Court abused its discretion in setting aside the jury's verdict as against the weight of the evidence under Rule 33.

Statement of the Case

A. Procedural History

Superseding Indictment S3 16 Cr. 371 (the "Indictment"), filed on March 26, 2018, charged Archer in two counts. Count One charged Archer with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371. Count Two charged Archer with 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.

Archer and two co-defendants also charged in the Indictment, John Galanis and Bevan Cooney, proceeded to trial before Judge Abrams and a jury. Trial commenced on May 22, 2018 and ended on June 28, 2018, when the jury convicted all three defendants of both counts.[1]

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[1] Four other defendants—Jason Galanis, Gary Hirst, Hugh Dunkerley, and Michelle Morton—were also charged in the same case, and each pleaded guilty prior to trial. Dunkerley pleaded guilty pursuant to a

Archer, along with the other trial defendants, moved for acquittal under Federal Rule of Criminal Procedure 29 and, in the alternative, for a new trial under Rule 33. By order dated November 15, 2018, the District Court denied the defendants' motions for acquittal, and denied Archer's co-defendants' motions for a new trial, but granted Archer's motion for a new trial.

B. Statement of Facts

As was essentially uncontroverted at trial, Jason Galanis ("Galanis") and others orchestrated a massive scheme to defraud a tribal entity, the Wakpamni Lake Community Corporation of the Oglala Sioux Tribe ("Wakpamni"), into issuing more than $60 million in bonds, the proceeds of which the schemers used not for a promised annuity but instead for their own personal use and to help build a financial services mega-company they would control. Wakpamni was not the only victim of the scheme. Also harmed were the investors upon whom the schemers foisted the bonds to generate cash.

By the time he launched the scheme, Galanis had already gained a measure of notoriety, and had been barred by regulators from serving as an officer or director of a public company. (Tr. 904-05).[2] Archer knew

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cooperation agreement with the Government, and testified at trial.

[2] "Tr." refers to the trial transcript; "A." refers to the appendix filed with this brief; "SPA" refers to the special appendix filed with this brief; "GX" refers to a

of Galanis's checkered past. (*See* A. 905-08; Tr. 2613-32). Yet Archer became a key player in the scheme. Had the scheme succeeded, he would have helmed the resulting conglomerate and, ultimately, reaped massive profits from its sale.

Archer facilitated the scheme in a number of ways. A company with which he was affiliated became the "placement agent" for three separate issuances of Wakpamni bonds. Another Archer-affiliated company financed the purchase of an investment firm, just in time to dump the unsaleable bonds onto the firm's unwitting clients (thereby negating the need for a true placement agent). Next, using proceeds from one Wakpamni bond issuance, sent to him by Galanis through intermediaries, Archer bought $15 million worth of another Wakpamni bond issuance, and used the bonds he purchased to prop up the placement agent's net capital. In trying to deposit the bonds, Archer falsely represented to two different banks that they had been purchased with "real estate" proceeds. For a third Wakpamni bond issuance, yet another Archer-affiliated company helped secure control of a second investment firm, which then dumped the entire issuance—$16 million worth—onto one of its institutional clients, without that client's prior knowledge or approval.

Government exhibit admitted at trial; and "Dkt." refers to a docket entry on the District Court's docket in this case. The transcript pages cited herein are reproduced in the appendix.

All of these facts, again, were essentially undisputed at trial.

What was disputed was whether Archer *knowingly* participated in the scheme or instead, as he argued, was simply a pawn in Galanis's game. The proof at trial established, to the jury's satisfaction and beyond a reasonable doubt, that Archer had the requisite *mens rea* and was guilty of both crimes charged. Specifically, the Government's case established the following:

1. The Scheme's Beginnings

In early 2014, Galanis, Archer, co-defendant Bevan Cooney, and others were working together to acquire and "roll up" financial companies into a conglomerate that they would control. (*See, e.g.*, Tr. 906-09, 1321; *see also* Tr. 2159-60 (Galanis and Archer were "business partners"); A. 1046 (Cooney describing Galanis as his "business partner")). Archer was to head the conglomerate, which was to be sold for profit. (*See* A. 915, 1102-70). But the plan lacked an important ingredient: capital. Archer and his business partners lacked the funds needed to acquire the companies that were to be part of their enterprise. (*See, e.g.*, A. 862-66).

Galanis proposed a solution to this problem: proceeds from a Native American tribal bond issuance. He sent Archer and Cooney an email telling 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 the municipal bonds" (A. 848), and attaching a letter from U.S. Department of the Treasury representative Bob Griffo to a representative of the

Oglala Sioux Tribe (to which Wakpamni belonged) regarding the tribe's application to issue development bonds. (A. 849-52). Cooney responded, copying Archer, "we will gladly help direct some of mr griffo[']s funds." (A. 853).

2. The Approach to Wakpamni

In March 2014, Galanis's father, John Galanis, attended a Native American development conference in Las Vegas, Nevada, and introduced himself—using the moniker "Yanni"—to the Oglala Sioux Tribe representative who had received Griffo's letter. (Tr. 1834-35). At the Las Vegas meeting, and over the next several months, "Yanni" proposed to the Oglala Sioux Tribe representative that Wakpamni issue bonds, the proceeds of which would be invested in an annuity. (Tr. 1836).

The representative understood from "Yanni" 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" Wakpamni's economic development projects on the Pine Ridge Reservation, one of the poorest areas in the United States. (Tr. 1828-29, 1836, 1850). John Galanis also told the representative that "[t]he payments would be guaranteed for the annual interest rate" to the bond investors and for annual payments to Wakpamni. (Tr. 1839). (The resulting bond documents would contain similar representations. (*See* A. 543-75 (annuity contracts for each bond issuance, stating that annuity provider "shall" make specified payments under the annuity)).)

John Galanis initially represented to the tribe that Wealth Assurance-AG, an actual insurance company that Archer, Cooney, Galanis, and others had acquired as part of their roll-up plan, would provide the annuity. (Tr. 911, 1840; A. 842-43). But the transactional documents ultimately identified the purported annuity provider as Wealth Assurance Private Client Corp. ("WAPC"), which was just a shell entity. (*See* A. 543-75). John Galanis falsely represented to the tribe and its counsel that WAPC was a "subsidiary" of Wealth Assurance-AG. (Tr. 183, 1014, 1852).

John Galanis also told the tribe and its counsel that the placement agent for the bonds would be an entity called Burnham Securities, and falsely represented that his son Jason worked as an investment banker for Burnham. (Tr. 150-51).

As plans for the Wakpamni bond issuance developed, and over the months to follow, the eagerness and greed reflected in Cooney's early remark that he would "gladly help direct mr griffo[']s funds" (A. 853) was echoed over and over again in communications between the three business partners—Galanis, Archer, and Cooney. All three knew that Wakpamni had been promised an annuity investment; two hours after "the Indians signed" their "engagement" with Burnham Securities, Galanis dutifully reported to Archer and Cooney that "[t]he use of the proceeds is to place the bond proceeds into a Wealth Assurance annuity." (A. 786). Galanis further reported that "annuity proceeds get invested by an appointed manager on a discretionary basis on a 20 year contract." (*Id.*). But no

such management occurred, because there was no annuity. (*See* Tr. 898, 1092; A. 620-26 (fake annuity statement)). Instead, as discussed below, the proceeds became the conspirators' slush fund. And that was also how they spoke of the funds amongst themselves—as a source of "discretionary liquidity" (A. 866; *see* A. 1024 ("more liquidity")), a "honey trail" (A. 895-96), and "liquid honey" (A. 1038; *see also* A. 902 ("excess honey")). On the eve of the first bond issuance, Galanis was writing to Archer and Cooney, "I[']m not counting the money yet," but "my primary objective is to get us a source of discretionary liquidity. sick of begging." (A. 866).

3. Securing Captive Investors for the Tribal Bonds

While John Galanis was inducing Wakpamni to issue bonds, Galanis, Archer, and Cooney were orchestrating another important aspect of the scheme: finding buyers upon whom to offload the bonds. Without buyers, there would be no cash—and no capital for the roll-up.

On May 9, 2014, Galanis alerted Archer and Cooney to an opportunity to acquire an investment firm named Hughes Asset Management ("Hughes"), which Galanis described as "possibly useful." (A. 854). As cooperating witness and co-conspirator Hugh Dunkerley testified at trial, the "primary reason" for pursuing this acquisition "was for the purchase of the bond issuances." (Tr. 933). Galanis's May 9 email attached resume and background information for co-conspirator Michelle Morton and another individual, who

would run Hughes after the contemplated acquisition. (A. 854-61).

Throughout the spring and summer of 2014, Galanis kept Archer and Cooney informed about the impending bond issuance and the Hughes acquisition. For example, Galanis informed Archer and Cooney that:

- a term sheet for the Hughes acquisition had been executed and Galanis "believe[d] Hughes would take $28 million of the Wakpamni bonds," to which Cooney responded, "West coast offense charging down the field!" (A. 871-72);
- "the Indians" had signed an engagement letter and it "maybe [sic] good" for Archer —whose reputation and connections the business partners sought to wield to their advantage—to make his association with the deal known to the law firm representing Wakpamni (A. 786);
- Wealth Assurance-AG had wired $2.76 million to close the purchase of Hughes (A. 875);
- a CUSIP had been issued for the bonds (A. 790-91); and
- two members of Wakpamni had "fully executed" the bond documents (A. 932).

Galanis's, Archer's, and Cooney's interest in these developments was clear: they anticipated taking con-

trol of Hughes, placing the bonds with Hughes's clients, and then using the proceeds generated from the bond sales to fund their own purposes—chiefly, their planned roll-up. (*See, e.g.*, A. 871-72 (email from Galanis to Archer expressing excitement at being able to invest $12-15 million from the Wakpamni bond issuance into Wealth Assurance-AG's parent company, which was not the purported "annuity" provider, but instead a roll-up entity in which Archer held millions of dollars' worth of stock and on the board of which Archer sat, *see* A. 1093-1101; Tr. 912)). Galanis even previewed for Archer his plan, upon closing of the issuance, to buy a Tribeca apartment in the name of an LLC bearing Archer's name and using Archer's business address (to avoid the scrutiny using his own sullied name would entail). (A. 869, 914).

The Hughes acquisition—a key step in turning the bonds to cash, through captive investors—closed on or about August 11, 2014. (*See* A. 875). Wealth Assurance-AG, the roll-up company with a name that sounded like the "annuity" provider, WAPC, financed the acquisition by wiring $2.76 million to Hughes. (*See id.*).

Also in August 2014, two other critical components of the scheme fell into place:

First, another roll-up company, COR Fund Advisors ("CORFA"), acquired a minority stake in the parent of the designated placement agent for the bonds, Burnham Securities. (*See* A. 1197-98). As a member of Burnham Securities' investment committee, Archer had approved that entity's role as placement agent. (Tr. 1007-11; A. 933-1019). And as an investor in

CORFA, he had been working to acquire Burnham Securities' parent since early 2014. (*See* Tr. 2607-13).

Second, a bank account was opened for the "annuity" provider, WAPC, with cooperating witness Dunkerley designated as the signatory. (Tr. 1013-14).

By mid-August 2014, then, all the pieces were in place: the conspirators controlled (i) Hughes, the entity whose clients would be used to purchase the Wakpamni bonds; (ii) Burnham Securities, the purported placement agent; and (iii) WAPC, the purported annuity provider.

4. Offloading the Bonds

On August 22, 2014, eleven days after the Hughes acquisition closed, Hughes purchased the whole $28 million worth of the first Wakpamni bond offering on behalf of nine Hughes clients. (A. 754-64). About $24 million worth of these clients' money was sent to the WAPC bank account over the ensuing days. (*See* A. 666, 1059). Burnham Securities, the purported placement agent, got a $250,000 "placement agent fee" —for no work. (*See* Tr. 1005; A. 863). Galanis got $1 million for his new Tribeca home. (A. 607, 667). Hughes's clients, meanwhile, were not informed of the bond purchases in advance, nor was it ever explained to them that their investment firm (Hughes), the placement agent for the bonds (Burnham Securities), and the entity reaping the proceeds from the bond sales (WAPC) were all controlled by related parties. (Tr. 1610, 1617, 1680-81). Once the clients learned of the bond purchases, they reacted "negatively across

the board," with many demanding that the bonds be sold immediately. (Tr. 2050).[3]

5. A Second Bond Issuance

"Immediately" after the first bond issuance, John Galanis proposed to Wakpamni that it issue a second round of bonds—allegedly because additional investors wanted to invest "right away." (Tr. 1853-54). John and Jason Galanis told Wakpamni's counsel that a "Burnham client . . . was excited about what had occurred with the first bond issue and wanted to be supportive" by purchasing more bonds. (Tr. 221). Wakpamni agreed, and, as with the first issuance, its attorneys received from John Galanis documents identifying the amount of the offering—$20 million this time—and explaining that the bulk of the proceeds would be used to purchase an annuity, again through WAPC. (*See* Tr. 1854-55).

Burnham Securities was again designated "placement agent" (Tr. 1023-24), but this time, the conspirators had a different plan for the issuance. Rather than use captive investors to offload the bonds and enjoy the resulting proceeds for their own projects, the schemers used the slush fund they had generated with the first issuance to buy the entirety of the second issuance and

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[3] These demands were futile, as the bonds were virtually unsaleable. (*See, e.g.*, Tr. 1616-17 (testimony of pension fund representative regarding inability to sell bonds)).

then used the *bonds* for their own purposes—all the while driving Wakpamni into further debt.

First, Galanis arranged to have $20 million of the proceeds that were sitting in the WAPC account transferred to an account controlled by Archer (who would take $15 million) and another account controlled by Cooney (who would take $5 million), and to have Archer and Cooney use that money to buy the entire second issuance. (*See* A. 1023, 1060-1072). Next, that same $20 million—which originated with the WAPC account—was sent right back to the WAPC account, for the purported annuity. (A. 1060-72).

The transfer of funds to Archer involved a complex set of steps, with funds flowing from the WAPC account to one of Galanis's companies, then from that company to attorney Clifford Wolff, and then to Archer's company, Rosemont Seneca Bohai LLC. (*See* A. 1023, 1060-66, 1073-76). Galanis explained to Archer in advance the mechanism for the payment: "we would need to wire cliff [*i.e.*, attorney Wolff] this week so he can wire you on Monday." (A. 1023). Galanis also confirmed for Archer in advance that the bonds, once purchased, could be deposited at Morgan Stanley. (*Id.*). To effectuate the bond purchase, Archer signed a representation letter, which was sent to Wakpamni, warranting that he was a sophisticated investor purchasing the bonds "for [his] own account and for investment only." (A. 618-19). Cooney signed a similar letter for his own bond purchase. (A. 616-17).

On the day of the bond purchase in October 2014, and over the next several days, Archer made a number

of false statements about the bonds and his relationship with Galanis—who, as noted, and as Archer knew, had a checkered past. (*See* Tr. 2613-31; A. 897, 905-08). First, Archer lied to Morgan Stanley in connection with depositing the bonds. Asked how the $15 million used to purchase the bonds had been generated, Archer responded, falsely, that "$15mm was generated through the sale of real estate." (A. 658-59). In a "Client Representation Letter" completed by the Morgan Stanley employee who communicated with Archer—and who testified at trial that she "would not have written something [in that document] that a client did not say" (Tr. 867)—the employee reported Archer to have said, "The funds used to purchase the bonds were from real estate sales through my business, Rosemont Seneca Bohai, LLC." (A. 660-63). Asked for "more detail about how [he] came to know of the [bond] purchase," Archer responded simply that he was a "shareholder" of Burnham Financial (Burnham Securities' parent), which "packaged the issuance." (A. 658-59). (After Cooney successfully deposited his own tranche of bonds at a different bank—a transaction that Cooney described as having gone off "without a hitch"—he commented to Archer, "Need to get you out of Morgan Stanley." (A. 787)).

Separately, in exploring a possible deposit of the bonds at Deutsche Bank instead, Archer lied to that institution. Asked how Archer's company had "come to own these bonds," Archer responded, "Real Estate Sale." (A. 781).

Needless to say, none of the proceeds of the second Wakpamni bond issuance were invested in the promised annuity. Archer and Cooney transferred the bonds they had acquired to two of their affiliated entities, propping up those entities' net capital. (Tr. 2082-99; A. 1060-72).[4] Cooney received $3.8 million from the WAPC account, and ultimately applied those funds toward acquisition of yet another roll-up company, Valorlife. (*See* A. 1073-76; *see also* A. 1025-27; Tr. 912-13).

6. Lies to the BIT Board

Meanwhile, right around this time, and to secure support for his and his partners' effort to consolidate control over the Burnham family of entities, Archer lied to the board of the Burnham Investors Trust (the "BIT Board") about Galanis's involvement with Burnham-related business. The conspirators needed the BIT Board to approve an acquisition of a Burnham subsidiary to further their roll-up plan. The BIT Board had raised serious concerns about Galanis's continued involvement in Burnham business, given Galanis's poor reputation. To that end, the board first sought from Archer "an iron-clad assurance that going forward [Galanis] will not be involved with any of the Burnham entities or their affiliated persons." (Tr. 2626). In response to this email request, Archer

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[4] The Financial Industry Regulatory Authority later determined that the Wakpamni bonds were not an allowable asset for either entity to use toward net capital requirements. (Tr. 2093-99).

responded, "Confirmed." (*Id.*). Later, on the very same day that he paid $15 million in cash sent by Galanis for Wakpamni bonds he later used in part to prop up a Burnham entity's net capital (*see* A. 1060-66; Tr. 2082-83), Archer warranted that:

> Jason Galanis will not be involved with any of the Burnham entities and their "affiliated persons" . . . as well as their successors or assigns at [Burnham Securities' parent company], Burnham, Burnham Securities . . . or the Trust. For the avoidance of doubt, Mr. Galanis will have no interest of any kind, direct or indirect, in any of the Burnham entities, and 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.

(A. 748).

Archer's representations were false and misleading; not only was Galanis-supplied money being used to buy bonds that would support a Burnham entity's net capital, but, as discussed below, Burnham Securities would shortly be acting, once again, as "placement agent" for a Wakpamni bond transaction that Galanis had spearheaded. Yet Archer told these lies to further his and his co-conspirators' roll-up project. What is more, as a fig leaf to cover Galanis's continued connection to the Burnham entities' business, Archer arranged a round-trip transaction, using Galanis's own

funds to "buy out" Galanis's interest in the entity that was acquiring Burnham Securities. (*See* A. 1171-82 (buy-out agreement); A. 627-57 (account statements for Archer's company showing inflow of $600,513 from Galanis-controlled entity and then payment of same amount to Galanis-related law firm); Tr. 3269-71).

7. The Third Issuance

In April 2015, the conspirators orchestrated yet a third issuance of Wakpamni bonds. The pattern of this issuance roughly mirrored the first: after John Galanis prompted Wakpamni to conduct the issuance, the schemers took control of an investment adviser, used that firm's clientele to offload the bonds and generate cash, positioned Burnham Securities as purported placement agent, directed the proceeds to the WAPC account, and then used the proceeds for their own purposes (and not a promised annuity for the benefit of the tribe). (*See* Tr. 277-78, 1858; A. 565-75, 576-88).

The investment adviser targeted and ultimately acquired this time was Atlantic Asset Management ("Atlantic"). Galanis alerted Archer and Cooney to the acquisition opportunity in August 2014, and provided regular updates to them about negotiations toward the purchase in early 2015. (*See* A. 891, 1045; Tr. 1032-33). Michelle Morton, the co-conspirator who had been hand-picked to run Hughes and was now to run Atlantic, emailed Galanis in October 2014—well before the acquisition was even consummated—to advise him that an Atlantic employee was reviewing Atlantic's client files "to determine where [the bonds] can be placed." (A. 892). Galanis forwarded this email

to Archer and Cooney soon after he received it. (*Id.*). When the acquisition finally closed, at a purchase price of approximately $6.1 million, it was structured as a merger between Hughes and Atlantic, financed by an entity of which Archer was a director and significant shareholder, and with a nearly $5 million guarantee of Atlantic's debts from that same entity. (*See* Tr. 912, 1032-33, 2051; A. 768, 1093-1101; *see also* A. 784-85 (email from Galanis to Archer and Cooney reporting delivery of guarantee and observing, "will be nice to have dry powder to fire"); A. 899 (email exchange of congratulations between Galanis and Archer over Atlantic transaction)).

Shortly after the acquisition, Atlantic bought $16 million worth of Wakpamni bonds on behalf of a single pension fund client, the Omaha School Employees Retirement System ("OSERS"), that was invested in Atlantic's Global Yield Opportunity Fund ("GYOF"). (*See* Tr. 645-56; A. 773-76, 900-901, 1077). Although OSERS was given no notice of the purchase—much less informed of the conflicts of interest plaguing the transaction (*see* Tr. 741-43)—the conspirators discussed the buy in advance. The day before, Galanis circulated to Archer and others the placement memorandum for GYOF, and noted a need to "finesse" a Kansas-city based Atlantic managing director who would have to be "marginalized" in connection with the proposed bond dump but seemed "agreeable." (A. 900). Archer asked about "get[ting] ahead of" that director, and Galanis responded that the plan appeared to be "winning hearts and minds through a full preppy assault . . . ." (*Id.*). That hurdle evidently having been

cleared, the conspirators were able to foist the tranche of bonds upon OSERS.

OSERS only learned of the purchase about a week after it happened, when Morton called to inform OSERS's representative of the transaction and of the overlapping relationships between the various entities involved, and to seek OSERS's after-the-fact approval of the buy. (Tr. 741-43). Morton acknowledged on the call that the Wakpamni bonds "did not fit within" GYOF's investment parameters. (Tr. 742). OSERS's representative refused consent for the purchase, saying, "[t]he reasons for GYOF **not** purchasing these bonds are so numerous that I won't go into them[.]" (A. 744 (emphasis in original); s*ee* Tr. 746; A. 777-80). But it was too late—Atlantic was unable to sell the bonds from OSERS's account. (Tr. 751).

Meanwhile, the proceeds from this purchase were sent to the WAPC account. (A. 1077). None went to the promised annuity. More than $5.4 million was used to acquire yet another roll-up company, Fondinvest (Tr. 1042; A. 1077)—a use that Galanis had previewed to Archer months before by reporting that he would likely help fund the Fondinvest acquisition with cash from "Indians." (A. 930-31 (email from Galanis to Archer reporting that co-conspirators had approached him with the Fondinvest acquisition and "they came to me for the money, which i have agreed to arrange/provide (probably Indians)"). Another $4.6 million went to another roll-up company, on the board of which Archer served, and to which he had transferred bonds purchased in the second Wakpamni issuance. (A. 1066, 1077; Tr. 375). Yet other of the proceeds went to

Hughes, to Cooney, and to entities controlled by another co-conspirator, Gary Hirst. (A. 666-67; Tr. 2161-62, 2165-67).

8. The Cover-Up

In the fall of 2015, the scheme unraveled. The annual interest payment on the first tranche of Wakpamni bonds became overdue. (Tr. 282). Ultimately, that payment was made, in Ponzi-like fashion, from funds contributed by Archer, another co-conspirator, and the proceeds of the third issuance. (*See* A. 1078-80). (Archer got partially repaid weeks later from entities that had received proceeds from the third issuance. (Tr. 2170-71)). But after this initial scramble, no further interest payments were made. (Tr. 281-83).

On top of these bourgeoning financial problems, Galanis was arrested on unrelated charges. (*See* A. 904; Tr. 2519-20).

Faced with these difficulties and the imminent threat of exposure, the conspirators worked to cover their tracks. They created a fake company, Calvert Capital ("Calvert"), to conceal the misappropriation of the bond proceeds. Calvert was not incorporated until October 1, 2015. (A. 847). But the conspirators created documents backdated to 2014 which made it look as if WAPC (the shell company that had been held out as the "annuity" provider, and the holder of the account into which all the bond proceeds had flowed) had invested in Calvert, and that Calvert, in turn, had lent Archer and Cooney $20 million to purchase Wakpamni

bonds. (A. 793-839 (fake Secured Loan Agreement between Cooney and Calvert), 845-46 (fake consent of WAPC to Calvert loaning $15 million to Archer's company)). Cooney produced one such faked document to the Securities and Exchange Commission in response to a subpoena. (A. 793-839, 1089). And although there was no evidence that Archer created the fake documents or handed them to regulators, he did wield the Calvert fiction to help cover up the fraud. He emailed an employee of a roll-up company that had taken possession of some of the bonds that Archer had purchased in the second issuance, in October 2014, instructing him the bonds "are to be replaced / returned to Calvert." (A. 912). When the employee sought clarification, Archer responded that "we would like to return these bonds to the lender and beneficial owner in the quickest orderly manner possible" (*id.*)—even though, when Archer bought his bonds in 2014, Calvert did not exist and (as Archer well knew) had no involvement in the bond purchase.

9. The Aftermath

In the end, as a result of the scheme, Wakpamni was left with over $60 million in outstanding debt, and the ten pension fund investors upon whom the Wakpamni bonds had been foisted together lost over $40 million. (Tr. 2950, 2956-57, 2959, 2964 (discussing GX 4003, 4004, 4005, and 4008); Tr. 752, 1686, 1862-63).

C. Closing Arguments and the Verdict

There was no dispute at trial that, as Archer's counsel put it, "there was a fraud here, there are victims, and actually there are two different kinds of victims." (Tr. 3846). The issue with respect to each of the trial defendants—Archer, Cooney, and John Galanis—was whether they *knew*, or consciously avoided learning, that they were participating in a fraud.

1. The Government's Summation

In summation, the Government walked through the wealth of evidence that Archer and Cooney, Galanis's business partners in the mega-company venture, knew that Wakpamni and the pension fund investors were being deceived—knew that the "annuity" promise was false and that the pension fund investors were being used as cash cows. (*See* Tr. 3625-26).[5] The Government acknowledged that neither Archer nor Cooney had reaped substantial personal gain—or any such gain, in Archer's case—by the time their fraud was discovered, but urged that "[t]he question is not what these defendants were holding when the music stopped; it is what they thought they were going to get when the fraud succeeded." (Tr. 3626-27). Archer, the Government emphasized, was to head up the entire conglomerate the conspirators were building with the bonds and the bond proceeds, and "expected a huge

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[5] Because John Galanis's role in the conspiracy was quite different from Archer's and Cooney's, the evidence concerning his knowledge was largely treated separately.

pay out when the Burnham roll-up was successful." (Tr. 3628).

The evidence of knowledge that the Government focused on in closing fell into eight categories: (1) email proof that Galanis kept Archer and Cooney apprised, in detail, of efforts to issue the Wakpamni bonds and to acquire Hughes and Atlantic as sources of captive investors for the bonds (Tr. 3630-34); (2) email and testimonial evidence that Archer, Cooney, and Galanis were close friends and business partners (Tr. 3635-39); (3) email communications between Galanis, Archer, and Cooney discussing how the Wakpamni bonds would furnish them with a source of "discretionary liquidity"—cash—to fund their roll-up project and, in the case of Galanis, his "nyc mansion," all against the backdrop of knowledge that Wakpamni had been promised its funds would be invested in an annuity (Tr. 3639-48); (4) the evidence establishing that Archer and Cooney got $20 million between them from Galanis days after the first issuance closed—money they had to have known was coming from the first issuance—and bought up the entire second issuance, using the resulting bonds to meet net capital for their roll-up entities (Tr. 3649-53); (5) proof that Archer and Cooney lied to their respective banks about where they had gotten the millions of dollars to buy the second tranche of Wakpamni bonds (Tr. 3653-61); (6) proof that Archer lied to the BIT Board about Galanis's involvement with the Burnham entities (Tr. 3661-69, 3674-77); (7) proof that Archer fronted a substantial part of the first interest payment on the Wakpamni bonds and then was reimbursed in part with bond proceeds (Tr. 3678-80); and (8) proof that Archer and

Cooney wielded the Calvert fiction to try to cover their tracks (Tr. 3680-83). The Government further argued that, even if this evidence did not establish affirmative knowledge, it certainly established, at a minimum, conscious avoidance of the key facts—that is, that the defendants "deliberately closed their eyes to what otherwise would have been obvious." (Tr. 3635).

2. Archer's Summation

Archer responded with what his counsel identified as "ten reasonable doubts that absolutely permeate the government's case" (Tr. 3846):

- (1 & 2) Archer did not know "what representations" were being made to Wakpamni or that conflicts of interest were not being disclosed to the bond investors because he had no contact with the victims of the fraud. (Tr. 3848-51).
- (3) Archer was cabined off from other alleged co-conspirators, including Dunkerley, and Galanis lied to him about how the venture was doing and repeatedly inserted intermediaries like Wolff into financial transactions to disguise money trails. (Tr. 3851-63).
- (4) Other participants in the scheme—Hugh Dunkerley and Francisco Martin especially—did not have contemporaneous knowledge that the $15 million Archer received was proceeds from the first issuance, and Galanis held himself

out as having the "trappings of wealth." (Tr. 3864-75).[6]

- (5) The evidence of Archer's lies—which was established in part through witness testimony—was not probative of guilt because: (a) the representations Archer made to the BIT Board were technically accurate and not, in any event, nefarious; (b) the Morgan Stanley witness's testimony that Archer must have told her the $15 million he used to pay for the second-issuance bonds came from his own real estate sales was mistaken; and (c) Archer could have believed the funds came from Galanis's real estate sales because Galanis allegedly had "significant real estate investments." (Tr. 3875-90).
- (6) Unlike Dunkerley, Martin, and Gary Hirst, Archer was not actively involved in the cover-up of the fraud after Galanis was arrested, and the jury should disregard his email communications naming Calvert. (Tr. 3905-15).

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[6] Addressing testimony from Francisco Martin that he, personally, deduced that the bond proceeds funded the acquisition of one roll-up company because "there was no other income . . . generated from Jason Galanis's business" (Tr. 2175), Archer's counsel posited that Martin was lying. (Tr. 3870-71).

- (7) The Government's case was "sloppy" and premised on "false evidence," including: (a) an "egregiously misleading" summary chart showing a $903,000 payment to Archer's company, Rosemont Seneca Bohai, that was made in error and later reversed (Tr. 3918-19 (discussing GX 4011 (A. 1081-84))); and (b) the purportedly false contention that Galanis's Tribeca apartment was paid for in part with bond proceeds. (Tr. 3915-24).
- (8) Galanis conveyed to others—Cooney and Dunkerley, principally—his desire to exploit Archer's political connections and reputation, and thus was using Archer. (Tr. 3924-29).
- (9) Archer lacked a motive to engage in the fraudulent scheme, and in fact suffered a net loss of over $800,000. (Tr. 3929-33).
- (10) The various emails in which Archer and Galanis and Cooney had referred to the bond proceeds as "discretionary liquidity" and the like were not evidence that "Devon knew that Jason Galanis was stealing the money"; these terms were consistent with ordinary assets under management and were not "somehow a code word for stealing the money." (Tr. 3934-38).

3. Rebuttal

The Government, in rebuttal, addressed the most significant of Archer's arguments:

While acknowledging that Archer stayed removed from the victims of the scheme, the Government noted that so, too, did Galanis—the admitted fraudster who had no contact with Wakpamni or the pension fund investors. (Tr. 4064-65). Like Galanis—and thanks to Galanis—Archer nonetheless had a detailed running account of what was happening with both sets of victims as plans unfolded. (Tr. 4066-67).

Next, the Government countered the suggestion that Galanis used lawyer intermediary Wolff to somehow shield Archer from the truth about the flow of the $15 million to be used to pay for the second-issuance bonds. In truth, Archer had visibility into this—Galanis planned with him in advance that the $15 million would come from Galanis through Wolff, and that the funds were to be used to buy bonds to deposit at Morgan Stanley. (Tr. 4067-68).

Responding to counsel's suggestion that Galanis appeared to have wealth and thus appeared capable of funding the $15 million for the second-issuance bonds through means other than first-issuance proceeds, the Government emphasized the many emails in which Galanis expressed his urgent need for "discretionary liquidity" and desire to avoid "begging" any longer, Martin's testimony concerning his understanding of Galanis's source of funds (*i.e.*, proceeds alone), and the clear evidence that Galanis was waiting for the bond

proceeds to fund his "nyc mansion." (Tr. 4068-72 (citing GX 2028 (A. 869))). (The Government also pointed out that, contrary to Archer's argument, that "mansion" was indeed paid for in part with bond proceeds. (Tr. 4071-72 (citing GX 225 (A. 595-615))). In light of all this, the Government argued, "Archer and Cooney knew that Jason Galanis didn't have $20 million to give them, much less $20 million to give them for free, no questions asked, absent that $28 million first Wakpamni issuance in August 2014." (Tr. 4069). At the very least, these defendants consciously avoided confirming the truth, when faced with a deal that was "filled with red flags." (*Id.*).

Addressing Archer's lengthy discussion of the BIT Board facts, the Government reiterated all the contemporaneous and continuing connections Galanis had to the Burnham entities' business immediately before, during, and shortly after Archer's false representations to the BIT Board. (Tr. 4074-81).

Relatedly, the Government reminded the jury of the details of Archer's lies to banks about the second issuance bonds, emphasizing Archer's specific representation that the funds came from *his own* real estate dealings, and further, in any event, noting the total lack of evidence that "Devon Archer had any reasonable belief that this money came from some real estate deal involving Jason Galanis." (Tr. 4083-86). The Government observed that the "proof" Archer tried to marshal to the contrary dated back nearly a year before and consisted principally of communications about a real estate circular. (Tr. 4083-84).

Concerning Calvert, the Government reiterated the uncontroverted point that "Calvert was not the lender and beneficial owner of the bonds" and indeed "didn't exist when [Archer] bought the bonds." (Tr. 4093). The Government further observed that Archer had no substantive response to this point. (*Id.*).

Finally, after addressing how little bearing *other* players' knowledge of the scheme should have on the question of Archer's own knowledge, and countering defense counsel's various criticisms of the Government's case, including his unfounded attack on the Government's summary chart showing money flow (Tr. 4094-4100; *see* GX 4011 (A. 1081)), the Government turned to Archer's argument that he was just being used by others. Here, the Government highlighted an early email between the business partners—Galanis, Archer, and Cooney—in which Galanis described the vision for their mega-company, touting "Archie's new 'enterprising' global profile," and noting this "[a]ligns the media and political stature Mr Archer now enjoys with the financial stature. Add the golden smile, and we could be massively effective." (A. 915; *see* Tr. 4100-01). As this email demonstrated, Archer was "well aware of what Jason Galanis want[ed] from him, and he continue[d] to do business." (Tr. 4100-01).

4. The Verdict

Following summations, the jury received its instructions and retired to deliberate. After less than three hours of deliberation, it returned with its verdict of guilty against all defendants on all counts.

D. Post-Trial Motions and the District Court's Order

All three trial defendants filed motions for acquittal and for a new trial, pursuant to Rules 29 and 33, respectively. On November 15, 2018, the District Court issued an opinion denying the motions for acquittal and denying John Galanis's and Cooney's motions for a new trial, but granting Archer's motion for a new trial. (SPA 1-55).

As relevant here, the court acknowledged that "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 [Archer], particularly because the primary issue was intent and the government presented a substantial amount of circumstantial evidence to that effect." (SPA 19). But Judge Abrams concluded that under Rule 33, which she understood as permitting a judge to "weigh the evidence and determine the credibility of witnesses" without "view[ing] the evidence in the light most favorable to the Government," relief was warranted. (*Id.* (quotation marks omitted)). In the court's view, "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." (SPA 20). Relatedly, Judge Abrams expressed concern at what she viewed as an insufficiently compelling motive theory for Archer, who never received any of the Wakpamni bond proceeds directly for his own personal use. (*Id.*). In sum, based on her view of the Govern-

ment's intent evidence, Judge Abrams expressed "substantial concern . . . that Archer lacked the requisite intent and is thus innocent of the crimes charged." (SPA 1).

As discussed below, in reaching these conclusions, the District Court drew many of the same inferences against the Government's case that Archer had urged upon the jury in closing—and that the jury necessarily rejected.

Summary of Argument

A jury convicted Devon Archer based on incontrovertibly reasonable inferences that established his guilt—including his guilty state of mind—beyond a reasonable doubt. The District Court accepted as much, and yet concluded, based on the inferences it thought *more* reasonable, that Archer might be innocent. That was an abuse of discretion. Archer is guilty. The evidence proved that beyond a reasonable doubt, and, in concluding otherwise, the District Court committed two related errors:

First, the court improperly usurped the jury's role by isolating each category of evidence and then drawing virtually all inferences therefrom against the Government. Not only did this approach contravene the governing legal standard, but the inferences the court chose to draw were not the more reasonable ones, particularly when considered in light of the evidence as a whole.

Second, the court ignored its own instruction to the jury that Archer's knowledge of the fraud could be proved by conscious avoidance, even suggesting at

times that the Government was required to adduce affirmative proof of Archer's having been *told* the facts that made the scheme a fraud. Viewing the evidence through the lens of conscious avoidance, and in its entirety, the District Court's vacatur of the jury's verdict becomes all the more untenable.

The Government respectfully submits that reversal is warranted.

ARGUMENT

POINT I

The District Court Improperly Usurped the Jury's Role

A. Applicable Law

Rule 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Given the deference owed to a jury's verdict, this Court has cautioned that district courts should exercise their Rule 33 authority only "'sparingly' and in 'the most extraordinary circumstances.'" *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)).

Thus, while a district court "may weigh the evidence," *United States v. Coté*, 544 F.3d 88, 101 (2d Cir. 2008), it "generally must defer to the jury's resolution of conflicting evidence," *United States v. McCourty*, 562 F.3d 458, 475-76 (2d Cir. 2009). "The court may

not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *United States v. Martinez*, 763 F.2d 1297, 1312-13 (11th Cir. 1985); *see also Coté*, 544 F.3d at 101 ("[T]he court may not wholly usurp the jury's role.").

Rather, where the grant of "a new trial is predicated on the district court's evaluation of the weight of the evidence rather than its concern about the effect of prejudicial acts that may have resulted in an unfair trial, . . . it [must be] quite clear that the jury has reached a seriously erroneous result," *United States v. Rivera Rangel*, 396 F.3d 476, 486 (1st Cir. 2005) (quotation marks omitted; alteration in original), and the evidence of innocence must "'preponderate[] heavily against the verdict,'" *Sanchez*, 969 F.2d at 1415 (quoting *Martinez*, 763 F.2d at 1313); *see also, e.g.*, *United States v. Conley*, 875 F.3d 391, 399 (7th Cir. 2017) ("A new trial is warranted where the evidence preponderates so heavily against the defendant that it would be a manifest injustice to let the guilty verdict stand." (quotation marks omitted)); *United States v. LaVictor*, 848 F.3d 428, 455-56 (6th Cir. 2017) (motion for new trial should be "granted only in the extraordinary circumstances where the evidence preponderates heavily against the verdict" (quotation marks omitted)); *United States v. Peake*, 804 F.3d 81, 95 (1st Cir. 2015) (applying "heavily preponderates" standard); *United States v. Knight*, 800 F.3d 491, 505 (8th Cir. 2015); *United States v. Mix*, 791 F.3d 603, 612 (5th Cir. 2015) (same); *United States v. Showalter*, 569 F.3d 1150, 1157 (9th Cir. 2009) (same); *Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004) (same).

In evaluating the evidence, moreover, the court is required "to review the record as a whole," rather than examine each item or category of proof in isolation. *See United States v. Bell*, 584 F.3d 478, 485 (2d Cir. 2009).

This Court "review[s] a district court's grant of a new trial for abuse of discretion." *United States v. Truman*, 688 F.3d 129, 141 (2d Cir. 2012). "There are, however, definite limits upon a district court's right to upset a jury verdict." *Rangel*, 396 F.3d at 486 (quotation marks omitted). A district court "'abuses its discretion when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision . . . cannot be located within the range of permissible decisions.'" *Truman*, 688 F.3d at 141 (quoting *United States v. Gonzalez*, 647 F.3d 41, 57 (2d Cir. 2011)). A district court similarly abuses its discretion when it grants a motion for a new trial in any but the most "extraordinary circumstances." *Coté*, 544 F.3d at 101 (quotation marks omitted).

B. Discussion

As noted, the Government's proof of Archer's intent fell into eight categories: email evidence establishing (1) Archer's detailed, contemporaneous awareness of the Wakpamni bond plan and the Hughes and Atlantic acquisitions, (2) the close business and personal relationships between Archer, Cooney, and Galanis, and (3) the plans the three business partners had for the bond proceeds; (4) Archer's purchase of the $15 million in second-issuance bonds; (5) Archer's lies to the banks; (6) Archer's lies to the BIT Board; (7) Archer's

fronting of part of the first interest payment on the bonds; and (8) Archer's wielding of the Calvert fiction.

In its treatment of each of these categories, and in its discussion of other "considerations" it believed supported a new trial (*see* SPA 19-21, 41-44), the District Court drew virtually every available inference against the Government and in favor of Archer. It repeatedly offered what it viewed as a "more reasonable interpretation" of an email (SPA 26), "a more natural inference" to be drawn (SPA 27), an understanding Archer "could easily" have reached (*id.*), a communication that "can also be read" to favor Archer's theory (SPA 32), and a "[m]ore likely" meaning of certain facts (SPA 35). This was not the proper approach under Rule 33.

As this Court has observed, "the question of [a defendant's] intention is primarily one of inference from his actions, and thus one especially suited for resolution by a trial jury." *United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2009); *see also United States v. Anderson*, 747 F.3d 51, 72 (2d Cir. 2014) (emphasizing "that the high degree of deference we afford to a jury verdict is especially important when reviewing a conviction of conspiracy . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel" (quotation marks and internal citation omitted)). Accordingly, a district court cannot grant a Rule 33 motion simply because it "interpreted the facts differently" from the twelve jurors. 584 F.3d at 485 (reversing

grant of new trial). So, for example, when witness credibility is at issue, a district court cannot simply substitute the jury's assessment of credibility with its own, but may grant a new trial only if the testimony "is patently incredible or defies physical realities." *Sanchez*, 969 F.2d at 1414; *see also Coté*, 544 F.3d at 101. This accords with the general rule that a district court cannot "set aside the verdict simply because it feels some other result would be more reasonable." *Martinez*, 763 F.2d at 1312-13; *accord United States v. Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008). The District Court's approach in this case contravened these principles.

Moreover, the District Court's assessment of the evidence was not, in fact, "more reasonable" than that of the twelve jurors who sat through this six-week trial and paid remarkably close attention to the evidence as it came in. (*See* Tr. 3939-40 (Archer's counsel commenting on the "precision" and "attention to detail" that the jurors had exhibited)). That is particularly true when one considers the evidence as a whole. The District Court acknowledged it had an obligation to consider the entire picture (SPA 44), but instead executed its analysis by isolating each category of evidence and neutralizing it in turn.

1. Inferences from the Email Evidence

Addressing the three categories of email evidence, the court concluded that the "language in the emails [was] facially innocuous or, at best, naturally subject to innocent interpretations" and thus "more probative

of Archer's innocence" than his guilt. (SPA 25). That was not a fair assessment of this evidence.

a. The "Liquidity" and Tribeca Apartment Emails

Judge Abrams discounted the emails in which the conspirators described the bond proceeds as "discretionary liquidity," "liquid honey," and the like because they did not necessarily reflect an understanding that the partners were "*stealing* the bond money" (SPA 26 (emphasis in original)), and might instead have struck Archer as consistent with the concept of an annuity, which Galanis had described to him in an early email as involving investment "on a discretionary basis." (SPA 26-28 (citing GX 1235 (A. 786))). This reasoning at once overstates the Government's argument to the jury and embraces an untenable theory about Archer's understanding.

The Government argued that these emails reflected not an open and notorious acknowledgement of out-and-out theft, but an understanding between Galanis, Archer, and Cooney that they could use the bond proceeds to further their roll-up—to invest at their discretion. The Government further argued that that understanding was flatly inconsistent with the conservative annuity investment that all three knew had been promised to Wakpamni. Archer, responding to these arguments before the jury, sought to downplay the communications' nefariousness, arguing that there was nothing wrong with a manager having discretion to invest funds generally. (Tr. 3935-37). He also simply denied awareness of the representations that had been

made to Wakpamni. (Tr. 3851). But the District Court, while apparently (and properly) accepting the evidence that Archer knew of the annuity representations, nonetheless reasoned that he could have reconciled those representations with the notion that he and his partners could use the proceeds as they wished. (SPA 26-28). That was an unreasonable inference to draw.

Relatedly, the court dismissed the email evidence that Archer knew, at a minimum, that Galanis would be using bond proceeds to finance his Tribeca apartment purchase—a use flagrantly inconsistent with any kind of "annuity," whatever discretion its manager might be afforded. (*See* SPA 26, 31-32). On July 11, 2014, Galanis forwarded Archer an email with the "Wakpamni Lake Community Corporation Distribution List" and the comment, "close, archie [-] target close is July 31." (A. 869). Archer responded by saying "[f]rom your lips to Gods ears! July 31 is right around the corner!" (*Id.*). And then Galanis, minutes later, wrote back, "So close[.] Cliff [Wolff] is running the stall for me on nyc mansion[.] I want to be here and won't live in 1750 square foot cage[.] Massively motivated." (*Id.*). This email chain—a discussion of the purchase of a "nyc mansion" in the context of the bond transaction—is strong proof that Archer knew Galanis intended to use the bond proceeds other than for an "annuity" benefitting Wakpamni. And, in fact, Galanis did use a portion of the bond proceeds to buy an apartment in Tribeca, through an entity called "Archer Diversified"—a borrowing of Archer's name (and associated business address) to which he alerted Archer in advance. (A. 595-615, 914).

Addressing this evidence at trial, Archer argued that Galanis did not, in fact, use the bond proceeds to buy the Tribeca apartment, but instead used proceeds from another crime. (Tr. 3922-23). That was incorrect, as Government explained in rebuttal. (Tr. 4071-72).

In discounting this evidence after trial, Judge Abrams embraced a different explanation, describing the chain 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 [Wakpamni]*)." (SPA 32 (emphasis added)). But there was no record support for this alternative explanation. There was no evidence that Galanis "might legitimately earn [money] from the bond deal," particularly given that he had no official, disclosed role with any of the entities involved in the transaction. Similarly, there was no evidence that Galanis or Archer anticipated that Galanis would somehow receive legitimate "fees later generated as a result of the anticipated investment on behalf of [Wakpamni]." (*Id.*). To the contrary, there was abundant evidence, including of Archer's lies to Morgan Stanley, Deutsche Bank, and the BIT Board, that Archer sought to *conceal* Galanis's involvement with the Wakpamni bonds. The District Court's preferred inference was therefore unfounded. *Cf. United States v. Bertling*, 510 F.3d 804, 809 (8th Cir. 2007) (reversing grant of new trial where, *inter alia*, district court's characterization of conversation between co-conspirators as "innocent [was] without foundation").

It was paired, moreover, with a flawed assessment of the evidence concerning Archer's understanding of Galanis's source(s) of funds. The court stated that it found "unpersuasive" the Government's argument that Archer had to have known Galanis needed to use the bond proceeds to fund his projects, including his Tribeca apartment, because "Jason Galanis successfully misled virtually every person he met into thinking he was immensely wealthy and successful." (SPA 32). The only evidence the court cited to support this conclusion was not anything communicated to Archer, but co-conspirator Francisco Martin's testimony agreeing that, "generally speaking, [Galanis] had all of the trappings of success and wealth." (Tr. 2306). But Martin was not copied, as Archer was, on the various emails in which Galanis: expressed his "massive[ ] motivat[ion]" to get the Wakpamni deal done so that he would have his "nyc mansion" (A. 869); said he was "sick of begging" for "discretionary liquidity" (A. 866); conveyed anticipation at having "dry powder in our control soon" (A. 867); and said he was "laser focused on summer cash hole, and discretionary" (A. 862). And Martin specifically testified that he believed Galanis's investment in one of the roll-up companies, Fondinvest, was funded "from bond proceeds," because "*[t]here was no other income that was generated from Jason Galanis' businesses*." (Tr. 2175 (emphasis added)). Once again, the inference the District Court chose to draw—the one it deemed more reasonable than the one the jury drew—is by far the weaker of the competing inferences.

b. The Update Emails

Turning to the email evidence showing that Archer was kept apprised of developments with the Wakpamni bond project and the Hughes and Atlantic acquisitions, the District Court dismissed these as "simply status updates" about matters that were not "inherently illegal or illegitimate." (SPA 29, 30). But this conclusion reflects a failure to consider the evidence in context and as a whole. The Government adduced this proof to establish important—albeit not individually dispositive—facts about Archer's state of mind. The "simpl[e] status updates" showed that Archer knew of the Wakpamni deal before it happened, knew what promises had been made to Wakpamni, knew about the plans to acquire Hughes and Atlantic for the purpose of securing a captive class of purchasers for illiquid bonds, and knew the deep involvement of Galanis—a person with a "well-documented checkered past" (SPA 35)—in all aspects of the scheme. This evidence was obviously probative of Archer's guilt, even if no single email, standing alone, established that guilt.

The email traffic concerning Hughes and Atlantic, viewed collectively and against the backdrop of other evidence, was particularly telling. The court acknowledged that Archer was presented with communications showing the investment firms' acquisitions were "motivated by a desire to locate purchasers [for] the [Wakpamni] bonds," but then dismissed these emails as failing to contain any "indication . . . 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." (SPA 30-31). Yet no such express "indication" was needed. By its very nature, a plan to purchase an investment adviser for the purpose of offloading bonds into its clients' accounts so as to generate cash for one's own business ventures presents inherent conflicts. As was well established at trial, investment advisers are bound by fiduciary duties to act solely in the best interest of their clients. (Tr. 1634). That means guiding a client's investments based on the client's needs and preferences—not trolling client accounts before a merger even goes through to identify easy targets for transforming illiquid tribal bonds to cash, all the while brainstorming ways to "get ahead of" management who might question your motives. (*Cf.* A. 900). Against the backdrop of this obviously suspicious plan, the notion that Archer believed its architects—led by a man with a checkered past—would scrupulously disclose their conflicts defies common sense. It becomes all the more inconceivable when one considers the lies that Archer himself told—to two banks and the BIT Board—to disguise the true players behind the scenes in various transactions.[7]

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[7] Relatedly, the District Court erred in suggesting that "certain of the conflicts" relating to Dunkerley's involvement with the "annuity" provider and the placement agent, Burnham Securities, "were apparently disclosed" because they were mentioned in a private placement memorandum. (SPA 30 n.21). As trial testimony established, this was merely a draft memo for the final tranche of bonds, issued in April

2. Evidence Concerning Archer's $15 Million Bond Purchase

Although the Government did not offer direct evidence that Archer knew the $15 million he used to buy Wakpamni bonds in the second issuance constituted proceeds from the first issuance, it did present substantial circumstantial evidence of that knowledge. As Archer knew, the first issuance had closed just two weeks before he and Galanis and Cooney started planning the $20 million purchase of the entire second issuance. Suddenly Galanis, who just months before had been bemoaning to Archer a lack of "discretionary liquidity" (A. 866) and praying for the close of the first issuance so that he could purchase his "nyc mansion" (A. 869), had $15 million on hand to give Archer to buy bonds and another $5 million to give Cooney for the same thing. Galanis also previewed for Archer the suspiciously complex structure for the transfer of the $15 million: the funds would travel through intermediaries, including Wolff, and land with one of Archer's companies before being paid out to buy the bonds. (A. 911, 1024; *see also* A. 877-79, 880-83, 909-10). What is more, Archer personally lied to Wakpamni about what was going on here: he certified that his company was a sophisticated investor and was purchasing the securities for its own account. (A. 618-19). Later, Archer lied to two banks, telling them he had purchased the bonds with proceeds from "real estate." (A. 658-59, 660-65,

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2015, which was not finalized. (Tr. 273-74). There was no evidence that this draft was ever provided to investors or that Archer saw it.

781-83). Viewed as a whole, this evidence strongly supported the inference that Archer knew the $15 million Galanis had provided him was derived from the first issuance.

In rejecting that inference, the District Court favored the competing suggestion—which Archer had pressed to the jury, unsuccessfully—that Galanis *hid* the provenance of the funds from Archer in part by structuring a complex funds flow. (SPA 22-24). To support its inference selection, the court pointed to Hugh Dunkerley's testimony that he was unaware of the provenance of the $15 million until he looked at the WAPC account statements—statements Archer presumably did not see, since he was not a signatory on the account. (SPA 23-24). The District Court's analysis on this score does not hold up.

First, the theory that Galanis structured the $15 million transaction to deceive Archer—as opposed to law enforcement—was contradicted by proof that Galanis laid out his plan for Archer in advance. Unlike Dunkerley, who had a completely different role in the conspiracy and was not copied on Galanis's various emails spelling out the funds flow, Archer was brought into the loop in advance. While there was no evidence he was told that the funds originated with the WAPC account, it was clear he knew that steps were being taken to disguise their provenance. (*See* A. 1023).[8]

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[8] The District Court said that "[i]t was only" after Wolff, "an attorney who represented [Jason] Galanis in various transactions," wired funds to Rosemont

Second, there was no evidentiary basis to use Dunkerley's state of mind as a surrogate for Archer's

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Seneca Bohai that Archer received the money—suggesting that Archer was somehow kept in the dark by Galanis and Wolff about the flow that preceded this. (SPA 22-23). But, as noted, Archer knew ahead of time that the money would be coming from Galanis to Wolff and on to Archer's company. And although Wolff represented Galanis at times, he was also Archer's attorney. Indeed, in extensive pretrial litigation over privilege issues, in which Archer largely prevailed, Archer claimed privilege over his communications with Wolff, including in Archer's personal capacity. (*See, e.g.*, Dkt. 313, Ex. A at 7, 10, 19).

Relatedly, the court committed two other errors in its factual recitation of the events surrounding the $15 million transaction: (1) it said Dunkerley testified that his visit to the bank to conduct an in-person funds transfer, without wires, "was the only occasion on which Dunkerley effected a transfer from the WAPC account in this manner" (SPA 23), when in fact Dunkerley testified it was "not" the only occasion (*see* Tr. 1517); and (2) it suggested that Dunkerley's leg of the transaction was "accompanied by" a cover-up email "ghost-written by Jason Galanis" and intended to deceive Archer (SPA 23), when in fact the email came weeks after the transaction had been planned by Galanis and Archer (*compare* A. 737 (withdrawal slip dated 9/23/2014) and A. 1192 *with* A. 1023 (9/8/2014 email from Galanis to Archer discussing wiring funds through Wolff)).

—for inferring that, if Dunkerley did not become aware of the $15 million's provenance until he looked at the WAPC bank statements, then Archer, who did not see those statements, must have remained in the dark. (SPA 23-24). Dunkerley's role in the conspiracy was to act as Galanis's gopher—effectuating bank transfers at Galanis's direction and standing in for Galanis at Hughes and Atlantic. (Tr. 939, 946-47, 1019-22, 1029-31). He never even met Archer. (Tr. 909).

Finally, and more broadly, in rejecting the inference that Archer knew the $15 million came from the first issuance, the District Court failed to consider the whole picture of the Government's circumstantial proof—including, most notably, the proof of Archer's lies to two banks about the provenance of the funds, and his lie to Wakpamni about his intentions in buying the second-issuance bonds. As to the bank lies, the court addressed them—and dismissed them—in a stand-alone section later in its opinion (discussed below), apparently without considering the powerful interplay between the proof of the $15 million transaction itself and what Archer was telling the banks about that transaction. Here was a man being handed $15 million from a person of ill repute who had been eagerly and loudly anticipating an influx of "discretionary liquidity" generated by a bond issuance, receiving the funds through a suspiciously complex transaction just weeks after that issuance closed. If that were not enough to establish Archer's knowledge of the funds' provenance, the fact that he was telling lies about that very provenance mere days later certainly tipped the scales.

As for Archer's false representation to Wakpamni that he was a sophisticated investor buying the bonds for his own account (A. 618-19), the court dismissed that fact in a footnote. (SPA 24 n.18). The court's reasoning was that the Government could rely on this evidence only if it independently proved Archer acted "with the requisite intent." (*Id.*). But that is not how evidence is to be evaluated, particularly under Rule 33; like all the other evidence of Archer's intent, this was a piece in the puzzle that the jury was entitled to consider, and that the District Court should have considered, in context, before vacating the verdict.

3. Inferences from Archer's Lies to Banks and the BIT Board

The District Court found the evidence of Archer's lies to banks and to the BIT Board "damaging," and acknowledged that his conduct was "deceptive" and "troubling," but concluded that the lies did not "lead to" what it described as the "ultimate conclusion necessary for Archer's guilt: that he was misleading because he knew Galanis was stealing the bond proceeds." (SPA 33, 37). This, again, reflected a failure to fairly weigh the competing inferences in light of the evidence as a whole.

First, the District Court's analysis of Archer's lies to the banks proceeded from an unsupported premise: it credited as "fair argument[ ]" the imagined fact, argued to the jury but grounded in no record evidence, that Archer's lies about the provenance of the $15 million were "accurate in his view because he was merely repeating lies Jason Galanis had told him about the

source of the funds." (SPA 33; *see also id.* at 35 (crediting that "Archer may well have repeated a lie told to him by Galanis")). There was no proof of this, and no proof even that Galanis told *others* the funds came from real estate. The court offered record citations to accompany its assertion that "Galanis specifically held himself out as having made money from real estate" (SPA 35 (citing Tr. 480, 924, 1417-18, & 2305)), but the cited testimony does not support that proposition. To the contrary, at one of the transcript pages, the witness reported that he "didn't know that [Galanis] had real estate investments." (Tr. 2305).

More fundamentally, as discussed above, the evidence showed that Archer's lie to Morgan Stanley, at least, was *not* that the $15 million came from real estate transactions generally (much less Galanis's real estate transactions), but rather that it came from Archer's own real estate sales. (A. 660-65; Tr. 799-801, 867-68). To blunt this evidence, the District Court noted Archer's unsupported argument—to the jury and in his Rule 33 motion—that "he did not actually provide this information" and the Morgan Stanley witness "must have assumed that any transactions generating the funds had been completed by the entity on whose behalf the bonds would be custodied, RSB." (SPA 33-34). That was not "fair argument[ ]" (SPA 34); it ran contrary to the only available evidence, which included the witness's testimony that she would not have written down something the client did not tell her. (Tr. 867). In this instance, the District Court did not just draw the weaker inference—it drew an impermissible one.

The court's treatment of Archer's lies to the BIT Board was likewise at odds with the record. The court was correct in noting that these lies were about Galanis's involvement with the Burnham entities, and not directly about the Wakpamni bond scheme. (SPA 34). But there was no record support for its speculation that Archer was motivated to lie simply because be "wished to retain the Trust as a client." (SPA 34). The evidence, which Archer did not meaningfully dispute at trial, was that Archer needed BIT Board approval for the acquisition of a Burnham subsidiary as part of the roll-up plan. (*See, e.g.*, Tr. 2608). Nor was there any record support for Archer's suggestion that he told his lies on "advice of counsel"—a suggestion the court evidently credited. (*See* SPA 34 ("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 [at Burnham] in certain capacities.")). In fact, when the Government sought to introduce an email between Archer and one of his attorneys relating to a draft letter to the BIT Board, Archer argued that the email should be excluded because it was privileged and had been produced inadvertently; the district court agreed. (Tr. 2469 (excluding GX 1401)).

In any event, contrary to the court's suggestion, the Government never argued that the BIT Board lies themselves established that Archer "knew Galanis was stealing the bond money." (SPA 37). Instead, the Government urged the jury to "[t]ake a look at the pattern, a pattern of lies over a period of months and, indeed, in some cases, with the BIT Board over a period of years about the bonds and about Jason Galanis."

(Tr. 4074). The Government explained that Archer's pattern of lies was "devastating because what it says about Archer's relationship with Jason Galanis, what Archer knew about Galanis' past are red flags that had been raised about Galanis during the time period when Archer was engaging in these bond transactions." (Tr. 4074).

4. Inferences from Archer's Cover-Up Actions: Fronting the Interest Payment and Employing the Calvert Fiction

As discussed above, when the scheme fell apart in the fall of 2015, Archer paid $250,000 to the purported annuity provider, WAPC, so that it could make what looked like an interest payment to the bondholders. He also instructed a third party to "replace[ ] / return[ ]" the Wakpamni bonds he had purchased in the second issuance "to Calvert," a fake entity created in 2015 by the conspirators to attempt to cover up the bond fraud. (A. 912). In giving this instruction, Archer falsely represented that "we would like to return these bonds to the lender and beneficial owner in the quickest orderly manner possible." (*Id.*). Archer, who had himself purchased the bonds directly, of course knew there was no original "lender and beneficial owner" to which they could be returned. This was powerful evidence of Archer's culpable state of mind.

Yet the District Court, again, drew all inferences against the Government from this evidence. And its reasons for doing so do not withstand scrutiny.

The court dismissed Archer's contribution to the interest payment on the basis that "it was relatively

common for Archer to supply liquidity to entities with which he was affiliated." (SPA 38). But Archer was not affiliated with WAPC, and there is no competent evidence to suggest he believed he was. The District Court sought to fill this gap with Hugh Dunkerley's testimony that, "to the best of his knowledge," Dunkerley was the "only member of the [Wealth Assurance Holdings] Board" who understood that WAPC was unconnected to Wealth Assurance Holdings—an entity with which Archer *was* affiliated. (SPA 38). But Dunkerley had no way of knowing what Archer knew. (*Cf.* Tr. 1460 (District Court sustaining Government's objection to Archer's questioning of Dunkerley about board's knowledge generally)). The evidence showed that Archer paid $250,000 to an entity with which he indisputably had no affiliation. The inference that he did so to prop up the scheme with an apparent interest payment is strong.

The District Court's treatment of the Calvert evidence was even more strained. It dismissed this proof on the ground that those who created the fake Calvert documents (Dunkerley and Martin) did not discuss Calvert with Archer, and Martin did not know Calvert was a fake entity. (SPA 39-40). Neither of these facts undercuts the affirmative proof of Archer's complicity in the Calvert cover-up: Unlike Martin, Archer was directly involved in securing the subject bonds in 2014, and therefore knew that "Calvert" was not "the lender and beneficial owner" of the bonds to whom they ought to be "returned" (A. 912). Archer, therefore, clearly understood that he was misrepresenting facts when stating the opposite in 2015. That he may not have discussed Calvert with Martin or Dunkerley is neither

here nor there; clearly, he came to understand that he should lie about Calvert being the original owner of the bonds, and he acted accordingly.

5. The Other "Considerations"

As bookends to its alternative assessment of the evidence, the District Court identified several other "considerations" it suggested supported a new trial. (*See* SPA 19-21, 41-44). None does.

First, the court stated that the Government was unable "to articulate a compelling motive for Archer to engage in this fraud." (SPA 21). But the Government's theory was the same throughout the trial: Archer and his co-conspirators wanted "money to fund their business empire." (Tr. at 54 (opening); *see also* Tr. 3650 (summation, arguing that Archer and Cooney used bonds to prop up their entities' net capital)). Archer was to be the head of the conglomerate that he and his partners were piecing together. He stood to gain an enormous amount if the scheme succeeded and the mega-company was sold at the massive profit the group anticipated. That Archer was caught holding the bag—to the tune of an $800,000 personal deficit—"when the music stopped" was not, as the Government argued, an indication that he had nothing to gain from the scheme. (Tr. 3626-27).

Second, and relatedly, the District Court was mistaken in its related criticism of the Government for allegedly advancing and then retreating from "a theory that Archer profited by way of $700,513 in misappropriated proceeds he received from" an entity controlled by Galanis. (SPA 21 n.17; *see also id.* at 42-44). The

Government never advanced such a theory. The evidence the court cited to support its criticism was one chart summarizing the flow of misappropriated bond proceeds out of an account held by Galanis's company. (*See* A. 1085). The chart showed the flow of funds to Cooney and Wolff and Rosemont Seneca Bohai in connection with the second Wakpamni issuance. (*Id.*). It in no way suggested these were *profits* or *gains* kept by the recipients.

Third, and similarly, the District Court unfairly criticized another of the Government's summary charts—the same one that Archer's counsel had characterized as "egregiously misleading" and picked apart, in great detail, before the jury. (SPA 42-43 (discussing GX 4011); *see* Tr. 3918-19). What Archer—and the District Court—criticized about this chart was that it depicted a flow of money to Rosemont Seneca Bohai, Archer's company, that was the product of a bank error and reversed a few days later. But that flow was accurate, and the chart was not misleading. To the contrary, the chart stated on its face: "wire reversed." (A. 1084). And the FBI agent who testified about the chart explained why the wire was reversed: it was a mistaken interest payment to a party, Rosemont Seneca Bohai, that no longer held the bonds on which interest was due. (Tr. 2970). If the record had been at all murky, it was clarified on cross-examination, when the agent affirmed "that RSB had received the money in error" as a result of "an internal mistake late rectified by the bank." (Tr. 3063-64; *see also* A. 1183-91). And, of course, this issue was thoroughly hashed out before the jury, which cannot have been left with any misimpression.

Finally, the District Court misstepped in crediting Archer's overarching narrative that he was duped and used by Galanis. (SPA 41-42). Far from being kept "in the dark" (SPA 41), Archer was kept apprised with accurate, up-to-date information about the Wakpamni bond plan and the investment adviser acquisitions—he and Cooney were Galanis's business partners, and they knew, in detail, what was going on. Moreover, while it is true that Galanis wielded Archer's credentials to further his own interests (*see* SPA 41), Archer was aware of this, and the "burnishing" was for their joint benefit as business partners. Archer willingly operated as a front for Galanis—most notably, in his purchase of $15 million in bonds from the second issuance. Archer knew that Galanis was using Archer's "cache [sic]" to buy a condo. (A. 914). And, in a June 2014 email regarding the Wakpamni bonds, Galanis told Archer that it "maybe [sic] good for [the law firm representing Wakpamni] to know that you are associated with the insurance company at the right moment." (A. 786). Galanis and Archer both knew Archer's value, and both used it.

POINT II

The District Court Abused Its Discretion By Failing to Consider Conscious Avoidance

The evidence of Archer's knowledge was established by the eight categories of evidence detailed above, and the District Court's treatment of each category—and of the proof as a whole—was flawed for all the reasons discussed above. But another error perme-

ated the court's analysis: a failure to consider the doctrine of conscious avoidance, which was argued to the jury (*see* Tr. 3634-35, 4069) and charged in the jury instructions (*see* Tr. 4177-78). That error independently supports reversal.

A. Applicable Law

A conscious-avoidance instruction "is warranted (i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (ii) the appropriate factual predicate for the charge exists[.]" *United States v. Lange*, 834 F.3d 58, 76 (2d Cir. 2016) (quotation marks omitted). "To establish a factual predicate, there must be evidence that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Id.* at 78 (quotation marks omitted). In the context of a conspiracy charge, "the conscious avoidance doctrine may be invoked to satisfy the requirement that a defendant know of the unlawful aims of the conspiracy." *United States v. Svoboda*, 347 F.3d 471, 478-79 (2d Cir. 2003).

B. Relevant Facts

Citing the "red flags" surrounding Archer's $15 million bond purchase, Judge Abrams properly concluded at the charge conference that a conscious avoidance instruction was warranted:

> Mr. Archer was given $15 million by Jason Galanis to purchase the second tranche of [Wakpamni] bonds, which particularly given Galanis' role in setting up the bond issuances, seems unusual to say

> the least. Those funds were, in fact, recycled bond proceeds from the first issuance of bonds. After purchasing the bonds, they were transferred to [a roll-up entity], . . . which that entity used to meet net capital requirements. These are the sorts of red flags about the legitimacy of the transaction that may be used to show both actual knowledge and conscious avoidance.

(Tr. 3587). Accordingly, the court charged the jury that, "[i]n determining whether a defendant acted knowingly with respect to the objectives of the conspiracy or the substantive crime, you may consider whether that defendant deliberately closed his eyes to what otherwise would have been obvious to him." (Tr. 4177). The court further instructed that

> if you find beyond a reasonable doubt that the defendant you are considering was aware that there was a high probability that a material fact was so, but that the defendant deliberately and consciously avoided confirming this fact, such as by purposely closing his eyes to it, or intentionally failing to investigate it, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

(Tr. 4178).

As the court would later reaffirm, in the same opinion containing its Rule 33 ruling, this instruction was

appropriate because Archer's "extensive involvement . . . in transactions that were central to the execution of the criminal conspiracy and . . . various misleading statements [Archer] made" were "'so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances [may] establish[] the defendant's purposeful contrivance to avoid guilty knowledge.'" (SPA 55 (quoting *Svoboda*, 347 F.3d at 480)). (These observations, made in connection with the conscious avoidance instruction, render inexplicable the court's suggestion, in connection with the Rule 33 motion, that there were "no . . . clues" for Archer that the bond proceeds were being used in a manner inconsistent with the annuity promised to Wakpamni. (SPA 20).)

And yet, in granting Archer a new trial, the court entirely disregarded the possibility of conscious avoidance. Instead, throughout its analysis, the court proceeded from the premise that positive knowledge was required. For example, discussing Archer's purchase of the second tranche using funds provided by Galanis, the District Court stated:

> 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 [Wakpamni] deal was a fraudulent scheme.

(SPA 36 (emphasis added); *see also id.* (citing lack of evidence that Galanis "admitted . . . to Archer" that the bond proceeds had been misappropriated)).

C. Discussion

The District Court's error in disregarding conscious avoidance fatally infected its analysis of the evidence of Archer's knowledge—in particular, the evidence surrounding his $15 million bond purchase. Had the court acknowledged, as it did at other points, the many red flags with which Archer was presented alerting him to the suspicious provenance of the $15 million he received from Galanis through a deliberately complex transaction, just weeks after the first issuance, the court could not have concluded that the $15 million purchase evidence was unpersuasive proof of knowledge. The absence of proof that Archer saw a WAPC account statement or heard from Galanis's mouth that the $15 million came from the first issuance simply is not dispositive—nor was it necessary for the jury to infer such affirmative knowledge in order to convict. If the jury properly concluded that Archer consciously avoided confirming a suspicion that the $15 million was misappropriated, then that was enough. And unless the evidence weighed heavily against that conclusion (it did not), or that conclusion was seriously erroneous (it was not), the District Court was not permitted to second-guess it.

The court's disregard of conscious avoidance also infected its analysis of the email evidence, Archer's lies, and Archer's involvement in the cover-up. As to the emails, the Government certainly argued that they

showed Archer was aware that (1) the bond proceeds were not being invested in an annuity for Wakpamni's benefit, and (2) rampant conflicts were not being disclosed to the captive class of Hughes and Atlantic investors upon whom the bonds were foisted. But even if the jury did not accept that, it had ample support for the alternative conclusion that Archer deliberately avoided learning these facts by turning his mind away from these achingly obvious truths. And if there had been any lingering doubt that Archer at least consciously avoided investigating the myriad red flags, it would have been dispelled by Archer's own lies to others about the proceeds and Galanis's association with Burnham's business. The evidence established, at a bare minimum, that Archer was turning his mind away from damning facts—like where the $15 million really came from, and why his cohorts were pretending that a newly-created company called Calvert had been the original owner of the bonds Archer himself had purchased with funds from Galanis.

CONCLUSION

The District Court's order granting Archer a new trial should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,870 words in this brief.

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