18-3727-cr

To be Argued by:
MATTHEW L. SCHWARTZ

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

– v. –

DEVON ARCHER,

Defendant-Appellee,

JASON GALANIS, GARY HIRST, JOHN GALANIS, AKA 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 DEFENDANT-APPELLEE DEVON ARCHER

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ISSUE ON APPEAL

The court below (Hon. Ronnie Abrams, *D.J.*) presided over a six-week trial in this "indisputably complex case." After Devon Archer was convicted of securities fraud and conspiracy, the court granted his motion for a new trial in light of its "unwavering concern that Archer is innocent of the crimes charged." In doing so, the court did not commit any claimed legal error, disregard any evidence, or make any credibility determinations.

The issue is whether Judge Abrams abused her discretion in ordering a new trial, or whether her decision can instead be located somewhere "within the range of permissible decisions." *United States v. Forbes*, 790 F.3d 403, 406 (2d Cir. 2015) (quotation marks omitted).

STATEMENT OF THE CASE

I. The Trial Record

Over six weeks, the government presented testimony from sixteen witnesses; Archer presented six witnesses; a co-defendant presented a witness; and the parties introduced almost 800 exhibits. As Judge Abrams later found, the "evidence in this indisputably complex case"

compelled the conclusion that "Archer lacked the requisite intent and is thus innocent of the crimes charged." SPA-20, 1.[1]

The core allegation against Archer was that he willfully participated in a scheme to induce the Wakpamni Lake Community Corporation ("WLCC") to issue bonds by promising to invest their money wisely, but instead stole the proceeds. It was undisputed that Archer had no contact with the WLCC, had no contact with the pension funds that bought the bonds, and had no involvement in any misrepresentations that were made to either of them. No witness implicated Archer in any wrongdoing. Two of the government's cooperating witnesses had never communicated with Archer at all, and the third had only spoken to him on conference calls where no one even hinted at impropriety. Tr. 1309-10, 1424-25.

So how was Archer involved? As Judge Abrams explained, "[t]he WLCC scheme took place during the course of a legitimate plan" by Archer and others "to conduct a 'roll up' of various businesses with the

[1] Citations to "A" and "SPA" are to the government's Appendix and Special Appendix. "DA" refers to the Defendant-Appellee's Appendix. Citations to "Tr." are to trial transcript pages, which appear beginning at DA-1243. "Br." refers to the government's brief.

goal of creating a financial services conglomerate that could be sold for a sum larger than the value of its parts." SPA-2, 3 (citing Tr. 906). Galanis – with whom Archer had no prior relationship – introduced the roll-up plan to Archer early on and explained, "The model is very much an emulation of the Guggenheim structure which has successfully built a $210 billion business." DA-227; *see* SPA 2-3; Tr. 906.

As part of the plan, an investor group acquired unquestionably legitimate and valuable companies, including:

- Wealth Assurance AG: An insurance company with $1.4 billion in assets that, according to PwC, provided the investors an immediate $61.6 million profit. Tr. 1353; DA-78.
- Hughes Capital Management: A registered investment advisor with $1.0 billion under management. A-854.
- Burnham Securities: A broker-dealer with $12 million in income. DA-419; DA-296.
- Valorlife: An insurance company with more than CHF 4 billion in assets. DA-148.
- Burnham Asset Management: A registered investment advisor with more than $1 billion in assets. DA-419; Tr. 1323.
- VL Assurance: A Bermuda-based insurance company. DA-93.
- Atlantic Asset Management: An investment advisor with nearly $12 billion under management. DA-179.
- Bonwick Capital: An investment bank and fixed income asset manager. Tr. 280, 1324.

- FondInvest: A European "fund of funds." Tr. 1324.

It was while executing this legitimate plan that Galanis and his actual co-conspirators convinced the WLCC to issue bonds, foisted them on the clients of Hughes and Atlantic – which other co-conspirators controlled – and diverted the proceeds to a fake entity called Wealth Assurance Private Client Corporation ("WAPC"). WAPC was named by Galanis to be confused with Wealth Assurance AG – the legitimate insurance company – when in fact it was nothing more than a bank account. Galanis used that money to enrich himself and others – but never Archer, who instead lost nearly $1 million of his own money that he invested into the success of the roll-up plan.

The government's recitation of facts alternatively ignores and mocks this plan, but the evidence was undisputed that Archer was involved in the roll-up plan at least several months before there was any discussion of WLCC bonds, and that his actions were almost exclusively in furtherance of that legitimate plan, and almost never specific to the WLCC bonds. At the same time, Galanis – the mastermind of both the legitimate roll-up plan and the illicit bond scheme, "which involved many of the same entities and actors" –

simultaneously deceived Archer about the bonds and exploited him in furtherance of the roll-up. SPA-20. "It is through this prism that the evidence in this case must be assessed." *Id.*

A. Archer Joined a Growing Business Enterprise, Not a Criminal Conspiracy.

1. Galanis Recruited Archer for His Reputation and Connections.

Before Archer got involved, Galanis and his business associate Jason Sugarman had already started on the roll-up plan. DA-1. To Archer, Galanis and Sugarman appeared immensely successful. Sugarman's family owned banks and brokerages, and his father-in-law was the billionaire part-owner of the Golden State Warriors. Tr. 906, 1070. Galanis, for his part, appeared to have hundreds of millions of dollars of "family money." Tr. 2340-41, 2929. He owned valuable art, flew in private jets, drove multiple Bentleys, and lived in a fully-staffed Bel Air mansion. Tr. 1194-96, 1203-05, 1416-17, 2195, 2305-06, 2932; DA-72; DA-73; DA-526.

Galanis and Sugarman were aided from the start by Hugh Dunkerley (the government's main cooperating witness), and over time, as they "took over companies, the CEOs, CFOs, admins of all the

companies" became involved, along with "quite a large number of investors." Tr. 906-07.

As the plan gained traction, Galanis aggressively recruited Archer for his reputation and connections, explaining (to others) that Archer "has value beyond capital," DA-519. Archer had worked closely with both Hunter Biden (Joe Biden's son) and Chris Heinz (John Kerry's stepson), building a series of successful businesses, including a multi-billion dollar real estate fund. Tr. 2688; DA-359; A-1102. Galanis repeatedly flaunted these connections. *E.g.*, SPA 41; Tr. 1867, 2159-60; DA-521.

Behind Archer's back, Galanis and his co-conspirators discussed explicitly how they were using Archer, and how to manage him. They spoke of how Archer was "not used to 'swimming in shit,'" DA-483, how Archer was "our horse," DA-481, and how he was "the biggest whale of anyone," "the biggest show pony of all time," and "a total f***ing whale," DA-526. In a meeting surreptitiously recorded by the government, co-defendant Bevan Cooney bragged (outside Archer's presence) that Archer's involvement added "layers of legitimacy with all the deals we're doing now." DA-533. And in one particularly telling

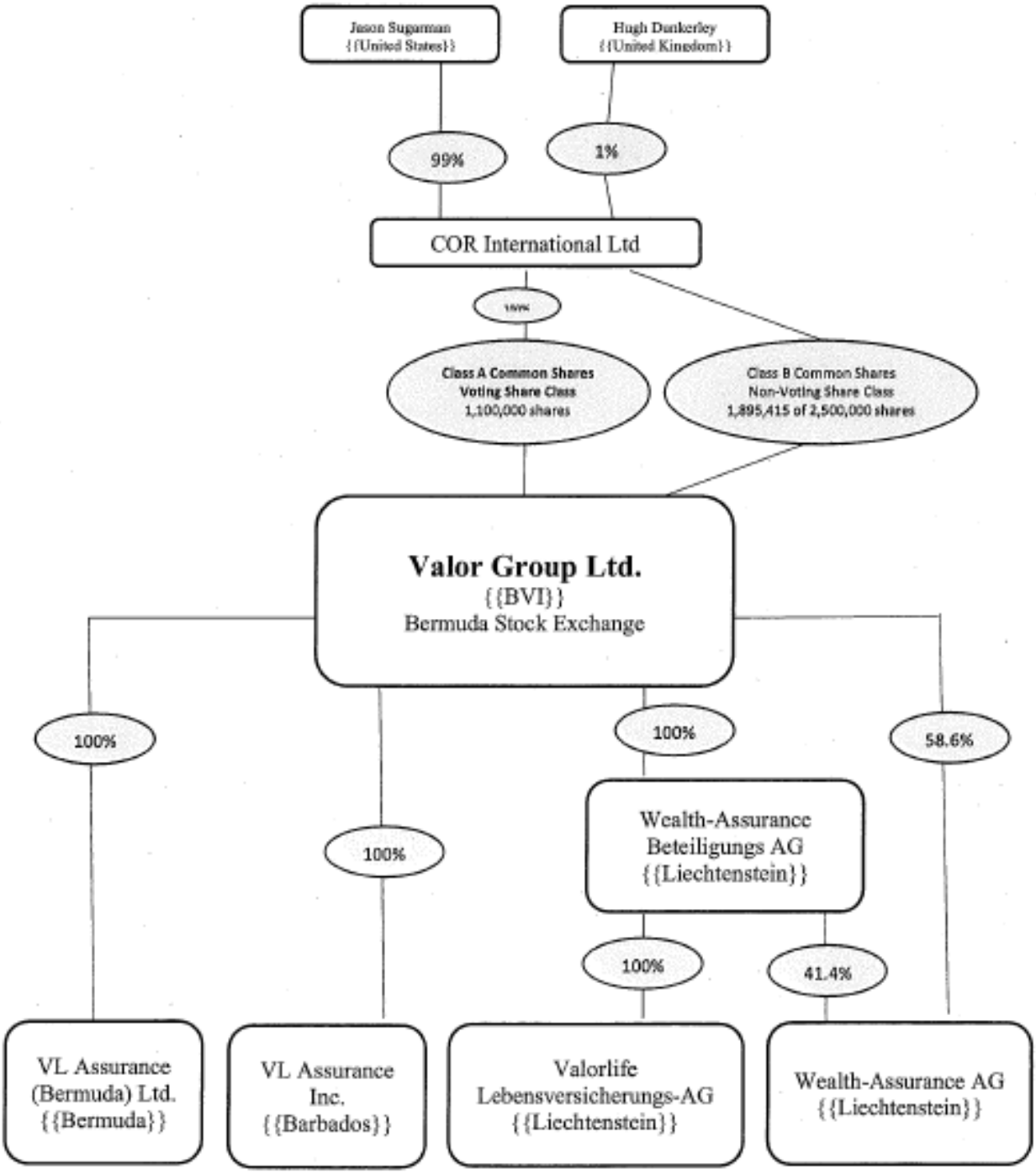
communication, Galanis suggested that they "use bevan" – with whom Archer had a pre-existing relationship – to manage Archer. "The alternative is to pimp devon and see how quickly he stops responding…it will happen." DA-483.

2. The Roll-Up Plan Involved Numerous Legitimate Acquisitions.

In December 2013, Galanis, Sugarman, and Dunkerley successfully acquired Wealth Assurance AG, or WAAG, the Lichtenstein-based insurance company. Tr. 907, 911, 1077-79, 2322-23; A-1102. WAAG was acquired by a newly-formed, publicly-traded entity called Wealth Assurance Holdings (later renamed "Valor Group"). Tr. 1081-82; DA-94; DA-225. Valor Group was in turn controlled, indirectly, by Sugarman. DA-225; DA-120; Tr. 1078-81. Initial investors in Valor Group's non-voting shares included the ex-Chairman of insurance giant Marsh & McLennan. Tr. 1084-95; DA-74; DX4007S; DX4038G

As set forth above, over time, Valor Group acquired other legitimate companies. The resulting corporate structure is depicted below, with the asset managers Atlantic and Hughes owned by a subsidiary of a subsidiary of WAAG. SPA-8 n.5:

Beneficial Ownership Schematic



DA-226; Tr. 1150-51, 1316-18.

Separately, Galanis targeted Burnham Financial Group ("Burnham"). Burnham – of Drexel Burnham Lambert – consisted of both a broker-dealer and an asset manager with around $1.5 billion in client money. Tr. 913-915, 1072. Because of its famous brand, the idea was that after it was acquired, "[t]he Wealth Assurance names would be retired in favor of Burnham & Co., which would be adopted as the name of the publicly quoted holding company." DA-227; *see also* Tr. 1321; A-1105. In fact, Burnham was never acquired by Valor Group.

3. Archer Was an Outside Investor Far Removed From the Companies' Operations.

Archer played virtually no role in the management of the conglomerate. He was offered a seat on the board of directors of the top-level holding company, but not its operating subsidiaries. *E.g.*, Tr. 1327-28, 1033-34, 1367-68. When the roll-up was eventually complete, he was to be its Chairman, with Hunter Biden as Vice Chairman and Sugarman as CEO. The operating businesses were to be run by experienced financial services professionals:

Extended Leadership Team

BURNHAM

Directed by seasoned executives with a broad range of experiences in financial services

Executive Management Team

Devon Archer
Chairman, Burnham & Co. Mr. Archer is also a Managing Partner of Rosemont Group, a $2.4 billion private equity firm. Co-founding shareholder of COR Fund Advisors, the lead investor in Burnham Financial Group. Mr. Archer earned his Bachelor of Arts from Yale University.

Hunter Biden
Vice-Chairman, Burnham & Co. Mr. Biden is the CEO of Burnham Advisors a Washington DC Advisory firm that was acquired by Burnham Financial in 2014. Mr. Biden received a Bachelor's degree from Georgetown University and a Juris Doctor from Yale Law School.

Jason Sugarman
Chief Executive Officer, Burnham & Co. Mr. Sugarman is a founding partner of Wealth Assurance which recently merged and rebranded to ValorLife. Mr. Sugarman is a graduate and Scholar Athlete from Stanford University (BA, Economics).

Selected Business Unit Leaders

David Ezekiel – Chairman & President, VL Assurance (Bermuda) Limited, Chairman Marsh, Bermuda

Rory Knight – Chairman, Valor Group, former Dean of Oxford Business School

Louis Zuckerbraun – CEO, VL Assurance (Bermuda) Limited

Andrew Godfrey – President & Co-CEO, Burnham Financial Group and Burnham Asset Management

Devin Wicker – Founder & CEO, Bonwick Capital, former Goldman Sachs

Stefan Zellmer – Head of Burnham Alternatives, Head of research at UBP and Arden Asset Management

Jon Burnham – Chairman & Co-CEO, Burnham Financial Group and Burnham Asset Management

Charles Soulignac – Founder & CEO, FondInvest, formerly Caisse des Depots (CDC)

Michelle Morton – CEO, Atlantic Asset Management

A-1112; *see also* A-1105. But the plan never got this far, and Archer never became Chairman.

4. Archer Invested His Money and Reputation In the Roll-Up Plan While Others Looted It.

Believing that the roll-up plan was a legitimate investment opportunity, Archer invested – and ultimately lost – almost $1 million of his own money. *See* DA-538. He also brought in the "highly reputable strategic consulting company" Teneo "to produce a strategy for the sale of Burnham," which he paid for himself. Tr. 1087-88, 1310; *see* DA-538.

Teneo presented a vision for the planned conglomerate, noting its established relationships with elite financial institutions and accounting and law firms, A-1108, the well-respected business leaders who would run the roll-up companies, A-1112, and the opportunity to leverage Archer's relationship with a major Hong Kong company. A-1123; Tr. 2619, 2630.

Meanwhile, Galanis, Dunkerley, and others plundered millions of dollars from the companies – entirely apart from the WLCC bond scheme. For instance, in 2013, long before the WLCC bonds, Galanis and Dunkerley tricked WAAG into investing $2.76 million in a fake asset manager that was actually nothing more than a bank account. Tr. 1122; DA-345; Tr. 921-922. Galanis and Dunkerley hid this scheme from Archer, who they knew was invested in WAAG's future as part of the roll-up. Tr. 1147-51.

Galanis and Dunkerley also stole $3.2 million from Valorlife, tricking its board and management into thinking that the company was purchasing $3.2 million in bonds. *See* DA-358. Galanis and Dunkerley caused Valorlife to pay the money to a law firm, which used it to buy Galanis's house. *See* DA-516; DA-981.

5. Galanis Curated the Information Available to Archer.

What Archer knew about the roll-up's execution (and the WLCC bonds) came almost exclusively from Galanis. Archer had limited insight into the operating companies, never spoke with Dunkerley outside of legitimate conference calls, Tr. 1309-1313, never communicated with co-conspirators Francisco Martin (who also testified for the government) or Gary Hirst at all, Tr. 2381-82, and was only introduced to co-conspirator Michelle Morton in passing, DA-936; DA-24.

In fact, although Archer and Dunkerley both sat on the board of Valor Group, Galanis forbade Dunkerley from meeting Archer in person; Dunkerley called in to board meetings when Archer was physically present Tr. 1328. This was consistent with Galanis's "*modus operandi*" of "compartmentaliz[ing] his schemes, such that each participant knew only that which was essential to his or her narrowly defined role." SPA-20. *See* DA-509 (Galanis was "VERY sensitive on how communication flows."); DA-483; DA-504, Tr. 2338-40; A-1192.

B. Galanis Orchestrated the First WLCC Bond Issuance, And Only Told Archer What He Wanted To.

In the summer of 2014, Galanis carefully oversaw the first WLCC bond issuance. Archer was not involved, and was only kept generally apprised of the features and progress of the deal by Galanis – all in ways that did not hint at Galanis's plan to steal the proceeds.[2]

Unlike Galanis and others who were involved in day-to-day operations, Archer had no contact with the WLCC (though its representative did hear others brag about him). *See* Tr. 1863-64. Unlike Cooney, Archer never dealt with the lawyer handling the issuance, Tr. 560-61, and he never knew who purchased the bonds. A-1040. Unlike Morton and Hirst, officers of Hughes or Atlantic who illicitly directed client money into the bonds, Archer never had any contact with those clients. Tr. 764, 1618, 1689-90.

In fact, Archer never had contact with Hughes or Atlantic. Tr. 2066. He was once introduced to Morton at a social function, DA-914,

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[2] According to Dunkerley, Archer was on the investment committee of Burnham Securities, placement agent for the bonds. Dunkerley testified that Archer's role on that committee did not expose him to any improprieties with the bonds, and that none of his communications involving Archer were about "anything improper." Tr. 1524.

but she did not even realize who he was until a few months later. DA-24. Archer never communicated with Hirst at all.[3] Simply put, Archer's insight into the operations of the roll-up companies – and especially anything relating to the WLCC bonds – came from Galanis, who did all he could to ensure Archer only saw their legitimate aspects.

1. Galanis and His Father Organize the First Bond Issuance Without Archer.

In March 2014, Galanis's father "Yanni" pitched the idea of issuing bonds to a WLCC representative. Tr. 1834-36.[4] Timothy Anderson, an experienced corporate lawyer who had done several tribal bond issuances and who had previously represented the WLCC, was also there. Anderson would go on to quarterback the bond issuances as counsel to Burnham Securities. Tr. 286-87, 444-45, 1836.

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[3] So desperate was the government to connect Archer to other conspirators that in rebuttal, to attempt to link Archer and Hirst, the government pointed to a single email that Galanis's associate Matt Nordgren sent to Hirst and others, copying Archer. *See* Tr. 4103; DA-504. The full text of that innocuous email read: "Please see the link below for your headshots." *Id.* Nonetheless, the email elicited this response from Galanis: "Nordgren, if you ever fucking email devon and rohan ever in the same fucking email I disown you. Do not risk our relationships. All we have." *Id.*

[4] The WLCC's representatives knew John Galanis as "Yanni." Tr. 1834. In this brief, references to "Galanis" are to Jason Galanis; references to "Yanni" are to John Galanis.

Yanni explained that the WLCC could use some bond proceeds for tribal development and put the rest in a fund – which he called an "annuity" – to generate returns. Tr. 1836, 1840. According to Yanni, the "annuity" would be administered by WAAG, the insurance company that was part of the roll-up. *Id.*

Over the next few months, Yanni, and later Jason, organized the first bond issuance with Anderson. Tr. 325. Getting his information from Galanis, Anderson drafted or reviewed every core document for all three issuances, Tr. 156-157, 179-80, 423, 443, 481-483, 522-523, 536-538, 561, each of which also involved highly reputable law firms, banks, and other entities on which Anderson and an accounting firm had performed due diligence. *See* Tr. 156, 164-165, 317-319, 353-354, 362-364, 483-484, 526-528.

Contrary to Yanni's representations to the WLCC, however, the transaction documents identified the shell company WAPC, rather than WAAG, as the "annuity provider" that would manage nearly all of the bond proceeds. A. 543-75. WAPC was named to give the false impression that it was affiliated with WAAG. Tr. 1014. Only Dunkerley and Hirst – who had signatory power on the WAPC account – and

Galanis knew what WAPC was, and even Dunkerley did not know Galanis was using the WAPC account to steal the bond proceeds until he eventually saw its bank records and realized where the money was going. Tr. 1310, 1437.

2. Galanis Lied to Archer About the Bonds.

In February 2014, Galanis previewed the idea tribal bonds to Archer. Galanis described "a $217 million tax free bond issuance by a native american tribe." A-853. Galanis explained, "The proceeds are exem[pt] from the required on-reservation usage," and "we can direct part of the proceeds." *Id*. Archer never responded to this email, which came a few months after the roll-up plan was set in motion and as the investor group was looking to acquire successful financial firms with discretionary assets under management. *See* A-1113.

Two months later – without any intervening communications about the bonds, Tr. 3639 – Galanis wrote Archer and Cooney: "$20mm bond approved. Proceeds are 15mm to us and 5mm to them for a winery investment they want to make." DA-939. A legal opinion from a reputable law firm was attached. DA-923. Cooney asked, "What do we get to do with the 15mm," to which Galanis replied, "Discretionary,"

DA-939 – seemingly affirming that he was amassing discretionary assets, consistent with the roll-up plan.[5]

Galanis next mentioned the bonds to Archer in a June 2014 email, every word of which was meant to give the false impression of legitimacy. A-786. Galanis reported that the WLCC signed onto the issuance and attached a link to a well-respected attorney. *Id.*; *see* Tr. 576-77. Galanis falsely added that the proceeds would be placed "into a Wealth Assurance annuity," and flattered Archer that letting the law firm know that Archer was "associated with the insurance company" could "be nice icing on the cake." A-786.

This was a lie. The proceeds were not going to the legitimate insurance company with which Archer was associated, Wealth Assurance AG. They were going to the unaffiliated shell company

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[5] At trial, the government "place[d] much weight" on this email, arguing that "discretionary" was code for stealing the bond proceeds, though no witness so testified. SPA-26. The government argued that Archer and Cooney "knew the bond money was being stolen.… $15 million to us? Discretionary? We can do anything we want with this money?" Tr. 3639. As Judge Abrams later explained, however, this email is entirely consistent with the idea that the investors were seeking to amass discretionary assets under management, and is in fact exculpatory absent speculation about an unnatural meaning of the word "discretionary." SPA-26-27. The government notably does not cite this exhibit anywhere in its brief.

WAPC, which Archer did not know about. Galanis's lies continued: "annuity proceeds get invested by appointed manager on a discretionary basis on a 20 year contract." *Id.* Galanis knew the proceeds would become his personal slush fund; he hid this from Archer, telling Archer the same lie he fed to Anderson and the WLCC. *See* Tr. 898, 1092.

Finally, in two more brief emails to which Archer never responded, Galanis sent CUSIP confirmation, A-790, and wrote that two Wakpamni tribe members had executed bond documents. A-790. None of Galanis's emails hinted at any impropriety.

3. Galanis Arranged For Hughes's Clients to Buy the Bonds, Without Archer.

Meanwhile, Galanis was also overseeing the acquisition of Hughes. To Archer, Galanis talked up the value of Hughes to the roll-up plan, and omitted or obscured its role in his bond scheme.

Galanis introduced the potential Hughes acquisition in a May 2014 email, writing that an associate "brought us an RIA [registered investment advisor] to acquire. possibly useful." A-854. Galanis added that Hughes had $1 billion under management, 52 institutional clients, and $2 million in revenue. *Id.* He attached the resumes of the executives who would run Hughes post-acquisition. *Id.*

Archer next heard about Hughes on July 16, 2014, when Galanis told him that a term sheet had been executed. DA-929. Galanis again emphasized the value of the firm, noting that "the group we are sponsoring are amazing marketers with a track record in the institutional world," that "the firm is highly profitable as is," that it "manages $900 million on a discretionary basis," and that the former mayor of Los Angeles "would be interested in the board[.]" *Id.*

Galanis ended with two sentences about the bonds: "We have agreed to give the firm an opportunity to participate in native american bond new issues. I believe they will take $28 million of the Wakpamni/Ogala [*sic*] Sioux issue that Greenberg Traurig is working on." *Id.* The government omits the first sentence, Br. 9, which is no wonder: that sentence makes clear that Galanis was informing Archer that Hughes *might choose* to use some of its $900 million under management to purchase bonds, not that he was scheming to foist the bonds on Hughes' clients.

About a month later, Galanis reported that the acquisition had closed. A-875; *see* DA-345. Once Galanis and Morton were in control, they installed Hirst as CIO. Hirst then bought WLCC bonds for

Hughes' clients, without regard for their investment parameters. Tr. 1610, 1680; A-754. As a result, $24 million of Hughes' clients' money was sent to the fake WAPC account, where it was ultimately misappropriated by Galanis, Hirst, and Dunkerley. A-666; A-1059. Galanis caused $4 million to be sent from WAPC to an entity he controlled called Thorsdale Fiduciary and Guarantee, where he would spend it on homes, cars, jewelry, and gifts to family members, A-1059, including $2.35 million to his father Yanni. DA-980. At the time, not even Dunkerley (who had access to the WAPC account) or Francisco Martin (who, according to the bond documents, was supposed to manage the annuity investments) realized Galanis had stolen the bond money. Tr. 1139-40, 2135, 2196, 2296, 2326, 2329.

C. Galanis Secretly Funded the Purchase of the Second Issuance with Money from the First.

Shortly after the "success" of the first bond issuance, Galanis orchestrated a second. Tr. 221, 1853-54. This time, Galanis arranged for the bonds to be purchased by Cooney and by Rosemont Seneca Bohai ("RSB"), an entity controlled by Archer, with funds supplied by Galanis. Unbeknownst to Archer, those funds did not come from Galanis, but were in fact some of the proceeds of the first issuance. There was no

evidence, however, that Archer knew the source of the money. As before, Galanis went to great lengths to hide from Archer – but not from Cooney – the truth.

In order to keep Archer from knowing the source of the funds transferred to RSB, Galanis arranged for the money to be sent through a circuitous route with the help of Martin and Dunkerley, neither of whom saw the full series of transactions or knew RSB received recycled proceeds.

First, Galanis instructed Dunkerley to go to a physical bank branch and withdraw $15 million from the WAPC account, and then immediately deposit it as cash into Thorsdale's account. Tr. 1517; A-671; DA-1145; A-737, DA-1014. This had the purpose and effect of severing any link between WAPC and Thorsdale in the bank records, which showed only "Withdrawal" and "Deposit." A-671, A-711; Tr. 1517.

Next, Galanis had Martin wire the money from Thorsdale to a law firm, which wired it to RSB. DA-1149; A-1192; Tr. 803, 1517-18; 2338, 2340. Archer therefore had no visibility into the WAPC account. Tr. 1339-40. As far as he could see, the $15 million came from a law firm. A-1060.

Indeed, other than Galanis, *no one* knew that the money transferred to RSB came from the first bond issuance. Dunkerley had "direct visibility into" and control over the WAPC bank account, Tr. 1310, 1437, but did not know RSB received proceeds. Tr. 1312-13, 1511-12. To the contrary, Galanis lied to Dunkerley, telling him that RSB was buying the bonds on behalf of Chinese investors whose money Archer was managing. Tr. 1025. The truth was so well hidden that before Dunkerley was arrested in May 2016, he had "no idea" as to "what happened to that money after it went to Thorsdale." Tr. 1028. He learned it from the government. Tr. 1311-12.

Archer's entity, RSB, did nothing with the bonds for months, and eventually transferred them to VL Assurance, one of the roll-up companies. *See* A-639; DA-611. Archer did not keep any of the bonds, and did not profit from them or from the money transferred to RSB in any way.

D. Galanis Orchestrated a Third Issuance, and Continued to Lie to Archer About the Legitimacy of the Bonds.

Galanis coordinated a final bond issuance in April 2015. This time, Valor Group funded the acquisition of another asset manager,

Atlantic, which merged with Hughes and – on Morton's orders – purchased the whole issuance with client money. SPA-10. Again, the proceeds were diverted to the fake WAPC account, where they were spent by Galanis and distributed to others, including Sugarman and Cooney. A-1077. Again, Archer had nothing to do with any of this.

Following the second bond issuance in October 2014 and through the third issuance in April 2015, Galanis continued to lie to Archer about the bonds' legitimacy. In November 2014, for example, Galanis sent Archer what he said was a photograph of "the actual groundbreaking for the town center for which we placed $20 million of bonds." DA-19. In April 2015 he sent another update, attaching several pictures of the town center's construction progress, adding, "Rewarding to see it happening." DA-350. Galanis followed up with more photographs in August 2015 – long after the final bond issuance – to perpetuate the fiction that the proceeds were going towards tribal development. DA-465. Archer, not knowing any different, responded, "This is a beautiful thing." *Id.*

E. Archer Tried to Save the Business Following Galanis's Arrest, While Galanis Tried to Cover Up His Crimes.

In late September 2015, Galanis was arrested for an "entirely unrelated" crime. Tr. 3830:23-3831:11. He and Dunkerley then began meeting in secret to develop a plan to cover up the bond scheme. Tr. 1223. A major part of the cover-up was a new entity called Calvert Capital. *See* Tr. 1464-66; DA-18. Calvert was intended to be a "client" of Thorsdale, Galanis's purported investment company. DA-18. At Galanis's instruction, Martin created Calvert, but he claimed not to know its purpose. *See* Tr. 2181:14-19.

In fact, "Calvert's sole purpose was to deceive people." Tr. 1508. Galanis, Dunkerley, and Cooney signed back-dated, fake Calvert agreements meant to show that the bond proceeds were properly invested. *See* DA-950; A-845; Tr. 1058-59, 1508; Tr. 2181. Martin and Hirst likewise used fake Calvert documents to fool the government. Tr. 927, 1057, 1146, 1227, 2244, 2296-97.

Galanis knew he could never get Archer to sign a fake, back-dated document. Still needing to explain bond proceeds that he had transferred to RSB, Galanis did the next best thing. He and Dunkerley imagined a loan between Calvert and RSB, and rather than create a

loan agreement that would have needed Archer's signature, they created a fake, back-dated WAPC resolution *describing* the made-up loan to RSB by Calvert, which *Dunkerley* signed. A-845.

Archer did not sign any fraudulent back-dated documents, and he was not involved in any of the Calvert scheming. Tr. 1464:1-13, 1509:6-8. There is no evidence Archer ever saw, discussed, or was aware of the fake WAPC resolution describing the loan to RSB, s*ee* Tr. 1462-64. Dunkerley testified that no one ever discussed Calvert with Archer, and that he only discussed Calvert's "illicit purpose" with Hirst and Galanis. Tr. 1508-09, 1464. There is simply no evidence that anyone ever revealed Calvert's true, fraudulent nature to Archer. Rather, the evidence – including a single email in which Archer referred to Calvert as the owner of the bonds originally purchased by RSB, A-912 – is consistent with Archer being fed the lie that Calvert was a Thorsdale client.

Meanwhile, as Galanis, Dunkerley, and the other conspirators were working frantically to save themselves, Archer was trying to help the companies and save his investment. Consistent with his faith in the roll-up plan, Archer became more personally involved following

Galanis's arrest. He met with clients to address their concerns. DA-873; DA-876; DA-880. He responded to questions about the SEC's lawsuit, DA-880, though Archer was "not one of the unnamed individuals discussed in that lawsuit." Tr. 3239:12-13. And Archer continued to bring in new investors, further putting his own reputation on the line. Tr. 2798:17-19.

In an email immediately following Galanis's arrest, Archer described what he believed were pressing tasks. DA-938. Consistent with his loose grasp on operational issues, the only items not annotated "???" were those Archer was directly involved in: outside funding and payments to a consultant. *Id.*[6] The consultant was the one that Archer had introduced to develop a plan to profit from the success of the roll-up – success that Galanis and his true co-conspirators knew was impossible, given their repeated frauds.

[6] While the government emphasized this email at trial, claiming that it was part of a cover up, *e.g.*, Tr. 3675-76, it has abandoned that argument on appeal.

II. Judge Abrams Granted Archer a New Trial in a Careful, Thorough Decision.

After a "protracted and tedious" six-week trial, SPA-42, Archer and his co-defendants were convicted of securities fraud and conspiracy. The jury deliberated for approximately 165 minutes, and did not ask any questions.

The defendants then renewed their motions for acquittal and moved for new trials. Following extensive post-trial briefing, argument, and more briefing, Judge Abrams denied all the motions except for Archer's Rule 33 motion, which she granted out of "an unwavering concern that Archer is innocent of the crimes charged." SPA-22. In her comprehensive and thoughtful opinion, Judge Abrams explored each category of evidence the government offered, both on its own and in light of the uncontroverted evidence that Galanis manipulated Archer, that most of the transactions related to the roll-up were perfectly legitimate and several predated the bonds, and that Galanis so controlled information that even his confessed co-conspirators did not know that he was stealing bond proceeds until well after the fact.

Judge Abrams concluded that, viewed "in the context of all the facts presented," SPA-20, the evidence and the reasonable, evidence-

based inferences failed to establish the key disputed element beyond a reasonable doubt: Archer's knowing and willful participation in Galanis's scheme. "[W]hen viewing the entire body of evidence…the Court harbors a real concern that Archer is innocent of the crimes charged…." SPA-45.

SUMMARY OF THE ARGUMENT

There has never been any dispute that Jason Galanis perpetrated a fraud that victimized the WLCC and a variety of pension funds. But as Judge Abrams recognized in her careful and well-reasoned decision, Archer was not a knowing participant in that scheme. Not a single witness implicated Archer. Not a single document demonstrated his awareness – directly or indirectly – that Galanis was stealing the proceeds of bonds issued by the WLCC. Archer did not profit from the fraud; he lost money. As Judge Abrams held, the evidence – taken piece-by-piece and as a whole – "suggests that Archer was not a party to this conspiracy but was instead being manipulated by a skillful con artist." SPA-42. In light of the trial record and Judge Abrams's thoughtful and thorough opinion, granting Archer a new trial was necessary to avoid a manifest injustice and not an abuse of discretion.

ARGUMENT

I. Faced with an Unwavering Concern That Archer Is Innocent, the District Court Did Not Abuse Its Discretion in Granting a New Trial.

A. Applicable Law and Standard of Review

Under Rule 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "The rule by its terms gives the trial court 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) (quotation marks and alterations omitted); *United States v. Morales*, 902 F.2d 604, 606 (7th Cir. 1990) (Posner, *J.*) (new trial is a response to "a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted").

The "objective evaluation" of the evidence required under Rule 33, *Ferguson*, 246 F.3d at 134, differs from a motion for acquittal "because, on a Rule 29(c) motion, the district court must view the evidence in the light most favorable to the government." *Id.* at 139 n.1 (Walker, *J.*, concurring in part and dissenting in part). "Consequently, a guilty verdict might survive a Rule 29(c) motion – because a rational jury, viewing the evidence through the government's eyes, could convict – but

fail to meet the Rule 33 standard because the momentum of the evidence as a whole would make a guilty verdict irrational." *Id.* Under either standard, "[d]ue process requires that essential elements of a crime be proven beyond a reasonable doubt." *United States v. Pauling*, 924 F.3d 649, 655 (2d Cir. 2019) (quotation marks omitted).

Any inferences "must be based on evidence and must be reasonable." *United States v. Ceballos*, 340 F.3d 115, 125 (2d Cir. 2003) (quotation marks omitted). "[S]pecious inferences are not indulged, because it would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty." *United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015) (quotation marks omitted). "An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist." *Pauling*, 924 F.3d at 656 (quotation marks and citations omitted). "The line between permissible inference and impermissible speculation is drawn by the laws of logic and not judicial idiosyncrasies…. Reasonable speculation occurs when the finder of fact concludes that a disputed fact exists that is within the realm of possibility, but the conclusion reached is nevertheless unreasonable because it is not logically based on another

fact known to exist." *Id.* (quotation marks and citations omitted); *see also Ceballos*, 340 F.3d at 127.

While the district court "may weigh the evidence" on a Rule 33 motion, it may not "wholly usurp the jury's role." *United States v. Coté*, 544 F.3d 88, 101 (2d Cir. 2008). For example, the district court may reject testimony that "is patently incredible or defies physical realities." *Coté*, 544 F.3d at 101 (quotation marks omitted). Similarly, when there is evidence that a witness perjured herself, the defendant must show "that without the original testimony, the jury probably would have acquitted the defendant.'" *United States v. Lespier*, 266 F. App'x 5, 6-7 (2d Cir. 2008) (quoting *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987)) (alteration omitted).[7]

[7] The government incorrectly suggests that to grant a new trial based on the weight of the evidence under *any* circumstances, "the evidence of innocence must 'preponderate[] heavily against the verdict.'" Br. 33 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1415 (2d Cir. 1992)). As in *Lespier* and *DiPaulo*, this Court requires that the weight of the evidence "preponderate[] heavily against the verdict" only when the defendant offers "newly discovered evidence" or where "perjury clearly has been identified." *Sanchez*, 969 F.2d at 1413–14.

This Court reviews the grant of a Rule 33 motion "for an abuse of discretion and accepts the district court's factual findings unless they are clearly erroneous." *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (quotation marks omitted). This review "is limited," and "the district court's holding is not an abuse of discretion even though [this Court] may have decided differently if [it] were the trial judge." *Ferguson*, 246 F.3d at 133; *see also United States v. Yellow Cab Co.*, 338 U.S. 338, 42 (1949). "A district court abuses or exceeds the discretion accorded to it 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." *Forbes*, 790 F.3d at 406 (quotation marks omitted).

B. After Conscientiously Reviewing the Record, Judge Abrams Properly Determined That This Is an Extraordinary Case Requiring a New Trial.

The government does not seriously contend that Judge Abrams engaged in any improper determination of witness credibility, made clearly erroneous factual findings, or committed an error of law.

Instead, the thrust of its argument is that Judge Abrams so misapprehended the entire trial record that her assessment of the undisputed evidence and the inferences that could reasonably be drawn from it "cannot be located within the range of permissible decisions." *Id.* That is wrong.

Archer's trial was long, complicated, and thorough. As the government concedes, its case was entirely circumstantial. Judge Abrams reviewed the trial record and determined that, notwithstanding the deference owed to the jury, Archer alone amongst the defendants "lacked the requisite intent and is thus innocent of the crimes charged." SPA-1.

Judge Abrams properly cited and faithfully followed the Rule 33 standards. She recognized that motions for a new trial are "'disfavored'" and "'should be granted only in the most *extraordinary circumstances*.'" SPA-18. She was careful not to "wholly usurp[] the role of the jury," and was "mindful of the deference appropriately accorded juries and [did] not grant Archer's motion for a new trial lightly or absent careful consideration." SPA-19. Judge Abrams in fact has never before exercised the "rarely used power" to grant a new trial under Rule 33, so

far as our research has revealed. *Ferguson*, 246 F.3d at 131. She recognized that this was the "extraordinary" case that required relief. SPA-18.

Ultimately, after "each piece of evidence in this indisputably complex case is examined with scrutiny and in the context of all the facts presented," Judge Abrams was "left with an unwavering concern that Archer is innocent of the crimes charged." SPA-20, 22. Regardless of whether this Court might weigh the evidence differently, Judge Abrams's decision is plainly "located within the range of permissible decisions." *Forbes*, 790 F.3d at 406.

1. Judge Abrams Searched the Record for Direct Evidence of Criminal Intent and Found None.

The district court scoured the record for any evidence that was "directly probative of [Archer's] guilt." SPA- 37. This evidence certainly existed for the real conspirators. SPA-14-17 (Yanni); SPA-45-46 (Cooney); SPA-5 (Hirst); SPA-10 (Morton); SPA-21-22 (Martin); SPA-5 (Dunkerley).

But there was no such evidence against Archer. Not a single witness testified to any impropriety by Archer with respect to the WLCC bonds. The government even conceded that its cooperating

witnesses did not incriminate Archer. Tr. 3467-68. And although it argued otherwise, *e.g.*, Tr. 3611, the government now admits that there is no direct documentary evidence either. Br. 41, 43, 49. Thus, in granting Archer a new trial, Judge Abrams did not have to reject any incriminating evidence, because there was none.

2. Judge Abrams Examined the Entire Record, Which Showed Galanis Deceived and Manipulated Archer.

The government repeatedly accuses Judge Abrams of ignoring the entirety of the evidence. *See, e.g.*, Br. 36, 41, 46. But she did no such thing. Judge Abrams examined every category of evidence both on its own and in the context of the record as a whole. *See* SPA-45. The government, on the other hand, completely ignores an enormous amount of evidence showing that Archer was focused on building a financial services conglomerate while Galanis actively lied to him. SPA-41-42; *see also* SPA-45 (noting "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'").

From the start, Galanis viewed Archer as a valuable resource with valuable connections, but also a person who had to be actively managed lest he "stop[] responding." DA-483; *see* DA-839; Tr. 854:21-855:5, 1329:15-1330:7. Galanis was careful to police how his co-conspirators spoke to Archer and what they shared with him. He oversaw every interaction with Archer, ghostwriting emails, *see* Tr. 2338, 2340; A-1192, forbidding Dunkerley from meeting Archer in person, *see* Tr. 1328, and disciplining anyone who acted without his approval, DA-504 ("if you fucking email devon and rohan ever in the same fucking email I disown you. Do not risk our relationships. All we have.").

Galanis lied to Archer in numerous other ways, too. He got Archer to invest nearly $1 million of his own money into the roll-up plan, while Galanis was siphoning money out of WAAG and Valorlife. At one point, discussed further below, he stole $240,000 from Archer. SPA-39 & n.22. He emphasized the involvement of legitimate lawyers and accountants, *e.g.*, A-786; DA-929; DA-227. And Galanis lied specifically about the legitimacy of the WLCC bonds. Before the first bonds were issued, Galanis said that Hughes's clients would be given "an opportunity to participate" – not that the bonds would be foisted on

them. DA-929. And he claimed, falsely, that the money would be invested in a "Wealth Assurance annuity," not diverted to the sham WAPC account, which Archer knew nothing about. A-786.

For months *after* the final bonds were purchased, Galanis continued to lie to Archer about them, claiming that the proceeds were being used to make capital improvements on the Wakpamni reservation:

From: jason galanos [jason@burnhamequitypartners.com]
Sent: 8/5/2015 4:56:25 AM
To: Devon Archer [darcher@rosemontcapital.com]; Bevan Cooney [btcooney@gmail.com]; Jason Sugarman [jsugarman@camdencap.com]
Subject: bonded duty free warehouse being built on Pine River Reservation

DA-67.[8] It makes no sense that Galanis would lie to Archer about the bond proceeds being used for the WLCC's benefit if Archer was in on the scheme.

In response, the government points to instances in which Archer was aware of Galanis trading on his good name. Br. 54. This is a non-sequitur. That Archer may have known that Galanis sometimes invoked his name – for perfectly lawful reasons – in no way undermines Galanis's repeated and undisputed lies to Archer, including about the bonds themselves. Archer was recruited precisely because he was well-credentialed, well-connected, and could bring in outside investors, which he did successfully at the risk of his own reputation. At the same time, Galanis and others purposefully hid their illicit aims from Archer and abused his name. *See, e.g.*, DA-485; DA-512; DA-513; DA-1. The district court properly took all of this into account, despite the government's claims to the contrary.

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[8] The other recipients of this email, Cooney and Sugarman, were co-conspirators according to the government. That does not diminish the lie to Archer. Galanis was always careful to stage-manage exactly how projects were discussed with Archer, *see, e.g.*, DA-483, and in particular believed that his relationship with Cooney was critical. DA-483.

3. Judge Abrams Examined the Circumstantial Evidence, and Properly Rejected Speculative or Unreasonable Inferences.

Judge Abrams correctly determined that to infer Archer's criminal intent beyond a reasonable doubt, the circumstantial evidence must be accompanied by assumptions or speculation about what he must have known – assumptions that lack support in the record. *See, e.g.*, SPA-36; *see also Pauling*, 924 F.3d at 656-61.

a. The Emails: Project Updates.

The government points to emails in which Galanis updated Archer about the acquisition of companies in the roll-up plan or about the WLCC bond issuances. By the government's own admission, this evidence is "not individually dispositive," Br. 41, and the district court determined that these emails were all "facially innocuous." SPA-29.

The government argues that this innocuous evidence somehow becomes incriminating beyond a reasonable doubt when considered "in context and as a whole." But that is exactly how the court considered it, *see* SPA-30-31, and the government cannot point to any evidence that the court overlooked or disregarded.

Despite its rhetoric that Archer's innocence is "inconceivable," Br. 42, the government's argument relies on a host of assumptions

unsupported by the record. It asserts as a settled proposition that Archer would have understood everything about the "inherent conflicts" or "fiduciary duties" the investment advisers faced. *Id.* But the evidence it cites is the testimony of their expert. Conspirators of Galanis who actually interacted with Archer, as explained above, stated they never discussed anything improper with him. Other witnesses with knowledge of the investment adviser fraud testified that they never spoke with Archer at all, and some did not even know who he was. *See* Tr. 764, 1618, 1689-90, 2066.[9]

[9] The government claims that the district court erred in finding that "certain of the conflicts…were apparently disclosed." Br. 42 n.7; *see* SPA-30. This argument is beside the point, because there was no evidence that Archer knew what was disclosed to investors. But to the extent Judge Abrams found that the conflicts were disclosed, that finding is not clearly erroneous because the court relied upon a placement memorandum that explicitly disclosed the conflict. DA-897. The government claims the memorandum was a draft that "was not finalized," Br. 42 n.7, but its cited testimony does not support that claim. Instead, the witness testified that he did not know whether the memorandum was ever finalized. Tr. 273-74. That being so, the best evidence of what was disclosed comes from the memorandum cited by the court, which Anderson—the lawyer who coordinated the bond deals—sent to Morton—the CEO of the asset manager that purchased the bonds—one week before the deal closed. *Id.* Moreover, Anderson testified that he knew about the conflicts, which were "common" and "[n]ot a significant concern." Tr. 186, 508-09.

It is telling that the government describes an entire category of evidence – the update emails – but only quotes one. Br. 42. In it, Archer asks about an Atlantic employee, "How do we get ahead of Don Trotter?" The district court considered this evidence. SPA-30-31. The government argues it means Archer was "brainstorming ways to 'get ahead of' management who might question your motives," Br. 42, in order "to identify easy targets for transforming illiquid tribal bonds to cash" by sticking Atlantic's clients with the bonds. *Id.* This may have been Galanis's intention, but the assertion that Archer shared his state of mind is pure speculation.

In the email, which was not even about the bonds, Galanis describes Atlantic and Michelle Morton's proposal for its new management following acquisition. A-900. Galanis wrote, "Michelle has proposed that Andrew and Stephen step in to take over. She is going over this with the CCO/General Counsel now. No apparent objection. Only finesse needed will be Don Trotter being marginalized, but he seems an agreeable guy." *Id.* Archer asks, "How do we get ahead of Don Trotter?" *Id.* The non-speculative interpretation most consistent with the language of the email is that "getting ahead of Don Trotter" means

being proactive to address an existing manager who will feel "marginalized" when new managers "step in to take over." Even if the government's urged reading is *conceivable*, the district court properly rejected the illogical interpretation, which relied on the assumption that Archer knew the details of Galanis's scheme to support the inference that he knew the details of Galanis's scheme – entirely circular reasoning. SPA-30-31. And even if this Court might interpret the email differently, Judge Abrams's conclusion deserves deference, especially in light of the entire record.

In weighing the evidence, the government itself ignores the context surrounding these communications, not to mention the direct evidence that Archer did *not* know that Atlantic and Hughes' clients were being defrauded. The evidence available to Archer established that there was "no intent to unilaterally foist the bonds upon" their clients. SPA-31 (quoting DA-929, wherein Galanis told Archer that they "agreed to give" Hughes "*an opportunity to participate* in Native American new bond issues"). Under these circumstances, it cannot be said that the district court's evaluation of the evidence was clearly erroneous.

b. The Emails: Discretionary Liquidity.

The government argues that Archer's criminal intent can also be inferred from emails referencing "discretionary liquidity," claiming that this is criminal code that really meant the conspirators were putting the money in their pockets (even though Archer did not pocket a cent). Br. 37. The government argued repeatedly throughout trial that these uninterpreted emails showed that Archer knew that Galanis was stealing the bond money. While Judge Abrams held that there was evidence from which the jury could infer criminal intent for Yanni and Cooney – who were each personally enriched with payments directly from WAPC, the entity that received the bond proceeds, SPA-21 – she recognized that this inference with respect to Archer necessarily depended on assumptions unsupported by the record. *See* SPA-35 (finding inference argued by the government "hinges on the assumption of the very fact for which it is offered"); SPA-36. This speculation, coupled with strong evidence of Archer's *innocent* state of mind (discussed in the next section), supports the court's decision to grant a new trial.

Throughout trial, the government argued Archer "directly participated in stealing the bond proceeds." Tr. 3649. For each piece of evidence, however, it invited speculation. It argued that a "key email" showed that Archer knew Galanis intended to "direct the proceeds for their own purposes" and "not send it to an annuity provider." Tr. 3611. In the email, however, Galanis does not write "for our own purposes," and no one had ever mentioned the idea of an annuity at the point that email was written. *Id*. Rather, Galanis wrote that the proceeds of the bond issuance "are exemtp [sic] from the required on-reservation usage" and that "we can direct part of the proceeds." A-848. Not only did the government put words in Galanis's mouth, it invited the jury to make a guess – not a rational inference – about what Galanis meant and what Archer understood. As the district court found, increasing discretionary assets under management – an undisputed goal of the roll-up plan – was the interpretation that aligned with the language of the email and others like it, rather than a secret, unsubstantiated code meaning "steal the money for ourselves," which no witness ever testified to. *See* SPA-25.

On appeal, the government attempts to recast its argument, contending the evidence "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." *Id.*

Contrary to its newfound position, the government argued explicitly below that these "liquidity" emails showed that Archer was in on a scheme to steal bond proceeds. Tr. 3639. The government argued the same to the district court. There, the government put particular emphasis on an email Galanis sent in April 2014, months before the first issuance. DA-923. The government described how Galanis reported the approval of a bond issuance: "Proceeds are *15mm to us* and 5mm to them for a winery investment they want to make." D.C. Dkt. 642 at 29 (quoting DA-923) (emphasis the government's). The government added: "From these communications, the jury was entitled to draw the reasonable inference that the conspirators viewed any WLCC bond proceeds as *their* money ('15mm to *us*') to use however *they* wanted." *Id.* (emphasis the government's). After waving that email in front of the jury and the district court, the government has abandoned it – the

email does not appear in its brief – along with the assertion that the "liquidity" emails show Archer knew about plans to steal bond money. No wonder, as Judge Abrams found that evidence was exculpatory. SPA-26-27.

The government's new theory fares no better than the old one, however, because they both turn on the same unproven assumption: that Archer knew the bond proceeds were being used for unauthorized purposes. Under the government's new construction, it at least admits that "discretionary liquidity" refers to investments. This is the natural reading, and one supported by record evidence. *See* SPA-27. It is also not remotely a crime for investors in financial services companies to want to increase their discretionary assets under management. SPA-25-26.

To get to criminal intent, the government further argues that the annuity contract prohibited investments in the roll-up entities (it did not) and assumes that Archer knew what the annuity allowed (he did not). As the district court correctly determined, "the annuity was intended to include private equity investments." SPA-26; *see also* DA-

568 (WLCC "wishes to invest utilizing a private equity strategy"); DA-552; Tr. 370, 1547.

The record also establishes that Archer's understanding of what "had been promised to Wakpamni" was based solely on what Galanis told him. Br. 7, 23, 37. When the first bond deal was finalized, Galanis told Archer, "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." A-786; *see also* SPA-28 ("Far from being inculpatory, this email appears exculpatory because Galanis is specifically representing that the bond proceeds would be placed in an annuity.").

Galanis certainly never told Archer that the bond proceeds were going to a fake company, WAPC, that was unaffiliated with WAAG. The government argued that Galanis "created the [WAPC] account for one purpose, to hide the bond proceeds and the fact he was stealing them." Tr. 3625. That was true, and Archer was one of the people whom Galanis deceived. Galanis in fact sent updates to Archer until the scheme unraveled to make it seem like the proceeds were being spent legitimately. *See* DA-19; DA-350; DA-465.

c. The Emails: The Tribeca Apartment.

Returning to its original theory that Archer must have known that Galanis was out-and-out stealing, the government next contends Archer knew that Galanis was using bond money to pay for a Tribeca apartment. Br. 38. Judge Abrams carefully reviewed this evidence and correctly determined that it could not support a non-speculative inference of criminal intent beyond a reasonable doubt. *See* SPA-31-32; *see also* SPA-32 ("this email was admitted with no accompanying testimony or other evidence probative of its meaning," so interpreting it as evidence of criminal intent "is simply too large an inferential leap.").

The government first points to an email, A-869, where Galanis wrote, referring to the bonds, "target close is July 31." *See* Br. 38. Galanis continued, in what the government admitted was a "non sequitur," Tr. 3647, "So close [-] [attorney] Cliff [Wolff] is running the stall for me on nyc mansion." A-869. This email, the government argues, shows that Archer knew Galanis would *steal* bond money to buy the apartment. *See* Br. 38.

The evidence cannot support this inference. Beyond the conclusion that Galanis was waiting for a deal to close before making a

substantial investment, any other inference about what Archer understood Galanis to mean is speculative. The language of the email does not hint at Galanis's criminal intent. Nor does it link the apartment purchase to the bond *proceeds*, as opposed to, for example, legitimate fees. Archer wrote no response. No witness testified as to its meaning.

Again and again, Judge Abrams looked at the government's evidence and found that the innocent interpretation "was more closely tethered to the actual language used in these communications." SPA-33. For example, the government claims that "there was no record support" to suggest Archer believed that Galanis would earn money legitimately from the bond deals. Br. 39. Beyond the common sense conclusion that people involved in transactions might earn fees, there was direct evidence of Galanis "earning" in connection with the Tribeca mansion. In one email, for example, Galanis responded to an email from Archer, "Super comforting arch, especially as I take the tribeca plunge. Got to *earn* to keep up with my rapper spending!" DA-923 (emphasis added). As the district court noted, Galanis lived a lavish lifestyle, SPA-32, 35, and this email literally said that he was "earning" money to afford it.

The government reaches even further when it argues that Archer knew Galanis's apartment would be bought with stolen bond proceeds because he allowed Galanis's lawyer to use his name in connection with the acquisition. *See* Br. 38; A-914. There was no "connecting evidence" linking Archer's state of mind – his awareness that the lawyer was using his name – to Galanis's misappropriation of bond proceeds. *Ferguson*, 246 F.3d at 137. In fact, the government stipulated that there was no evidence whatsoever "that Archer had any affiliation, association, or involvement with" the entity Galanis used to buy the condo, Archer Diversified TCG. DA-1241.

d. The Second Bond Offering.

The "primary aspect of the government's case" against Archer was his role in buying bonds in the second issuance, using proceeds from the first. SPA-22. As Judge Abrams found, the trial record established that Archer did not know the illicit source of the money. SPA-23.

The court first determined that the evidence "counsels strongly against concluding that Archer had insight into" the facts necessary "to know where the money originated from, namely the WAPC account." SPA-24. Not even Dunkerley – who initiated the transfer of funds and

had access to WAPC's bank records – knew where the money went. SPA-22-24. The court next looked to "other aspects of the record," which compelled the opposite conclusion: Archer "did not know." *Id.* This included how Galanis treated Archer differently from others, like Yanni and Cooney, who received proceeds directly from WAPC. *Id.*

The contention that the district court's decision was unreasonable, Br. 43-44, again relies on speculative inferences and assumptions. For example, it argues that "Galanis also previewed for Archer the suspiciously complex structure for the transfer of the $15 million." Br. 43. As described above, Galanis instructed Dunkerley to go to a brick-and-mortar bank branch, withdraw $15 million and deposit it as cash in Thorsdale's account, then instructed Francisco Martin to wire the money from Thorsdale to a law firm, which sent it on to RSB.

The documents the government cites fail to show that Archer knew the money originated with WAPC (let alone represented bond proceeds), or that he had insight into the full "complex structure" employed by Galanis. In one, Galanis forwards Archer, his assistant Sebastian Momtazi, and attorney Cliff Wolff a wire confirmation for the transfer. The email provides no information about where the funds

came from, and only supports the inference that Galanis was the source of funds. A-911. In another, Galanis emails Momtazi, copying Archer and Wolff, providing wire instructions for RSB to purchase the bonds. A-909. Two other emails cited by the government concern custodying the bonds after the purchase, not how it was funded. A-877, A-880. And the last was written a month after the second bond issuance, and described a conversation between Morton and another Atlantic employee having nothing to do with the bonds RSB purchased. A-1024.

In short, there is no evidence that Archer knew the money for the second bond issuance came from the first. Indeed, the government admits that "there was no evidence [Archer] was told that the funds originated with the WAPC account," merely that Archer "knew that steps were being taken to disguise their provenance." Br. 44. Even this is not so – unless sending funds for a sizeable investment through an attorney, standing alone, was supposed to provide notice that Galanis was "disguising" something. To the contrary, the trial evidence showed that Galanis was, at least in part, disguising the source of funds *from Archer*.

In criticizing the district court, the government points to a certification that RSB was a sophisticated investor. *See* Br. 43, 47; A-618-19. The statements in that letter were true: Archer's company did not resell the bonds but held them in its own account. Even if the letter was inaccurate, its value as evidence of Archer's intent still depends on layers of additional inferences and, ultimately, speculation. *See* SPA-24 n.18. The letter was drafted by a lawyer, Anderson. Tr. 430. It was then sent to another lawyer, Wolff, who determined the "letter is approved for signature by Devon." *Id.* Archer's assistant then attached his signature and sent the letter back. *Id.* Archer was copied, but it is speculation as to what he knew about the letter or the representations in it. (The government complains that the district court dismissed this argument "in a footnote," Br. 47, but it only raised the point in a footnote. *See* SPA-24 n.18.)

The government also attempts to manufacture a clearly erroneous factual finding, pointing to what it describes as "errors in [the court's] factual recitation of the events surrounding the $15 million transaction." Br. 44 n.8. The government accuses Judge Abrams of erroneously finding "that Archer was somehow kept in the dark by

Galanis and [the lawyer] about the flow" of funds. *Id.* But the court recognized explicitly that it was "undisputed that Archer knew Jason Galanis supplied the money." SPA-22. What Archer *was* kept in the dark about was that the ultimate source was WAPC, and the first issuance.[10]

e. Placement of the Bonds with Morgan Stanley.

The government devoted significant argument to Archer's representations to Morgan Stanley, where RSB's bonds were held. In Judge Abrams's view, these representations were some of the "most damaging evidence against Archer." SPA-33. She therefore evaluated it closely to determine what inferences were properly drawn. Ultimately, she determined that while "certain of these statements were clearly misleading," they were misleading in a way that "does not lead to the

[10] The other "errors" identified by the government are even less compelling. Judge Abrams correctly found that no matter what Dunkerley, Martin, and Galanis were doing behind the scenes, the only information available to Archer was that Galanis was sending money through an attorney escrow account. *See* SPA-22-23. The government reaches outside the record to argue that Galanis's attorney "was also Archer's attorney." Br. 45 n.8. *Contra* Tr. 2340. (This was not the only occasion in the government's brief in which it cites to evidence outside the record. *E.g.,* Br. 19 (citing GX719, which was never admitted at trial).)

ultimate conclusion necessary for Archer's guilt: that he was misleading because he knew Galanis was stealing the bond proceeds." *Id.* While Archer respectfully disagrees that anything he said was intentionally misleading, Judge Abrams's ultimate conclusion is correct, and certainly not an abuse of discretion. *See* SPA 36-37.

The evidence concerning what Archer actually said is straightforward. A Morgan Stanley employee emailed Archer's assistant Momtazi attaching a form and asking him to "complete all blank fields and have Devon sign." DA-829. The completed form read:

1. I acquired and fully paid for the Private Security on 10/1/14 (Date), in the following manner:

a. Method of acquisition: Purchase

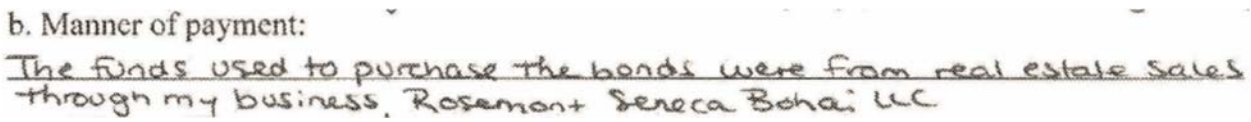
b. Manner of payment: Wire Transfer

DA-835. Archer signed this letter. DA-837; *see also* Tr. 3300:3-5.

About a week later, the employee asked, "How was the $15mm generated that was used to purchase the bonds?" A-658-9. Archer replied, "through sale of real estate." A-658; *see also* A-781 (same answer to Deutsche Bank). Just 26 minutes later – without any additional discussion about the source of funds, A-658, Tr. 867-88 – she

embellished Archer's answer to her manager: "The funds used to purchase the bonds ($15mm) were from real estate sales through [Archer's] business, Rosemont Seneca Bohaii [sic] LLC." DA-982. She also noted that Archer "runs a real estate private equity group." DA-839; Tr. 854.

Almost two weeks later, the Morgan Stanley employee emailed Momtazi a "new rep letter," which she had completed. DA-850. Her version read:


b. Manner of payment:
The funds used to purchase the bonds were from real estate sales through my business, Rosemont Seneca Bohai LLC

DA-851; Tr. 869-71. Momtazi responded with a signed copy, A-663, although the signature was one he inserted. A-665; *see* Tr. 3299-3300; DA-437.

Archer's statement that the money came from real estate sales was factually untrue: unbeknownst to Archer, the money came from the first issuance. Archer, knowing only that the money came from Galanis, answered based on information available to him at the time: Galanis projected a façade of extreme wealth, and "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." SPA-35.

See Tr. 480, 924, 1194-96, 1203-05, 1416-18, 2195, 2305-06, 2340-41, 2929, 2932; DA-11; DA-72; DA-73; DA-537. Even Galanis's email address (jason@holmbycompanies.com) was an allusion to real estate wealth, Holmby Hills being an upscale LA neighborhood. Tr. 533-34. *See also* DA-525 (Galanis to Archer: "im all over the real estate stuff.").

With the true source of funds hidden from Archer, and in the context of all the evidence, the government's claim that Archer knowingly lied is not a fair inference. But even if Archer's statements contributed to the bank's incorrect elaboration that the funds were generated from RSB's real estate sales, the question remains as to what further inference could be drawn, if any. The district court identified "two possible inferences" about Archer's reason for answering in the way he did: to hide "the fact that the funds constituted recycled bond proceeds," or to "hid[e] the involvement of Galanis." SPA-35. The validity of the first inference, however, "hinges on the assumption of the very fact for which it is offered." *Id.*

Judge Abrams correctly concluded that the second inference was the only plausible one. While she found some circumstantial evidence that Archer was helping to obscure Galanis's involvement in various

transactions given Archer's (partial) knowledge of Galanis's checkered past, the Morgan Stanley evidence did not support the further inference that Archer knew about the bond scheme. SPA-33-37.

In response to Judge Abrams's reasoning, the government reiterates its argument that Archer claimed that the money "came from [his] own real estate sales." Br. 48. But even if Archer did lie about the money coming from *his* real estate sale, that would not help answer the critical question: why did he lie? To hide Galanis's involvement, or to hide the bond scheme? *See* SPA-33-34. If anything, the government's version adds further support for the inference that Archer was hiding Galanis's involvement, because it puts even more distance between Galanis and the transaction.

f. The BIT Board.

"The inference urged by the government is even less persuasive with respect to the BIT Board evidence," SPA-37, which had absolutely nothing to do with the bonds, *id.* *See also* Tr. 2656-2658, 2806. Nothing in the entire course of dealing with the BIT Board suggests that Archer knew about Galanis's schemes.

Archer's interactions with the BIT Board concerned the proposed purchase of Burnham Asset Management, or BAM, as part of the roll-up. Because the BIT Board represented a significant BAM client, Archer wanted to ensure that its assets would stay put following a change in ownership. Tr. 2656, 2666-67. It is precisely because Archer valued BAM's role in the legitimate roll-up plan that he spent so much time with the BIT Board. Had he just wanted to acquire Burnham *Securities* – the placement agent for the bonds – he could have done so without regard to the BIT Board.[11]

After months of back-and-forth, *e.g.,* DA-870; A-746; Tr. 2765-2778, the BIT Board and the investor group arrived at a set of narrow representations concerning Galanis's involvement with Burnham. It was no secret that Galanis had been and would continue to be a consultant for CORFA and the roll-up companies. The chair of the BIT Board was explicit that Galanis "operated as a consultant." DA-439; Tr.

[11] The government argues that "Archer needed BIT Board approval for the acquisition." Br. 49. The record was exactly the opposite: the BIT Board had no right to block or approve an acquisition; it only had the right to pull its money. Tr. 2665-67.

2646. The investors likewise told the BIT Board that Galanis "consulted with CORFA and certain of its members." DA-440; DA-867.

At the end of that back-and-forth, the investor group "confirmed" three specific points: (1) "Galanis will have no interest of any kind, direct or indirect, in any of the Burnham entities or their successors," (2) Galanis "will not source deals to the Burnham entities," and (3) "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." DA-870-1.

Each representation was accurate and honored:

- Galanis had no ownership in the entities that acquired BAM and Burnham Securities. A-1193, DA-211; DA-868; DA-436; DA-863; DA-388; DA-868; DA-436; Tr. 2622-23, 2775-76.[12]
- Galanis did not source any new deals, although Burnham finalized deals that he had previously introduced, including the bond issuances and an IPO. DA-22.

[12] Earlier, Galanis was bought out of one of the acquiring entities. In what was likely an effort to establish a cost basis in the investment, Thorsdale transferred funds to RSB, which it used for the buyout. Tr. 3270. There is no evidence in the record about why these payments were made, and the record affirmatively reveals that the BIT Board was not told about the buyout, Tr. 2786, meaning it could not possibly have been a "fig leaf" to fool the BIT Board. Br. 16.

- Burnham never invested in any Galanis-affiliated company. DA-394; DA-144; A-1171; DA-225.

Even assuming that Archer was misleading in some way, Judge Abrams correctly found that that would not support the inference that he knew about the bond scheme – especially because the BIT Board evidence had absolutely nothing to do with the bonds. SPA 33-37. As with the Morgan Stanley evidence, the only non-speculative inference about the reason for any misstatement was that Archer was trying to downplay Galanis's involvement in the legitimate roll-up plan because of Galanis's past SEC settlement and the BIT Board's concerns about his involvement. *Id.*

g. Galanis's Cover-up.

After Galanis was arrested in September 2015, he attempted to hide the bond scheme, principally through the Calvert fiction. As discussed above, Hirst and Martin were also involved in the Calvert scheme, and Cooney signed and submitted to the SEC at least one fake, back-dated agreement with Calvert.

As Judge Abrams correctly determined, the evidence overwhelmingly demonstrated that Archer was not part of this scheme, and in fact was specifically kept out of it. SPA 39-40. The evidence that

Archer was "involved" in the Calvert cover-up was limited to a single email in which he referred to Calvert as the owner of the bonds originally purchased by RSB. A-912. On the other hand, there was substantial evidence that Archer did *not* know Calvert's true, fraudulent nature. To avoid having to ask Archer to do something they knew he would have refused – because he had no idea about the bond scheme – Galanis and Dunkerley fabricated a back-dated WAPC corporate resolution purporting to describe a loan between Calvert and RSB, which Dunkerley signed. A-845. Dunkerley and Martin confirmed that they never spoke to Archer about Calvert, or had any knowledge about *anyone* speaking to him about it. Tr. 1464, 1509, 2381.

The government argues that because Archer "was directly involved in securing the subject bonds in 2014," he "knew that 'Calvert' was not the lender and beneficial owner." Br. 51. This argument fails because, as discussed above, the only information Archer had at the time of the second issuance was that the funds for the bonds came from Galanis through a lawyer escrow account. There was no evidence about what additional information Archer may have been provided, if any,

including which entity transferred the money. As the evidence showed, Galanis's story was that Calvert was a Thorsdale customer, s*ee* Tr. 1465-66; DA-18, so Archer's statement that Calvert was the "lender and beneficial owner" of the bonds is entirely consistent with the idea that, as part of the cover-up, Galanis lied to Archer about where the money came from. Given the other steps he had taken to conceal the truth about Calvert from Archer – not to mention that Galanis hid this truth even from Martin, who had created Calvert, Tr. 2181 – that is the only evidence-based inference.

Separate from Calvert, the government also argues that Archer covered up the crime by paying $250,000 of his own money to WAPC. *See* Br. 50-51. There is no evidence to support this argument. It is true that Archer paid $250,000 to WAPC. But there was absolutely no evidence of why he did so, or what he was told (other than to receive wire instructions). DA-940.

Archer's payment was made to WAPC on September 1, 2015. On September 4, Galanis promptly paid himself $240,000. *See* SPA-39 n.22; A-731; A-1078. The remaining $10,000, along with $1,802,000 from other sources, was used by Galanis to pay interest on the bonds. *See*

SPA-38-39; A-1078. The government argues that Archer somehow knew the money would go towards an interest payment, and was trying "to prop up the scheme." Br. 51. The district court carefully examined the evidence and concluded that the "more compelling" inference was that Archer "was intending to assist what he believed to be a legitimate transaction by providing liquidity needed in the short-term" SPA 38-39. The evidence supporting Judge Abrams's inference include Archer's history of infusing liquidity into the roll-up companies, and the fact that Archer had no reason to believe WAPC was anything other than a legitimate affiliate of Wealth Assurance – as Galanis had (falsely) told him. SPA-38-39; *see also* Tr. 1459-61; A-786.

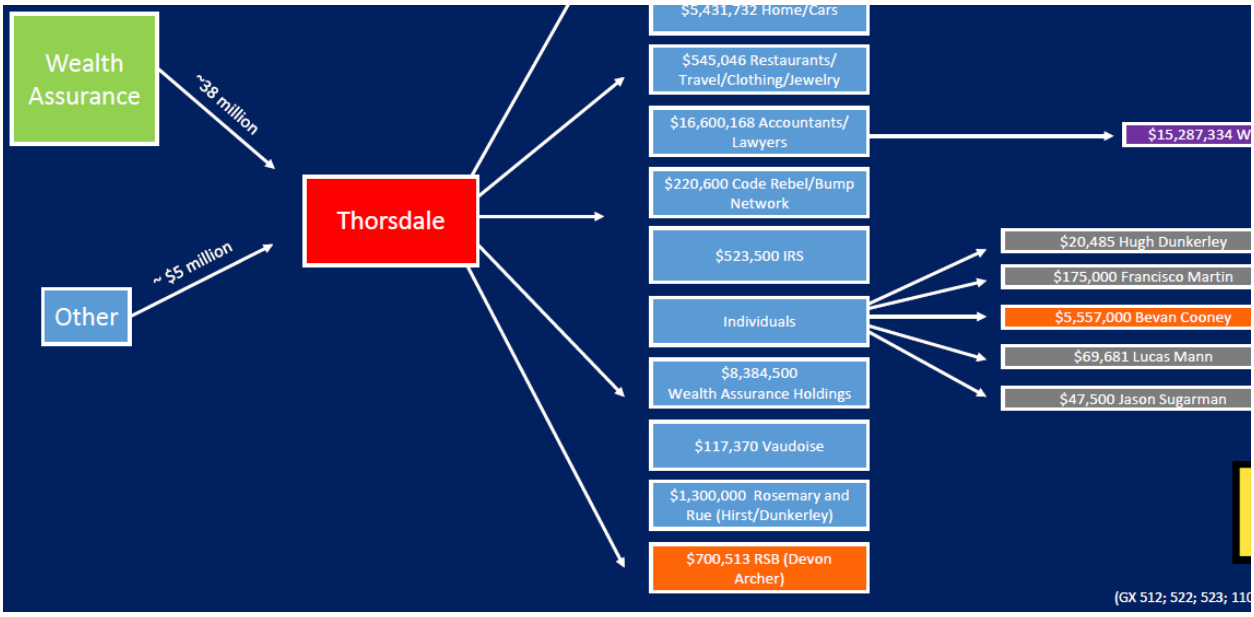
Based upon the trial record, the district court's finding was far from clearly erroneous – it was the only possible choice. While unexplained conduct "may strengthen inferences supplied by other pieces of evidence, such evidence is insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt." *United States v.*

Cassese, 428 F.3d 92, 101 (2d Cir. 2005) (quotation and citation omitted).

h. Archer's Objective Was to Build a Financial Services Firm, Not Steal Money.

The district court correctly reasoned that the absence of any "compelling motive for Archer to engage in this fraud" further weakened any inference of criminal intent. SPA-21. Ultimately, the only motive supported by the evidence was Archer's desire to build a healthy and successful company, not one infected by fraud. DA-227; A-1102.

The government advanced several theories of motive, each of them flawed. First, it claimed that Archer "profited by way of $700,513 in misappropriated proceeds." SPA-21 n.17. Although the government denies making this argument, Br. 53, it obviously did:



A-1085; *see* Tr. 2970-71.[13] Archer did not profit by $700,513. As the government's own witness admitted, that amount consisted of two wires: a $100,000 "repayment of a loan" while "the second wire (for the remaining $600,513) was soon thereafter returned to Thorsdale." SPA-21 n.17.

The government next argued that Archer wanted to use the bonds to satisfy certain companies' regulatory capital requirements. Tr. 4079; *see* Tr. 3650-51 (arguing that Archer wanted to "try and fool FINRA"). As the district court correctly noted, this argument found absolutely no support in the record, SPA-9 & n.8, and the only witness to testify about the use of the bonds for net capital requirements had nothing to say about Archer. Tr. 2100; *see also* DA-611; DA-747; DA-787.

Finally, the government settled on its current theory: that Archer "had millions of dollars of Wealth Assurance Holdings stock that he received for his role as a director." Tr. 3628-29. This was true. Archer received shares when he joined the board in late 2013, long before he knew anything about WLCC bonds. DA-210; DA-78; DA-115.

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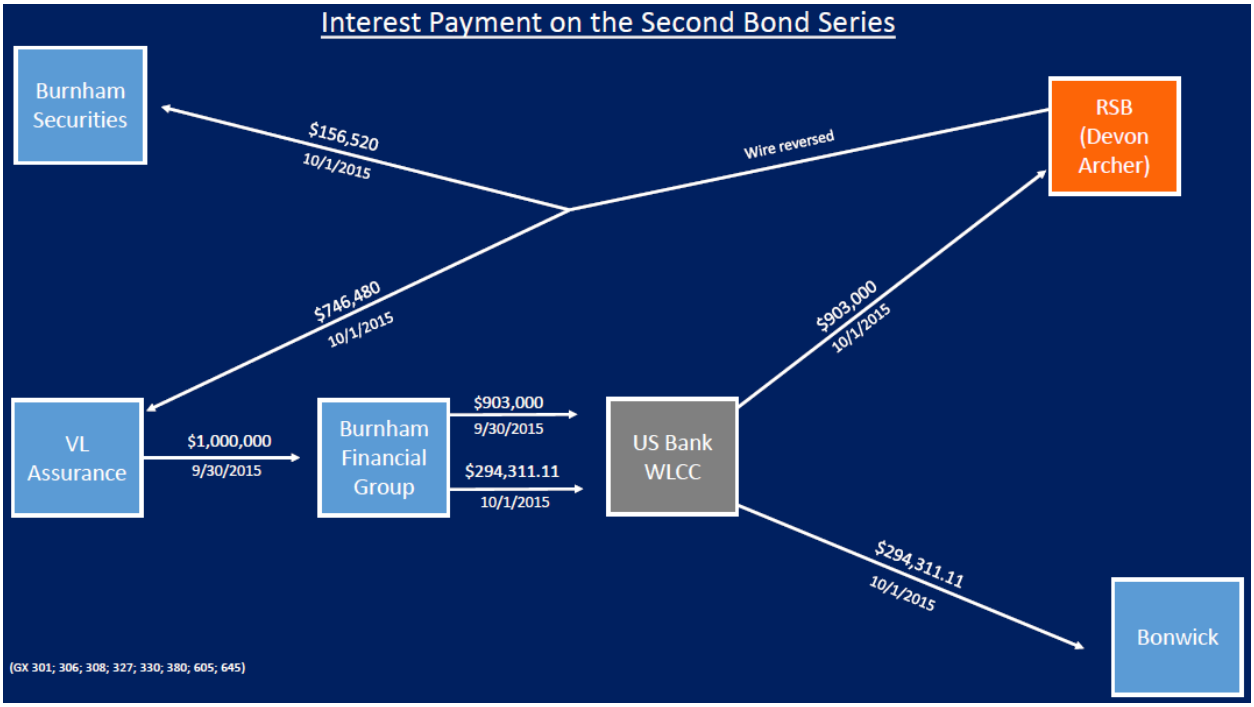
[13] In the government's charts, "Wealth Assurance" means WAPC, the fake company. Tr. 2988. The government refused to use "WAPC," preferring to taint the legitimate and unaffiliated Wealth Assurance.

Judge Abrams noted that while it was theoretically possible this created a motive for Archer to participate in the fraud, it made no sense. She reasoned that Archer's investment of $1 million of his own money into the plan was flatly inconsistent with his knowledge that tens of millions of dollars of bond proceeds were being misappropriated, and instead was consistent with his good faith belief in the legitimacy of the roll-up. SPA-21. That good faith belief was further evidenced by Archer bringing in, and paying for, high-powered consultants to study and market the roll-up to outside investors. Tr. 1310, 1087-88. The real conspirators, meanwhile, personally profited in cash pay-outs of the stolen bond proceeds – significant evidence undermining the government's theory. SPA-21; *see also* SPA-44 ("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.").

i. The Government Introduced Misleading Demonstrative Evidence.

Although the evidence demonstrated, as Judge Abrams found, that Archer was factually innocent, the court was also rightly concerned that the jury's verdict was tainted by misleading evidence. SPA-42-44. Among other things, the government introduced an egregiously misleading chart that falsely depicted RSB receiving funds from the WLCC to pay interest on the second bond series:



A-1084. Anyone who looks at this chart can tell what it was trying to convey: that $903,000 in proceeds went through RSB and was used *by Archer* to pay interest on the bonds. But that simply never happened.

The government admits that the payment of $903,000 to RSB was "the product of a bank error," and occurred (and was corrected) without Archer's knowledge or involvement. Br. 53; *see also* A-1188. Contrary to the chart's clear suggestion, therefore, Archer undisputedly did not make interest payments on the second bond series.

Not only did the chart wrongly suggest Archer received and paid money in connection with the interest payment, the entire detour – especially by the government's very last witness – served to inflate "the relatively limited nature of Archer's involvement in the universe of relevant transactions." SPA-43.

C. The Government Asks this Court to Review the Record *De Novo* and Draw Unsupported Inferences.

The government's appeal depends on this Court second guessing Judge Abrams's careful analysis, which benefited from her sitting through and presiding over this complex trial. This is not the first time the government has "suggest[ed] that a more stringent standard of review may be appropriate in Rule 33 cases involving a ruling that the verdict was against the weight of the trial evidence[.]" *Ferguson*, 246 F.3d at 133 n.1. To reverse based on this Court's independent evaluation of the record "virtually amounts to a trial de novo on the

record of such findings as intent, motive and design." *Yellow Cab*, 338 U.S. at 341-42. In this case, though, Judge Abrams's conclusions are the only ones consistent with the record, and certainly not an abuse of discretion.

The circumstances under which this Court has previously reversed a grant of a new trial are absent. The court did not disregard any testimony, because no witness implicated Archer. *E.g., United States v. Truman*, 688 F.3d 129 (2d Cir. 2012); *United States v. Bell*, 584 F.3d 478, 483 (2d Cir. 2009); *Sanchez*, 969 F.2d at 1414. The court committed no legal error. *E.g., Bell*, 584 F.3d 478; *Cote*, 544 F.3d 88.

Instead, the government repeatedly points to instances where it believes the district court chose "the weaker of the competing inferences." Br. 40. In rejecting Archer's Rule 29 motion, the district court gave the government the benefit of every permissible inference – a benefit the government does not enjoy under Rule 33. *See Coté*, 544 F.3d at 101. For example, in *United States v. Knight*, cited by the government, *see* Br. 33, the circumstantial evidence of intent was weak, and the inculpatory testimony "largely devoid of legal or factual support." 800 F.3d 491, 510 (8th Cir. 2015). While it was enough to

reject acquittal, the Eighth Circuit could not say that the "district court committed a clear error in judgment in weighing the extraordinarily complex evidence." *Id.*

Here, the government's argument rests on a set of impermissible inferences about Archer's state of mind. The government tries repeatedly to make up for the shortcomings in any particular category of evidence by pointing to others. But the force of those other categories of evidence depend equally on speculation and assumption.

The government wants to argue that its evidence is greater than the sum of its parts. But instead, it has drawn an endless circle – a self-referential loop of circumstantial evidence. It argues that innocuous emails updating Archer about the roll-up plan or the WLCC development projects were "obviously probative of Archer's guilt, even if no single email, standing alone, established that guilt." Br. 41. The reason these emails were "obviously" incriminating is that they were written "[a]gainst the backdrop of this obviously suspicious plan." Br. 42. But no evidence shows that Archer knew about Galanis's "suspicious plan" to misappropriate bond proceeds. Likewise, Archer's payment of $250,000 to WAPC and his single mention of the word Calvert do not

suggest he knew WAPC was unaffiliated with the real Wealth Assurance or that Calvert was fake, especially given the countervailing evidence that Galanis claimed WAPC *was* affiliated with Wealth Assurance, A-786, and that he deliberately declined to have Archer sign Calvert documents.

* * *

This was an extraordinarily complicated case. Judge Abrams presided over an extended trial and observed every witness. She analyzed the record carefully and recognized that Archer was different from everyone else. Based on everything before her, Judge Abrams found that Archer was innocent, and that the verdict was manifestly unjust. This is precisely what Rule 33 is intended to guard against. *See Pauling*, 924 F.3d 649; *Valle*, 807 F.3d 508; *Cassese*, 428 F.3d 92; *Ferguson*, 246 F.3d 129. Even if this Court might have reached a different result, the district court did not abuse its discretion.

II. Judge Abrams Did Not "Fail To Consider" Conscious Avoidance.

The contention that Judge Abrams committed legal error by "fail[ing] to consider" conscious avoidance is absurd. Br. 55. In the same opinion in which she vacated the verdict out of an unwavering concern

for Archer's innocence, Judge Abrams *denied* his challenge to a conscious avoidance instruction. *See* SPA-55-57.

A. Legal Standard

Conscious avoidance requires proof beyond a reasonable doubt that the defendant (1) "was aware of a high probability of the disputed fact," (2) "deliberately avoided confirming that fact," *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003), and did not "actually believe[] that [the fact] does not exist." *United States v. Henry*, 888 F.3d 589, 600 (2d Cir. 2018).

Conscious avoidance alone could not support Archer's conviction. Fraud requires proof of willfulness and intent to defraud, whereas a defendant can only consciously avoid knowing a fact. *Id.* at 601. A defendant also cannot consciously avoid knowing that he or she is a member of a conspiracy, but must intentionally joint one. *United States v. Ferrarini*, 219 F.3d 145, 154-56 (2d Cir. 2000).

B. Archer Did Not Consciously Avoid Learning About Galanis's Fraud

The court gave a conscious avoidance charge because of what it described as Archer and Cooney's "extensive involvement…in transactions that were central to the execution of the criminal

conspiracy." SPA-55-56. But this statement about Archer's *conduct* says nothing about whether he acted with a guilty mind.

Archer's relatively minor and mostly passive involvement in the bond deals provides no evidence he "subjectively believe[d] that there was a high probability that" Galanis was stealing bond proceeds. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). People much more involved in the bonds had no idea that Galanis was stealing proceeds, including the lawyer who handled every aspect of the bonds, Tr. 526-27, the WLCC representative who spearheaded the bond deals and received fees from the bond issuance, Tr. 1849, and even, for a time, the government's cooperating witnesses, Tr. 897-88, 1139-40, 2329.

The government claims that Archer ignored "red flags," but it identifies only two: (1) "the suspicious provenance of the $15 million he received from Galanis through a deliberately complex transaction," and (2) that misuse of "a newly created company called Calvert" by others. Br. 58-59.

Judge Abrams expressly rejected the first: "the government presented no evidence that Archer knew these funds came from WAPC,

which presumably would have operated as a red flag." SPA-23. As discussed above, Archer saw only that Galanis transferred money to RSB through a law firm, A-1023 – not unusual for a sizeable investment.

The contention that Calvert served as a "red flag" fares no better because, as discussed above, there was no evidence Archer knew it was a "newly created company." Br. 59. As Judge Abrams found, "the weight of the evidence undercuts the notion that Archer was aware of the Calvert cover-up." SPA-39.

The government points to no actions Archer took to suggest he was deliberately "turning his mind away from damning facts." Br. 59. To the contrary, the trial record is replete with evidence that Galanis was actively deceiving Archer: about the roll-up plan, about the annuity provider, about the source of funds transferred to RSB, and about the bond proceeds being used for construction. *See* SPA-42 ("Archer was not a party to this conspiracy but was instead being manipulated by a skillful con artist").

C. Archer Believed That The Bonds Were Legitimate.

A defendant cannot consciously avoid learning a fact if he "actually believes that it does not exist." *Henry*, 888 F.3d at 600. Archer risked nearly $1 million of his own money on the belief that the roll-up was real. He brought in and paid for consultants to help market the conglomerate to legitimate buyers. He brought in investors, leveraging his own contacts. Meanwhile, Galanis continued to lie about what the bonds were doing for the WLCC. The evidence was clear that "Archer had good reason to believe the WLCC bond deal was legitimate," SPA-33, so he could not have consciously avoided learning otherwise.

CONCLUSION

The district court's order should be affirmed.

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Fed. R. App. P. and this Court's Local Rule 32.1(a)(4)(a). As measured by the word processing system used to prepare this brief, excluding the parts of the document exempted by Fed. R. App. P. 32(f) there are 13994 words in this brief.

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Dated: June 26, 2019

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