

18-3727

To Be Argued By:
BRENDAN QUIGLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 18-3727

UNITED STATES OF AMERICA,

—v.— *Plaintiff-Appellant,*

DEVON ARCHER,
Defendant-Appellee,

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

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

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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REPLY BRIEF FOR THE
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Preliminary Statement

The United States of America respectfully submits this brief in reply to the brief filed by defendant-appellee Devon Archer, and in further support of its appeal from an order entered in the United States District Court for the Southern District of New York, by the Honorable Ronnie Abrams, United States District Judge, granting Archer's motion for a new trial.

In convicting Archer, the jury drew reasonable inferences about the only disputed issue in the case against him: Archer's state of mind. Archer's brief simply confirms that the jury's decision was not "extraordinary," "exceptional," or a "manifest injustice"—all terms that this Court has used to describe the Rule 33 standard. Far from seeking "*de novo*" review of the District Court's ruling, as Archer charges, the Government asks this Court to rectify an abuse of discretion. At Archer's urging, the District Court rejected the considered verdict of a careful jury by isolating each piece of evidence, drawing essentially all inferences from each piece against the Government's case, and adopting inferences favorable to Archer that had little or no support in the record. While Archer contends that the District Court did not commit any "claimed legal error," it certainly did, including by requiring direct proof of Archer's state of mind and by failing to even consider the weight of the evidence under a conscious avoidance theory. The District Court's ruling should be reversed, and the jury's verdict reinstated.

ARGUMENT

POINT I

Archer Was Deeply Involved in A Massive Fraud

Archer's brief significantly understates his involvement in the scheme, painting him as a detached outsider. (*See, e.g.*, Br. 5, 14).¹ The record simply does not support this version of events. At trial, it was "undisputed" that Archer "undertook actions that had the effect of assisting" "a massive fraud." (SPA 1). The only real area of contention was whether Archer was a knowing and willful participant in the scheme, a question that this Court has held is "one especially suited for resolution by a trial jury." *United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003).

¹ "Br." refers to Archer's brief on appeal; "DA" refers to the appendix filed with that brief; "Gov't Br." refers to the Government's opening brief on appeal; "A." refers to the appendix filed with the Government's opening brief; "SPA" refers to the special appendix filed with the Government's brief; "GX" refers to a Government exhibit admitted at trial; "DX" refers to a defense exhibit admitted at trial; "Dkt." refers to an entry on the District Court's docket in this case; "Add." refers to the addendum to this brief; and "Tr." refers to the trial transcript, the cited pages of which are, unless otherwise noted, included in the appendix filed with the Government's opening brief.

As detailed more fully in the Government’s opening brief, the trial record is rife with circumstantial evidence of Archer’s guilty state of mind. In pursuit of the glory and wealth that would come with helming a sprawling financial services mega-company, Archer schemed with the notorious Jason Galanis and others to have an impecunious tribal entity issue tens of millions of dollars’ worth of illiquid bonds. There neither is nor ever was any genuine dispute that Archer *knew* about the bond issuance, *knew* about the capture of an investor pool for the purpose of offloading the bonds, and *knew* that the proceeds of the bond sales—and the \$15 million in bonds that Archer personally purchased from the second issuance—were being used to prop up the burgeoning corporate conglomerate that he, Galanis, and others were building. If he did not know from the outset that the bond proceeds would be diverted from their promised investment in a safe “annuity,” he certainly gained that knowledge—or, at a minimum, deliberately chose to turn his mind from the truth—as the scheme progressed. By the time he was using \$15 million in sudden cash to buy nearly the entirety of the second bond issuance, Archer was already lying to cover his tracks, falsely representing to two banks that the funds came from real estate sales. And when the scheme unraveled, he, like his co-conspirators, was wielding the “Calvert” fiction to try to paper over the scheme, and contributing his own money to give the appearance of a legitimate interest payment on the bonds.

The evidence did not “preponderate heavily” in Archer’s favor, nor was it “extraordinary,” “exceptional,” or a “manifest injustice” for the jury to find

that he knowingly participated in the scheme. *See United States v. Sanchez*, 969 F.2d 1409, 1414-15 (2d Cir. 1992).²

² Archer is wrong that *Sanchez*—or any other authority—limits application of the “heavily preponderates” standard to cases where “the defendant offers ‘newly discovered evidence’ or ‘where perjury clearly has been identified.’” (Br. 31 n.7 (citing *Sanchez*, 969 F.2d at 1413-14)). Indeed, as authority for the “preponderates heavily” language, *Sanchez* cites *United States v. Martinez*, 763 F.2d 1297 (11th Cir. 1985), a weight-of-the-evidence case. *See Sanchez*, 969 F.2d at 1415; *see also Martinez*, 763 F.2d at 1312-13 (“The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.”). Other cases the Government cited in its opening brief likewise apply the “heavily preponderates” standard to weight-of-the-evidence claims. *See, e.g., United States v. Conley*, 875 F.3d 391, 399 (7th Cir. 2017); *United States v. Knight*, 800 F.3d 491, 504-06 (8th Cir. 2015); *Butcher v. United States*, 368 F.3d 1290, 1297-98 (11th Cir. 2004). And the two witness recantation cases Archer cites—*United States v. Lespier*, 266 F. App’x 5 (2d Cir. 2008), and *United States v. DiPaolo*, 835 F.2d 46 (2d Cir. 1987)—do not even discuss the scope of the standard’s application, much less purport to limit it.

A. Archer’s “Purchase” of \$15 Million Worth of Bonds

On October 1, 2014, Archer purchased \$15 million worth of Wakpamni bonds with funds he had received only days before from Galanis. This single buy represented nearly a quarter of the entire amount of bonds issued.

Archer would have the Court conclude—along with the District Court, but contrary to the verdict—that he made this purchase innocently oblivious to the funds’ provenance because, “as far as he could see, the \$15 million came from a law firm.” (Br. 21). But Archer plainly was aware that the money came from Galanis. Three weeks before Archer closed the purchase, on September 8, 2014, Galanis emailed Archer to confirm that he would wire funds through Clifford Wolff, the attorney who had represented both Galanis and Archer. (A. 1023).³ And while it is true that Galanis also had another conspirator, Francisco Martin, wire the funds from Galanis’s company, Thorsdale, to Wolff in the first instance (*see* Br. 21), Archer *knew* about that transfer because Galanis sent Archer a contemporaneous confirmation (A. 911). Finally, while Archer

³ Archer asserts that the Government “reaches outside the record to argue” that Wolff “was also Archer’s attorney.” (Br. 54 n.10). Not so. Archer’s privilege log, which was attached to a brief filed in connection with pre-trial litigation, is a public, judicial document and not “outside the record.” (*See* Dkt. 313, Ex. A at 7, 10, 19).

makes much of the role another co-conspirator, Hugh Dunkerley, played in transferring funds, Dunkerley's transfer did not occur until at least 15 days after Archer and Galanis first discussed the transaction. (See A. 671). In short, no one was hiding the complexity of this transaction from Archer; he knew the money was coming from Galanis through a circuitous route.

Even standing alone, Archer's straw purchase of \$15 million worth of bonds on behalf of Galanis—a man he knew had a “well-documented checkered past” (SPA 35), and who earlier in the summer had been complaining to Archer about a “summer cash hole” (A. 862)—was significant proof that he knew, or consciously avoided learning, that the funds came from the first bond issuance and that the proceeds of that issuance therefore were not being invested in an “annuity.” Archer knew that the first bond tranche had been sold only a few weeks before (A. 933; Add. 1, 18-19 (GX 2035, 2224)), and that Galanis suddenly had the ability to wire him \$15 million. Even the District Court described this transaction as “unusual to say the least.” (Tr. 3587). Archer did not attempt to explain to the jury why he purchased \$15 million of illiquid, unregistered bonds for Galanis, and the District Court offered no such explanation in its Rule 33 opinion.⁴

⁴ Notably, there is no evidence in the record that anyone—other than Archer and his co-defendant Cooney—ever willingly purchased any Wakpamni bonds. To the contrary, there was overwhelming evidence that the other bonds were placed with clients of Hughes and Atlantic without their consent and that

B. Archer Was Accurately Informed About the Details of the Bond Transactions and Galanis’s Plan to Use Some of the Bond Proceeds on Personal Expenses

Also undercutting Archer’s efforts to portray himself as the unwitting stooge are the dozens of emails he received from Galanis regarding the bond issuances—reporting, for example, that money had been wired to fund the Hughes acquisition (whose clients, as Archer well knew, purchased the entirety of the first tranche of bonds just weeks later), and that two members of the Wakpamni tribe had signed bond documents for the first tranche. (A. 790-91; A. 932). These emails established Archer’s direct knowledge that (i) entities on all sides of the bond deal were controlled by members of the scheme, and (ii) prior to the first bond issuance, Galanis was “sick of begging” for “discretionary liquidity” (A. 866) and facing a “summer cash hole” (A. 862), making it unlikely he would have \$15 million to give to Archer, no questions asked, just weeks later, to purchase highly illiquid, unrated bonds.

Moreover, in one of these emails, Galanis and Archer linked Galanis’s “massive[] motivat[ion]” to close the first bond deal with Galanis’s purchase of a

those clients immediately sought to liquidate their holdings after learning about the bonds. (*See, e.g.*, Tr. 2050 (testimony that Hughes’ clients reacted “[n]egatively across the board” to learning the bonds had been placed in their accounts)).

“nyc mansion.” (A. 869). Archer tries to avoid the probative force of this email chain by invoking a supposed “common sense conclusion that people involved in transactions might earn fees. . . .” (Br. 49). But this hypothesis, which Archer persuaded the District Court to adopt, ignores the fact that Galanis had no official role in any of the entities involved in the Wakpamni transactions, and no legitimate expectation of earning anything. Archer, moreover, *knew* as much—as underscored by his repeated lies, discussed below, to conceal Galanis’s actual but illegitimate involvement in the deal. As for Archer’s effort to support his fee-earning hypothesis by reference to a stray email in which Galanis mentioned his “tribeca plunge” and told Archer he had to “earn to keep up with [his] rapper spending,” the Court should swiftly reject it. (*See* Br. 49 (citing DA 923, although correct citation is DA 946)). The suggestion that this exchange could support a reasonable inference, strong enough to counter all the other proof pointing in the opposite direction, that Galanis actually expected to “earn” legitimate “fees” from the Wakpamni bond transaction is absurd—which, presumably, is why Archer never argued to the point to the jury.

Viewed fairly, in the context of all the other evidence, Galanis’s “nyc mansion” email chain is just the sort of “‘connecting evidence’” that Archer erroneously claims was lacking in this case—evidence “linking Archer’s state of mind . . . to Galanis’s misappropriation of the bond proceeds.” (Br. 50 (quoting *United States v. Ferguson*, 246 F.3d 129, 137 (2d Cir. 2001))). Archer told Galanis that the tentative bond closing

date was “right around the corner,” and Galanis responded that he was “massively motivated”; that an attorney was “running the stall for me on nyc mansion” and that he “won’t live in [a] 1750 square foot cage.” (A. 869). The connection reflected here between the bond transaction and Galanis’s use of the proceeds for his own personal benefit could hardly have been starker, or more starkly communicated to Archer. And it readily distinguishes this case from *Ferguson*, the only reported decision of this Court affirming the grant of a new trial based on weight of the evidence where witness credibility was not the central issue. *See Ferguson*, 246 F.3d at 137 (finding “absolutely absent” any “connecting evidence” between a shooting the defendant undertook and a payment he received from a gang leader).

C. Archer’s Pattern of Misleading Statements

There was ample other evidence, moreover, establishing that Archer’s highly suspicious actions were paired with a guilty state of mind. His pattern of misleading statements in the days before and after he purchased the bonds provided the jury with significant evidence that he harbored an intent to deceive—the requisite *mens rea* for securities fraud. *See United States v. Litvak*, 808 F.3d 160, 178 (2d Cir. 2015). (*Cf.* Br. 73 (erroneously characterizing the requisite *mens rea* as intent to defraud)).

First, while Archer claims “it was undisputed that Archer had no contact with the WLCC . . . and no involvement in any misrepresentations . . . made to . . .

them” (Br. 2), he in fact sent a misleading representation letter to the WLCC days before the second bond issuance, claiming he was buying the bonds “for [his] own account for investment only” (A. 618-19), and failing to disclose that he was purchasing the bonds on Galanis’s behalf. Given Galanis’s central role in the issuance of the bonds (of which Archer was indisputably aware), this would have been a highly relevant and troubling revelation for the WLCC, who had been told by Archer’s co-conspirators that the bond issuance Archer purchased was necessary because legitimate investors wanted more Wakpamni bonds “right away.” (Tr. 1853-54).

Second, on the day of his purchase and thereafter, Archer made a series of false statements while attempting to custody the bonds at Morgan Stanley and Deutsche Bank, claiming that the \$15 million he used to buy the bonds “was generated through sale of real estate.” (A. 658-59; *see* A. 781 (“Real Estate Sale”). In his brief, Archer alternatively claims that (i) Galanis had lied to him about the source of the funds and (ii) even if Archer lied to the banks, he lied to hide Galanis’s involvement, not because he knew he was using misappropriated proceeds from the first tranche to buy the bonds. (Br. 54-58). As discussed below, there was no evidence supporting the idea that Galanis told Archer that the funds came from a real estate sale. But there *was* evidence that Archer stated the funds had been generated by his *own* real estate sales—a clearly false statement that could not have been the result of a lie by Galanis. Specifically, a Client Representation Letter completed by a Morgan Stanley employee re-

ported that Archer stated “[t]he funds used to purchase the bonds were from real estate sales through my business, Rosemont Seneca Bohai, LLC.” (A. 660-63). While the Morgan Stanley employee could not recall a specific conversation with Archer regarding the representation, she testified that she would “not have written something [in that document] that a client did not say.” (Tr. 867). And it was certainly not “extraordinary” or an “injustice” for the jury to find that Archer’s lies regarding the provenance of the funds were highly probative that he knew, or consciously avoided learning, the truth about the provenance.

Third, on October 1, 2014, the same day of his \$15 million bond purchase, Archer told the trustees of Burnham Investors Trust, falsely, that Jason Galanis would not be “involved with” any Burnham-related entity, including Burnham Securities. (A. 748). These false representations were the culmination of a months-long process, in which the BIT Board demanded assurances about Galanis’s lack of involvement with Burnham-related entities, given his sordid past. (*See generally* Tr. 2604-40). In his brief, Archer repeats many of the same arguments he made to the jury regarding this evidence, all to the effect that Archer’s representations to the BIT Board were unrelated to Wakpamni bonds and were literally true. (*Compare* Br. 58 (arguing that the BIT Board “had absolutely nothing to do with the bonds”) *and* Br. 60 (“each representation was accurate and honored”) *with* Tr. 3876 (“the BIT board discussions had nothing to do with the WLCC bonds”) *and* Tr. 3879 (“Devon and COR Fund Advisors did exactly what they promised to do, which is to take Jason Galanis out of the deal in

the very, very specific way they promised to do, okay?”)). In fact, Archer’s representations bore a close temporal connection to the Wakpamni bond issuances, which involved a Burnham entity, and they were indeed lies. That very morning, Archer was “purchasing” \$15 million worth of bonds, in a deal arranged by Galanis, for which Burnham Securities was the purported placement agent (Add. 2-4 (GX 2047, 2049)); in the ensuing days, Archer’s co-conspirator, Cooney, would purchase \$5 million additional bonds (A. 787); and Galanis would go on to organize a third tranche of Wakpamni bonds, with Burnham Securities as the purported placement agent.

Fourth, Archer’s pattern of deceptive conduct continued for an extended period. In November 2015, after Galanis’s arrest on unrelated charges, Archer directed that the bonds he had purchased a year earlier be “returned to Calvert,” the “lender and beneficial owner in the the [sic] quickest orderly manner possible.” (A. 912). Calvert was a fake entity, created by Galanis in the fall of 2015, to cover up the bond fraud. However Archer came to learn about Calvert—whether from Galanis or otherwise—he got with the program and wielded the fiction with full knowledge that it was a lie. After all, he—not “Calvert”—was the original purchaser of the bonds, and he well knew that the bonds could not be “returned” to Calvert.⁵ Archer

⁵ Archer asserts that, “[t]o avoid having to ask Archer to do something they knew he would have refused—because he had no idea about the bond scheme

tries to blunt this evidence by once more invoking the possibility that Galanis lied to him about Calvert and its role in the second issuance bond purchase. (Br. 62-63). Setting aside the independently dispositive problem that there is no *evidence* to support this hypothesis, it strains credulity well beyond the breaking point: The story that Archer now suggests Galanis sold him about Calvert (namely, that Calvert was the actual beneficial owner of the second tranche bonds and the source of the \$15 million) bears no resemblance to the story that Archer says—and the District Court credited—Galanis sold him about the bonds at the time of purchase (namely, that the \$15 million came from Galanis’s own real estate sales rather than Calvert, which did not even exist at that time). (See A. 658-59, 781; DA 835). Even if there were some support for either of the Galanis lie stories (and there is none), Archer cannot have swallowed *both* without falling over the precipice into—at a minimum—conscious avoidance.

—Galanis and Dunkerley fabricated a backdated corporate resolution to describe a loan between Calvert and RSB, which Dunkerley signed.” (Br. 62). But there is no record support—in Dunkerley’s days-long cross-examination, even—that Dunkerley and Galanis created the agreement “[t]o avoid having to ask Archer to do something [he] knew [Archer] would have refused.” Further, as Archer notes elsewhere in his brief, Dunkerley never met Archer in person and had no conversations with him about Calvert, and thus had no way of knowing what Archer would or would not do.

D. Archer's Extended Involvement in the Fraud

Archer's active involvement in the bond scheme after the \$15 million purchase in October 2014 supports the jury's finding of culpable *mens rea* and belies Archer's contrary protestation of sustained naivety. As the District Court recognized in denying Cooney's Rule 33 motion, knowledge can develop over time. (SPA 45 (concluding that "at some point [Cooney] became a member of the conspiracy")). While Archer claims "he did nothing with the bonds for months" (Br. 22), in fact he and Galanis used the bonds he purchased to attempt to meet net capital requirements at Burnham and Bonwick, two broker dealers acquired as part of the roll-up plan, and to fund the purchase of VL Assurance, another entity acquired in the roll-up plan. (A. 1066, A. 1072; Add. 5-12 (GX 2075, 2077, 2079, 2098)). And while Archer asserts he had "nothing to do with" the third bond issuance (Br. 23), in fact, the day before the entirety of the third tranche was foisted upon an unwitting Atlantic client, Archer participated in discussions about how to "finesse" an Atlantic managing director who would need to be "marginalized." (A. 900). Finally, a year after the first bond issuance, Archer contributed funds to make an "interest" payment on the bonds—a move necessitated by the fact that the bond proceeds had been misappropriated and not invested in the promised "annuity" (*see* Gov't Br. 20-21)—and, as discussed above, purported to attempt to "return" the bonds to Calvert.

In short, there was overwhelming evidence of Archer's extended involvement in a massive fraud, and substantial evidence to support the jury's finding that

his participation was knowing rather than unwitting. Certainly, there was nothing extraordinary, exceptional, or unjust about that finding. *See Sanchez*, 969 F.2d at 1414-15.

POINT II

The Inferences Archer Asked the Jury to Draw, and that the District Court Adopted, Were Unfounded and Unreasonable

The soundness of the jury's finding is further confirmed when one examines fairly, and in light of the entire record, the competing set of inferences Archer asked the jury to draw—and the ones the District Court adopted in its Rule 33 opinion.

A. Galanis's Purported Lies to Archer and Galanis's "Façade of Extreme Wealth"

Archer argued to the jury and to the District Court that Galanis lied to him repeatedly, and asked both to draw the inference from those purported lies that Archer must have been deceived more generally about the bonds. (*E.g.*, Tr. 3851, 3941). That theme, which Archer continues to press in his brief on appeal, is unsupported by the record. Indeed, the few specific "lies" Archer cites were not lies at all.

Archer cites, as he did for the jury, emails that Galanis sent to him, Cooney, Dunkerley, and Jason Sugarman (at least some of whom Archer admits were Galanis's "real" co-conspirators, *see* Br. 34), showing progress on the construction of a warehouse building in the Wakpamni community. (Br. 23 (citing DA 19,

350, 465); Br. 37-38). But this was not a lie; as the WLCC's representative testified at trial, the warehouse was actually constructed before the scheme collapsed in 2015. (Add. 20 (Tr. 1862) ("We put the outer shells of the buildings in that town center site plan.")).

Archer also cites a June 20, 2014 email message from Galanis to Archer and Cooney that the "use of the bond proceeds is to place the bond proceeds into a Wealth Assurance annuity." (Br. 17 (quoting A. 786)). Archer claims this "was a lie" because the proceeds were not going to Wealth Assurance AG, "[t]hey were going to an unaffiliated shell company," Wealth Assurance Private Client. (Br. 17-18). The original plan, however, was for Wealth Assurance AG to provide the annuity (Tr. 911, 1840; A. 840-43); indeed, Wealth Assurance Private Client was not even created at the time the e-mail was written (Tr. 1011-12). Further, while Archer contends this email shows that Galanis told "Archer the same lie he fed to [an attorney involved in the deal] and the WLCC," neither the attorney nor the WLCC knew about the "massively motivated" "nyc mansion" email; the emails in which Galanis, Archer, and Cooney discussed the bond proceeds as a source of "discretionary liquidity"; or Archer and Cooney's straw purchase of the entire second tranche.

Next, to explain Archer's lies to Morgan Stanley and Deutsche Bank, Archer quotes the District Court's conclusion that because Galanis "projected a façade of extreme wealth" and "held himself out as having made money from real estate," Archer "may well have repeated a lie told to him by Jason Galanis."

(Br. 56 (quoting SPA 35)). Here again, the narrative of the Galanis lie is untenable. First, as the Government argued in its opening brief, the evidence that Galanis projected “extreme wealth” to *Archer* is unsupported—indeed, directly contradicted—by the record. (Gov’t Br. 40). Second, and in all events, neither Galanis’s purported “façade of extreme wealth” nor any purported real estate investments explain why Archer lied to Morgan Stanley, falsely stating the money came from real estate sales *through Archer’s business*, Rosemont Seneca Bohai, LLC (A. 660-63), an entity with which Galanis had no affiliation. Finally, there is no evidence that Galanis told Archer anything about a real estate sale around the time of the bonds.⁶ To the support the assertion—and the District Court’s conclusion—that Galanis “held himself out as having made money from real estate,” Archer cites 14 different transcript excerpts and exhibits. (Br. 57). None of these concern any real estate sale around the time of the bonds (when Galanis was expressing a need for liquidity and a desire to get funds to buy a mansion), very few can be read to suggest any type of real estate

⁶ To be sure, as discussed above, Galanis told Archer that he was “massively motivated” for the bond deal to close, so he could *buy* a “nyc mansion” using Archer’s name. (A. 869, 914).

transaction generally, and none involve a communication with Archer.⁷ (Cf. Br. 5 (asserting, with no relevant support, that “[t]o Archer, Galanis . . . appeared immensely successful”).

The best Archer can muster to establish what Galanis projected to *Archer* are (i) an email from almost nine months before Archer’s bond purchase, in which Galanis tells Archer and Cooney “im all over the real estate stuff,” and (ii) the fact that (one of) Galanis’s email addresses “was an allusion” to an upscale Los Angeles neighborhood. (See Br. 57). The notion that the jury should have inferred from these disparate specks of proof that Archer believed the \$15 million he suddenly received from the previously cash-strapped Galanis was from “real estate” sales, rather than the bond transactions that Galanis had been so eagerly and vocally anticipating, is simply untenable.

⁷ (See Br. at 56-57 (citing Tr. 480, Tr. 2340-41, Tr. 2929, DA 11 (evidence of Galanis family wealth); Tr. 1194-96, Tr. 1203-05, Tr. 2195, Tr. 2932, DA 72-73, DA 537 (evidence of Jason Galanis’s ownership of and improvements to his Bel Air home); Tr. 924, Tr. 1416-18 (Dunkerley testimony regarding Galanis’s involvement in purchase of Aman Resorts, in 2015, and a \$1 million commission Galanis received at an unspecified point for the sale of a Florida hotel); Tr. 2305-06 (Martin testimony that he did *not* know that Galanis had real estate investments, but acknowledging having wired money to an escrow account once); Tr. 2340-41 (Martin ghost-written email to Wolff))).

(*See, e.g.*, A. 866 (Galanis “sick of begging” for “discretionary liquidity”); A. 867 (Galanis anticipating having “dry powder in our control soon”); A. 862 (Galanis “laser focused on summer cash hole, and discretionary”); A. 869 (Galanis yearning for the day, after the bond closing, when he “won’t live in [a] 1750 square foot cage”)).⁸ At a minimum, there was nothing unreasonable, unjust, or exceptional about the jury accepting the more straightforward inference: that Archer was not merely repeatedly something Galanis had told him, but instead lied about the provenance of the funds, and did so because he knew or consciously avoided learning the true origin of that money.

B. The False Distinction Between the Bond Fraud and the “Legitimate” Roll-up Plan

Archer persuaded the District Court—but not the jury (*cf.* Tr. 3859 (Archer closing))—that his deep involvement with Galanis and the bonds stemmed from his interest in a “legitimate” plan to “roll up” various financial services companies that was inconsistent

⁸ Archer argues that the Government “abandoned” a particular “liquidity” e-mail by not citing it in its initial brief. (Br. 45-46). The Government did no such thing, and the numerous examples of “liquidity” discussions between Galanis, Archer, and others support the Government’s unchanging theory of this case: that the schemers misappropriated the bond proceeds from their promised investment in a conservative “annuity” for the benefit of the Wakpamni community to the schemers’ own ends, including their roll-up plan.

with the Government's charge of misappropriation. Like other inferences Archer asked the jury to draw, this one rests on a false premise—specifically, a false dichotomy between the bond fraud and the purportedly “legitimate” roll-up plan. Whatever aspirational “legitimacy” the roll-up plan may have had, the efforts to fund it were supplied by the execution of the bond scheme. Indeed, the success of the roll-up plan, which would have positioned Archer at the helm of the resulting mega-company, was strong motive evidence explaining why Archer and others sought “liquidity” through the bond scheme. (*See, e.g.*, Tr. 4080). Nearly all of the roll-up related companies cited on pages 3 and 4 of Archer's brief were used to facilitate the bond fraud and/or benefitted from the bond fraud:

- Wealth Assurance AG: This entity was used to finance the purchase of Hughes (A. 875), and its parent was the planned beneficiary of the bond proceeds (A. 873).
- Hughes Capital Management: The entirety of first bond tranche was placed with Hughes clients, without their consent, just weeks after the Hughes acquisition. (A. 754-64, 875; Tr. 2037-51).
- Burnham Securities: As placement agent for each WLCC bond issuance, this entity received fees despite doing no work. (A. 576, 863, Tr. 1022-24). Archer was on the entity's investment committee. (A. 933). Burnham's minimum net capital requirements were satisfied with

bonds acquired during the scheme. (A. 1060).

- Valorlife: This entity was purchased with bond proceeds. (A. 1025-26, 1076; Add. 5-7 (GX 2075)). Archer sat on the board of the entity's parent. (*See* Tr. 912, 1033).
- Burnham Asset Management: Archer controlled this entity, after providing false assurances about Galanis's role in the transaction. (Gov't Br. 15-17).
- VL Assurance: Archer transferred bonds he purchased in the second issuance to help facilitate the purchase of this entity, on the board of which Archer sat. (A. 1060; Add. 8-9, 13-17 (GX 2077, 2118)).
- Atlantic Asset Management: The entirety of the third tranche of the WLCC bond issuance was placed with an Atlantic client, without disclosure to the client, just weeks after conspirators acquired Atlantic. (Tr. 741-43; A. 899, 900)
- Bonwick Capital: The bonds that Cooney acquired in the second issuance were used to help Bonwick meet net capital requirements, and Archer facilitated the relevant transfers. (A. 1072; Add. 11 (GX 2098)).
- Fondinvest: This entity was acquired using proceeds of the third bond issuance, (Tr. 1042, A. 1077), in a transaction that

Galanis previewed for Archer months before. (A. 930-31 (reporting that Galanis had “agreed to arrange/provide” financing for the Fondinvest transaction (“probably Indians”))).

To be sure, the evidence showed that Archer invested a substantial sum of his own funds into the roll-up plan. But Archer was no dupe, and he stood to profit handsomely if the roll-up plan—and the closely related bond scheme—succeeded. He owned millions of dollars of stock in one of the roll-up companies, and was slated to become chairman of the resulting financial conglomerate. (A. 1095).

* * * * *

In short, the themes that Archer advances on appeal—that he, a sophisticated businessman, was deceived by Galanis’s lies and wealth, and that his interest in the success of the roll-up plan somehow negated his criminal intent—are the same themes he tried, without success, on the jury. There was nothing extraordinary or exceptional about the jury’s rejection of Archer’s competing narrative, which rested on weak—sometimes non-existent—premises. It was an abuse of discretion for the District Court to conclude otherwise.

POINT III

The District Court’s Analysis Improperly Failed to Consider Conscious Avoidance

In its opening brief, the Government argued that the District Court abused its discretion by requiring evidence of Archer’s positive knowledge of the fraud

and failing to consider conscious avoidance in its Rule 33 analysis. (Gov't Br. 54-59; *see* SPA 56-57). Archer does not directly address these points but instead contends that there was insufficient evidence that he consciously avoided learning “that Galanis was stealing bond proceeds.” (Br. 74). The argument fails.

First, while Archer claims that “conscious avoidance alone could not support his conviction” because it is not a substitute for intent (Br. 73), conscious avoidance could certainly establish Archer’s knowledge that the bond proceeds were being misappropriated, which was the critical issue at trial since Archer indisputably “took actions” that furthered the fraud. (SPA 1). *See United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (“[I]ntent to participate [in a conspiracy] may be shown by a finding that the defendant either knew, or consciously avoided knowing, the unlawful aims of the charged scheme and intended to advance those unlawful ends.”).

Second, there was ample evidence from which the jury could infer that Archer harbored a subjective belief that there existed a high probability Galanis was misappropriating the bond proceeds, and Archer’s contrary argument rests on the same false premise discussed above: that Archer played a “minor and mostly passive involvement in the” scheme. (Br. 74). Archer was extensively involved in the scheme, and his “lack of knowledge defense, despite his deep involvement in the transactions that effectuated the fraud, all but invited the conscious avoidance charge.” *United States v. Cuti*, 720 F.3d 453, 464 (2d Cir. 2013). This distinguishes Archer from the other players whose roles he

seeks to liken to his own (*see* Br. 74); unlike Archer, these other players did not buy \$15 million in bonds from the second issuance, lie about the provenance of the funds used for that purchase, receive emails from Galanis decrying a lack of “liquidity” and voicing a desire to purchase a “nyc mansion,” and, after the scheme began to unravel, direct that bonds be “returned” to a fake entity that did not even exist at the time of the original transaction.

Third, this series of red flags peppering Archer’s participation in the scheme plainly gave the jury an adequate factual predicate for a finding of conscious avoidance. Archer’s “failure to question [these] suspicious circumstances established [his] purposeful contrivance to avoid guilty knowledge.” *Cuti*, 720 F.3d at 463 (quotation marks and citation omitted). Indeed, in arguing otherwise, Archer proves the Government’s point about the District Court’s errors, citing the District Court’s statement that there was “no evidence that Archer *knew*” the funds he used to purchase the bonds came from the annuity provider. (Br. 74-75 (citing SPA 23)). Of course, that would have been more than a “red flag”; it would have been actual knowledge that the bond proceeds were being stolen.

Finally, even if there were evidentiary support for Archer’s competing narrative that Galanis lied to him, causing him to believe affirmatively that the bonds and their proceeds were being used appropriately (*cf.* Br. 75-76), the jury had more than enough contrary evidence before it to reject that story. *Cf. Cuti*, 720 F.3d at 464 (explaining that defendant “might have been sufficiently disengaged or trusting that in fact he

lacked knowledge on any culpable level; but the jury was empowered to find otherwise, and did”).

POINT IV

Archer’s Arguments About a Summary Chart Do Not Render This Case Exceptional or Extraordinary

The Court should reject Archer’s argument that a Government summary chart renders this case an exceptional one worthy of Rule 33 relief. (*See* Br. 68-69). As the Government explained in its opening brief, the chart was accurate: \$903,000 was actually deposited into the RSB account before the wire was reversed. (Gov’t Br. 53). Moreover, Archer extensively cross-examined the Government’s summary witness and aired his criticisms of the chart fully before the jury, describing the exhibit as “egregiously misleading” (Tr. 3918) and claiming that the summary witness “was physically in pain at having to admit that she had made all these mistakes” (Tr. 3903). Put simply, the chart supplies no basis to “invade the fact-finding province of the jury.” *United States v. Mercedes*,—F. App’x—, 2019 WL 2560634, at *1 (2d Cir. Jun. 21, 2019) (affirming denial of new trial motion where the jury “had [the defendant’s] arguments that [the Government’s sole co-operator] was not credible before it and nonetheless convicted [the defendant] on all counts” and explaining

“[i]n such circumstances, we will not invade the fact-finding province of the jury to set aside the verdict”.⁹

POINT V

The District Court Usurped the Jury’s Role

The District Court’s decision represents an extraordinary usurpation of the jury’s role. While Archer asserts that the District Court’s decision “is precisely what Rule 33 is intended to guard against” (Br. 72), that is wrong for at least four reasons.

First, three of the four cases Archer cites for that proposition involve not Rule 33 grants, but judgments of acquittal under Rule 29. *See United States v. Pauling*, 924 F.3d 649, 662 (2d Cir. 2019) (affirming grant of judgment of acquittal); *United States v. Valle*, 807 F.3d 508, 523 (2d Cir. 2015) (same); *United States v. Cassese*, 428 F.3d 92, 95 (2d Cir. 2005) (affirming grant of judgment of acquittal and expressly declining to reach the issue of a new trial). Here, by contrast, the District Court denied Archer’s Rule 29 motion, finding that “when drawing all inferences in the government’s favor, there is not a valid basis to grant his motion.”

⁹ Archer’s criticism of another chart for “obviously” arguing that Archer profited by \$700,513 (Br. 65) is likewise misguided. The chart accurately reflects outflows from Galanis’s account, not merely “profits” from the scheme, as evidenced by the fact the Internal Revenue Service is shown on the chart as having received over half a million dollars from Galanis. (A. 1085).

(SPA 18). As such, the inferences the jury drew about Archer's state of mind were not "impermissible" or merely speculative; they were reasonable. *Cf. Pauling*, 924 F.3d at 656.

Second, the other case Archer cites, *Ferguson*, is distinguishable for the reasons discussed above. While this Court in *Ferguson* found no "connecting evidence" between a payment and a shooting, here there was substantial evidence connecting Archer's involvement in the bond scheme and his culpable state of mind, including his false statements to Morgan Stanley and Deutsche Bank, and his awareness that Galanis viewed the bond deal as a source of funding for a "nyc mansion."¹⁰

¹⁰ Elsewhere in his brief, Archer cites *Knight*, 800 F.3d 491, an Eighth Circuit case which, in relevant part, affirmed a grant of a new trial to an attorney convicted for his role in a client's alleged bankruptcy fraud. The court there noted that the attorney played "no meaningful role" in certain of the transactions, cited "conclusory" testimony by a number of the Government's fact witnesses regarding the attorney's involvement in those transactions, and expressed concern about "murky" law surrounding whether the client needed to disclose certain transactions at all in his allegedly false bankruptcy filings, further noting that the district court had given "little weight" to the Government's expert on this issue. *Id.* at 505-11. The court also affirmed the grant of a new trial on another count of conviction based on a faulty jury instruction. *Id.* at 512-13. Here, by contrast, there no issues with

Third, Rule 33 does not allow a court to “reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable.” *Martinez*, 763 F.2d at 1312-13; *see also United States v. Bell*, 584 F.3d 478, 485 (2d Cir. 2009) (explaining that Rule 33 does not allow a district court to overturn a jury verdict because it interpreted “the facts differently from the jury”). That is exactly what happened here. While Archer asserts the Government is seeking “*de novo*” review of the District Court’s ruling, it is the District Court that improperly conducted a *de novo* review of the jury’s verdict, rejecting the reasonable inferences the jury drew from the evidence and improperly usurping its role.

Fourth, contrary to the criticisms levied by Archer and by the District Court in this case, there is nothing remotely improper or even unusual about reliance on circumstantial evidence to prove a defendant’s guilty state of mind in a fraud case. Indeed, mental state is “generally proved with circumstantial evidence.” *United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2017); *Crowley*, 318 F.3d at 409 (“The state of a person’s mind is rarely susceptible to proof by direct evidence, and usually must be inferred from evidence of his or her acts.”). If it were otherwise, holding white-

witness testimony or jury instructions to be redressed at a new trial; Archer’s involvement in the scheme was “extensive” and included key roles in important transactions, including the \$15 million bond purchase; and there was no evidence that the law surrounding, for example, deceiving banks and investors was “murky.”

collar defendants responsible for their deceptive—and, in this case, deeply harmful—conduct would be prohibitively difficult.

* * * * *

There was nothing extraordinary, exceptional, or unjust about the jury's verdict in this case. The District Court's decision failed to consider the evidence as a whole, improperly imposed a heightened requirement of direct proof of Archer's intent, and failed even to consider the doctrine of conscious avoidance. The jury properly rejected the inferences that Archer later successfully urged the District Court to adopt, and the evidence certainly does not preponderate heavily in Archer's favor. The verdict should be reinstated.

CONCLUSION

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

Dated: New York, New York
July 17, 2019

Respectfully submitted,

AUDREY STRAUSS,
*Attorney for the United States,
Acting Under Authority
Conferred by 28 U.S.C. § 515.*

REBECCA MERMELSTEIN,
BRENDAN QUIGLEY,
NEGAR TEKEEI,
SARAH K. EDDY,
*Assistant United States Attorneys,
Of Counsel.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 6,985 words in this brief.

AUDREY STRAUSS,
Attorney for the United States,
Acting Under Authority
Conferred by 28 U.S.C. § 515.

By: SARAH K. EDDY,
Assistant United States Attorney

ADDENDUM

Add. 1

To: Devon Archer[darcher@rosemontcapital.com]
From: jason galanos
Sent: Sat 8/30/2014 4:18:17 AM
Subject: Fwd: Wakpamni Second Tranche
[Closing Statement.pdf](#)
[First Supplemental Trust Indenture.pdf](#)

closed second tranche

Begin forwarded message:

From: "Anderson, Timothy B. (PHL)" <tanderson@dilworthlaw.com>
Subject: FW: Wakpamni Second Tranche
Date: August 28, 2014 at 11:33:01 AM PDT
To: "Jason Galanis (jason@burnhamequitypartners.com)" <jason@burnhamequitypartners.com>

Well on our way. Second annuity wire to go out this afternoon. - Tim

TIMOTHY B. ANDERSON | DILWORTH PAXSON LLP
1500 Market Street | Suite 3500E | Philadelphia, PA 19102
Tel: (215) 575-7257 | Fax: (215) 575-7200
tanderson@dilworthlaw.com | www.dilworthlaw.com

From: keith.henselen@usbank.com [mailto:keith.henselen@usbank.com]
Sent: Thursday, August 28, 2014 2:12 PM
To: Anderson, Timothy B. (PHL)
Subject: Re: Wakpamni Second Tranche

Tim,
Attached are copies of the fully executed First Supp Ind and Closing Statement. Copies of bonds are being emailed now and original bonds sent per Delivery Instructions.
Thanks,

Keith Henselen, Vice President
U.S. Bank National Association
Global Corporate Trust Services
U.S. Bank Center, LM-AZ-X16P
101 North First Ave., Suite 1600
Phoenix, AZ 85003
Phone: 602-257-5431
Fax: 602-257-5433
Email: keith.henselen@usbank.com

From: "Anderson, Timothy B. (PHL)" <tanderson@dilworthlaw.com>
To: "keith.henselen@usbank.com" <keith.henselen@usbank.com>,
Cc: "Anderson, Timothy B. (PHL)" <tanderson@dilworthlaw.com>
Date: 08/28/2014 10:45 AM
Subject: Wakpamni Second Tranche

Keith - this should be everything. - Tim

Timothy B. Anderson | Dilworth Paxson LLP
1500 Market Street | Suite 3500E | Philadelphia, PA 19102
Tel: (215) 575-7257 | Fax: (215) 575-7200

Confidential Material



Add. 2

Cc: Sebastian Montazi[smontazi@rosemontcapital.com]
To: jason galanos[jason@burnhamequitypartners.com]
From: Devon Archer
Sent: Wed 10/1/2014 1:17:50 AM
Subject: Re:

Agreed. Instruct.

Devon Archer

> On Sep 30, 2014, at 8:20 PM, jason galanos <jason@burnhamequitypartners.com> wrote:
>
> arch
>
> MSSB seems to be trying to subscribe to the new issue like a "trade." as a trade it involves
> coordination.
>
> my suggestion at this stage is to simply DVP the transaction by wiring the money to US Bank and US
> Bank delivers the securities to MSSB. full stop.
>
> The securities are recorded at the Bond Registrar - which is US Bank - also serving as the Indenture
> Trustee for the 7-year duration.
>
> I think we direct them to wire to US Bank tomorrow and take delivery of your bonds.
>
> We need a physical address for delivery. We also need an email address for US Bank to correspond
> with at MSSB.
>
> Jason



Confidential Material

Add. 3

To: Sebastian Momtazi[smomtazi@rosemontcapital.com]; jason@holmbycompanies.com[jason@holmbycompanies.com]
From: Devon Archer
Sent: Wed 10/1/2014 1:22:07 PM
Subject: Re: Wire Transfer Request

Seb,

I initiated the wire and awaiting voice confirm.

Devon Archer

On Oct 1, 2014, at 9:19 AM, jason@holmbycompanies.com wrote:

See last email.

Thanks for staying on this.
Sent via BlackBerry from T-Mobile

From: Sebastian Momtazi <smomtazi@rosemontcapital.com>
Date: Wed, 1 Oct 2014 13:12:40 +0000
To: jason galanis<jason@holmbycompanies.com>; Devon Archer<darcher@rosemontseneca.com>
Subject: Fwd: Wire Transfer Request

Surely we should instruct to send and work on next steps after?

Seb Momtazi
347 602 1160

Begin forwarded message:

From: "Driever, Catharine" <Catharine.Driever@morganstanleypwm.com>
Date: October 1, 2014 at 9:04:56 AM EDT
To: Sebastian Momtazi <smomtazi@rosemontcapital.com>
Cc: Devon Archer <darcher@rosemontcapital.com>, "Schatz, Eugene" <Eugene.Schatz@morganstanleypwm.com>
Subject: RE: Wire Transfer Request

Confirming receipt.

Will call shortly with Gene to give a status on holding the Wakpamni bonds.

Thanks,
Catharine

From: Sebastian Momtazi [mailto:smomtazi@rosemontcapital.com]
Sent: Wednesday, October 01, 2014 8:53 AM
To: Driever, Catharine (PWM)
Cc: Devon Archer
Subject: Wire Transfer Request

Good morning Catharine, per the attached instructions,

Please wire

Confidential Material



Add. 4

\$15,000,000.00

From Rosemont Seneca Bohai, LLC's account (876 018483)

To:

Bank: U.S. Bank National Association
Address: 60 Livingston, St. Paul, MN 55107
ABA: 091000022
Account: 180121167365
Ref: Wakpamni Town Center 211683000
Attn: Tia Xiong (651) 466 6134

Devon will be available for a voice confirmation at 646 436 3745

Thanks, and Best,

Seb

Important Notice to Recipients:

Please do not use e-mail to request, authorize or effect the purchase or sale of any security or commodity. Unfortunately, we cannot execute such instructions provided in e-mail. Thank you.

The sender of this e-mail is an employee of Morgan Stanley Smith Barney LLC ("Morgan Stanley"). If you have received this communication in error, please destroy all electronic and paper copies and notify the sender immediately. Erroneous transmission is not intended to waive confidentiality or privilege. Morgan Stanley reserves the right, to the extent permitted under applicable law, to monitor electronic communications. This message is subject to terms available at the following link: <http://www.morganstanley.com/disclaimers/mssbemail.html>. If you cannot access this link, please notify us by reply message and we will send the contents to you. By messaging with Morgan Stanley you consent to the foregoing.

Confidential Material

Add. 5

To: Gomez, Iris[Iris.Gomez@morganstanley.com]
From: Sebastian Momtazi
Sent: Tue 3/31/2015 5:29:29 PM
Subject: RE: Bond transfer
[Bond signatures.pdf](#)

Attached are signed copies

From: Sebastian Momtazi
Sent: Tuesday, March 31, 2015 1:13 PM
To: 'Gomez, Iris'
Cc: Devon Archer
Subject: Bond transfer

Iris,

Per our conversation, please see attached letter and instructions. Let me know what we need to do to get this done quickly

Best,

Sebastian Momtazi
Chief Operating Officer
Rosemont Capital, LLC
152 West 57th Street, 47th Floor
New York, NY 10019
347-602-1160 mobile
smomtazi@rosemontcapital.com



Confidential Material

Add. 6

March 27, 2015

Morgan Stanley
Attn: Kyle Wool
399 Park Avenue 12th Floor
New York, NY 10022

Dear Mr. Wool,

Please DTC 9000 Wakpamni Lake SD Cmnty Corp. SPL Limited Revenue bonds from the account titled RSB LLC (654-028319) to the following instruction:

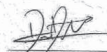
DTC# 0352

Account Title: BURNHAM SECURITIES, INC - SDN COLLATERAL ACCOUNT

Account Number: 101-48291-099 2-9

If you have any questions, please feel free to call. Thank you.

Regards,



Devon Archer

Add. 7

Re: Transfer instructions

Dear Mr. Wool,

Confirming our conversation, RSB is participating in a capital increase of Valor Group Ltd (*f/k/a* Wealth Assurance Holdings; Bermuda Stock Exchange: WAH.BH). Valor Group is acquiring 100% of Bermuda International Insurance Services Limited from BF&M, the 100 year old Bermuda Stock Exchange-listed insurance group.

As you know, Devon Archer is an existing beneficial owner of Valor Group common stock. This stock is held with MSSB.

Please consider this your written instruction to transfer to HSBC (instructions below) by DTC bonds from the account titled RSB LLC (654-028319) issued by Wakpamni Lake Cmnty Corp. SPL (CUSIP 931130 AC2) in the amount of \$11.6 million, at par.

The transaction is closing tomorrow, so the consideration needs to be delivered post haste. Please advise what steps need to be taken to confirm the transfer for tomorrow.

Thank you.



Add. 8

To: Gomez, Iris[Iris.Gomez@morganstanley.com]; Fereno, Joseph[Joseph.Fereno@morganstanley.com]
Cc: Devon Archer[darcher@rosemontcapital.com]
From: Sebastian Momtazi
Sent: Thur 4/9/2015 2:02:33 PM
Subject: Bonds Transfer
[RSB Bonds Transfer.pdf](#)

Joe/Iris,

Please see attached for a bonds transfer request to be completed ASAP

Thank you,

Sebastian Momtazi
Chief Operating Officer
Rosemont Capital, LLC
152 West 57th Street, 47th Floor
New York, NY 10019
347-602-1160 mobile
smomtazi@rosemontcapital.com



Confidential Material

Add. 9

RSB LLC
152 West 57th Street
Floor 47
New York, NY, 10019

April 9, 2015

Iris Gomez
Morgan Stanley Wealth Management
399 Park Avenue
Floor 12
New York, NY, 10022

Re: 654-028319

Dear Iris,

Please take this letter as authority to transfer the entire position (15,000,000) Wakpanni Lake Community Bonds (Cusip: 931130AC2) from RSB LLC Morgan Stanley Account 654-028319 to VL Assurance (Bermuda) Ltd Morgan Stanley Account 654-030737.

Thank you,



Devon Archer

Add. 10

Cc: jason galanos[jason@burnhamequitypartners.com]; Devon Archer[darcher@rosemontcapital.com]
To: Andrew Godfrey[andrew.godfrey@gmail.com]
From: Bevan Cooney
Sent: Fri 4/24/2015 5:11:24 PM
Subject: Re: Burnham

I will have the cert medallion guaranteed and sent to burnham. I will email my business manager Alexis and copy you Andrew so we can hopefully get this expedited and out to Burnham this am.
Sent from my iPhone

> On Apr 24, 2015, at 9:45 AM, Andrew Godfrey <andrew.godfrey@gmail.com> wrote:

>
> The best bet would be to send to Burnham. That way marcelle can place into separate subordinated loan account.

>
>

>> On Apr 24, 2015, at 12:24 PM, Bevan Cooney <btcooney@gmail.com> wrote:

>>
>> Let me know if we should send to US Bank or Burnham. I can expedite this morning. Lets get the process started.

>>
>> Sent from my iPhone

>>> On Apr 24, 2015, at 9:12 AM, jason galanos <jason@burnhamequitypartners.com> wrote:

>>>
>>> guys

>>>
>>> if we hustle, we can get the \$5MM on to Burnham's balance sheet this month. This would require Bevan getting the physical bond delivered to US Bank for transfer into Burnham's name. This would mean fedex'ing today.

>>>
>>> as an alternative, Andrew, you should check with Marcel to see if the bonds can be recorded on balance sheet if Burnham has in hand 1) an executed Secured Demand Note from Cooney, 2) the physical securities delivered from Cooney to Burnham together with medallioned stock powers. My strong belief is the securities would be deemed delivered if this were in hand, and the deposit of the security would be administrative only between Burnham and US Bank.

>>>
>>> we need to confirm 'the deal' between the parties today. ive discussed with both of you what i wanted to achieve. broadly the goal is to get cooney some reliable income while getting Burnham Net Cap it can commercialize.

>>>
>>> separate from bevan, i believe that an structure that would be equitable to the indians would be for Burnham to pay some participation on the revenue generated that is attributable to the Net Cap. lets discuss today.

>>>
>>> Open question remains about Bonwick Net Cap and whether Burnham could deliver securities to Bonwick and essentially stack.

>>>
>>> Separately we need to paper the \$3,000,000 and the \$650,000 cash infusions, and the impending \$750,000. Also the money we are putting in Burnham to put in Bonwick. There will be an aggregate of over \$10.5 million of new money invested in Burnham.

>>>
>>> Jason
>>>



Confidential Material

Add. 11

To: Holmby[jason@holmbycompanies.com]
From: Devon Archer
Sent: Wed 7/1/2015 11:41:02 PM
Subject: Fwd: Bonwick transfer

Looks like we're resolved. Confirm in the am.

Devon D. Archer
646 436 3745

Begin forwarded message:

From: Kyle Wool <kylewool1@gmail.com>
Date: July 1, 2015 at 7:30:31 PM EDT
To: Devon Archer <darcher@rosemontcapital.com>
Cc: Sebastian Montazi <smontazi@rosemontcapital.com>, Andrew Godfrey <andrew.godfrey@gmail.com>
Subject: Re: Bonwick transfer

Should be good

Best Regards,

Kyle M Wool

Sent from my iPhone

On Jul 1, 2015, at 7:07 PM, Devon Archer <darcher@rosemontcapital.com> wrote:

Ok Seb. So hold on the wire to Bonwicks Citi account and let's power through this tomorrow first thing and have it cross at MS.

Devon D. Archer
646 436 3745

On Jul 1, 2015, at 6:51 PM, Kyle Wool <kylewool1@gmail.com> wrote:

Where we are is we needed the proper legal ownership docs for Bonwick, no we have it. Then we needed the legal ownership doc for Burham since burham owns a piece of Bonwick. Marcel just sent us a doc that I think looks good but I need my internal guy to sign off on it. I think that should do it. I will know by 8 am. Once approved I will journal.

Sorry I can't do it today as the back office guys punch out at 5. Going toward let's try not to start this so late in the day but also really this should be almost the last of the docs.

Best Regards,

Confidential Material



Add. 12

Kyle M Wool

Sent from my iPhone

On Jul 1, 2015, at 6:44 PM, Devon Archer
<darcher@rosemontcapital.com> wrote:

Seb & Andrew & Kyle,

Can we all get on the same page about what we need to transfer funds to Bonwick for their requirements today. Seb I believe you were working on some LOA but I am not sure if Bonwick has not responded or they're unclear on the request. Let me know what I need to do.

Thanks.

D

Devon D. Archer

646 436 3745

Confidential Material

Add. 13

Cc: Sebastian Montazi[smontazi@rosemontcapital.com]
To: <jason@holmycompanies.com>[jason@holmycompanies.com]
From: Devon Archer
Sent: Fri 3/27/2015 11:25:15 AM
Subject: Director Conf of Appt- VL Assurance (Bermuda) Ltd
[Director Conf of Appt- VL Assurance \(Bermuda\) Ltd.pdf](#)
[ATT00001.txt](#)



Confidential Material

Add. 14

The Board of Directors
VL Assurance (Bermuda) Ltd.
Canon's Court
22 Victoria Street
Hamilton HM 12
Bermuda

Dear Sirs

The undersigned hereby accepts the appointment as a Director of VL Assurance (Bermuda) Ltd. (the "Company") effective when so appointed by the Shareholder of the Company. For the purpose of the Register of Directors and Officers of the Company, and for service of notice of Board meetings, the contact details are as follows:

Devon D Archer
152 West 57th Street, 47th Floor
New York New York 10019
United States of America

Tel: 212 933 9982
Email: darcher@rosemontcapital.com

Yours faithfully



Devon D Archer

3/27/2015

Date

Add. 15

The Board of Directors
VL Assurance (Bermuda) Ltd.
Canon's Court
22 Victoria Street
Hamilton HM 12
Bermuda

Dear Sirs

The undersigned hereby accepts the appointment as a Director of VL Assurance (Bermuda) Ltd. (the "Company") effective when so appointed by the Shareholder of the Company. For the purpose of the Register of Directors and Officers of the Company, and for service of notice of Board meetings, the contact details are as follows:

Louis D Zuckerbraun
The Argus Building
14 Wesley Street
Hamilton HM EX
Bermuda

Tel: 441 298 0832
Email: lzuckerbraun@crownglobalinsurance.com

Yours faithfully

Louis D Zuckerbraun

Date

Confidential Material

Add. 16

The Board of Directors
VL Assurance (Bermuda) Ltd.
Canon's Court
22 Victoria Street
Hamilton HM 12
Bermuda

Dear Sirs

The undersigned hereby accepts the appointment as a Director of VL Assurance (Bermuda) Ltd. (the "Company") effective when so appointed by the Shareholder of the Company. For the purpose of the Register of Directors and Officers of the Company, and for service of notice of Board meetings, the contact details are as follows:

David Ezekiel
44 Church Street
Hamilton HM 12
Bermuda

Tel: 441 298 6604
Email: dez@ias.bm

Yours faithfully

David Ezekiel

Date

Confidential Material

Add. 17

The Board of Directors
VL Assurance (Bermuda) Ltd.
Canon's Court
22 Victoria Street
Hamilton HM 12
Bermuda

Dear Sirs

The undersigned hereby accepts the appointment as a Director of VL Assurance (Bermuda) Ltd. (the "Company") effective when so appointed by the Shareholder of the Company. For the purpose of the Register of Directors and Officers of the Company, and for service of notice of Board meetings, the contact details are as follows:

Jason Sugarman
11400 W. Olympic Blvd.
Suite 350
Los Angeles California 90064
United States of America

Tel: 424 202 3872
Email: jsugarman@camdencap.com

Yours faithfully

Jason Sugarman

Date

Confidential Material

Add. 18

From: jason galanis <jason@holmbycompanies.com>
Subject: Fwd:
Sent: Thu, 11 Sep 2014 08:17:42 -0700
To: Devon Archer <darcher@rosemontseneca.com>, Bevan <btcooney@gmail.com>
[WLCC: tombstone.docx](#)

Begin forwarded message:

> From: jason galanis <jason@holmbycompanies.com>
> Date: September 11, 2014 at 8:16:48 AM PDT
> To: gdangler@buffalomgmt.com, Chad Brownstein <chad@ctbmgmt.com>
>
> tombstone for the first native american bond issue completed.
>
> i'm calling the attorney Greg gave me tomorrow to see if we can get anywhere.
>

Begin forwarded message:

From: jason galanis <jason@holmbycompanies.com>
Date: September 11, 2014 at 8:16:48 AM PDT
To: gdangler@buffalomgmt.com, Chad Brownstein <chad@ctbmgmt.com>

tombstone for the first native american bond issue completed.

i'm calling the attorney Greg gave me tomorrow to see if we can get anywhere.



Confidential Material

Add. 19


New Issue *August 2014*

\$27,077,436

WAKPAMNI LAKE
COMMUNITY CORPORATION,
a governmental unit of the Oglala Sioux Tribe
of the Pine River Reservation

5.62% Special Limited Revenue Bonds (Taxable)
Series of 2014 (Economic Development Program)
due September 10, 2024

Placement Agent

 **BURNHAM**
SECURITIES INC.

Add. 20

| UNITED STATES OF AMERICA, V JOHN GALANIS, et al., | | | June 11, 2018 | | |
|--|--|-----------|---------------|---|-----------|
| 16B7GAL5 | Raines - Direct | Page 1859 | 16B7GAL5 | Raines - Direct | Page 1861 |
| 1 | A. That was one year from the anniversary date from the | | 1 | which the annuity payments were structured? | |
| 2 | initial bond, when we were expected to receive the first | | 2 | A. Yes. | |
| 3 | distribution. | | 3 | Q. Let me ask you, did you ever meet any other members of | |
| 4 | Q. So that's the fall of 2015? | | 4 | Yanni Galanis' family? | |
| 5 | A. Yes. | | 5 | A. Yes. | |
| 6 | Q. What happened when the money didn't arrive? | | 6 | Q. Who is that? | |
| 7 | A. A number of things happened. We made some e-mails, phone | | 7 | A. His wife. | |
| 8 | calls, inquiries to the U.S. Banking trustee as well as | | 8 | Q. And do you remember her name? | |
| 9 | ultimately to Wealth Assurance, just requesting distribution, | | 9 | A. Shandra. | |
| 10 | and we got like sent back -- we had to make a more formal | | 10 | Q. Let's go down to the last paragraph of this e-mail, and let | |
| 11 | request, or wait for a policy anniversary date. It seemed | | 11 | me ask you to read that paragraph. | |
| 12 | pretty routine at the time until it didn't. | | 12 | A. "You indicated in your October 8th letter that Private | |
| 13 | Q. Let me show just to the witness, the court and the parties, | | 13 | Equity management was engaged by Wealth Assurance and that you | |
| 14 | please, Government Exhibit 282. | | 14 | intend to dismiss the manager. Our records indicate that | |
| 15 | Do you recognize that e-mail? | | 15 | WLCC -- not Wealth Assurance private client -- hired the | |
| 16 | A. Yes. | | 16 | manager and approved the investment criteria. We attach your | |
| 17 | Q. Is that an e-mail that you received? | | 17 | written instruction to U.S. Bank dated August 21, 2014." | |
| 18 | A. Yes. | | 18 | Q. Now, at the time that you were involved in the bonds being | |
| 19 | MS. MERMELSTEIN: The government offers Government | | 19 | issued, did you have an understanding of Private Equity | |
| 20 | Exhibit 282. | | 20 | management's role in the bond transaction? | |
| 21 | THE COURT: Any objection? | | 21 | A. No. | |
| 22 | MR. TOUGER: No. | | 22 | Q. Did the WLCC ever communicate with anyone from Private | |
| 23 | MS. NOTARI: No objection. | | 23 | Equity Management with respect to the investment of the annuity | |
| 24 | THE COURT: It will be admitted. | | 24 | proceeds? | |
| 25 | (Government Exhibit 282 received in evidence) | | 25 | A. No. | |
| 16B7GAL5 | Raines - Direct | Page 1860 | 16B7GAL5 | Raines - Direct | Page 1862 |
| 1 | Q. If we could publish that to the jury, | | 1 | Q. And after receiving this e-mail indicating that the | |
| 2 | How, who is sending this e-mail? | | 2 | Wakpamni Lake Community Corporation had the legal relationship | |
| 3 | A. This was from Hugh Dunkerley. | | 3 | with Private Equity Management, did the Wakpamni Lake Community | |
| 4 | Q. And who other than you is receiving it? | | 4 | Corporation take steps to sever that relationship? | |
| 5 | A. Our attorneys, Steven Haynes, President Lonchill and our | | 5 | A. Yes. | |
| 6 | trustee from U.S. Bank. | | 6 | Q. Since the payments ceased on the bonds, has construction of | |
| 7 | Q. If we can zoom back in, please. | | 7 | the town center ever been fully completed? | |
| 8 | Let me direct your attention to the paragraph that | | 8 | A. No. | |
| 9 | begins "The annuity contract number ..." Can you read that | | 9 | Q. How much has been accomplished? | |
| 10 | paragraph, please. | | 10 | A. We put the outer shells of the buildings in that town | |
| 11 | A. "The annuity contract number WAPC-2014-0010 dated August | | 11 | center site plan. | |
| 12 | 26, 2014 in the amount of \$25,250,000, was purchased with | | 12 | Q. Is there a functioning warehouse distribution business? | |
| 13 | proceeds from the economic development program series of | | 13 | A. No. And the long road and the driveway and the parking | |
| 14 | special revenue bonds issued in connection with the trust | | 14 | lots were never completed, so they're still prairie. | |
| 15 | indentures dated August 25, 2014. The contract provides for | | 15 | Q. Without the annuity, has the Wakpamni Lake Community | |
| 16 | annual distributions of \$1,823,600 per annum for years 1 to 9, | | 16 | Corporation been able to make the interest payments that it | |
| 17 | \$25,250,000 principal plus \$500,000 to be paid at the tenth | | 17 | owes on the bonds? | |
| 18 | anniversary, \$350,000 in income for each of the subsequent 15 | | 18 | A. No. | |
| 19 | years (\$5,250,000 cumulative), and a variable payment up to \$5 | | 19 | Q. Have any of the pension funds that bought the bonds reached | |
| 20 | million on the 25th anniversary. We understood these payments | | 20 | out to the Wakpamni Lake Community Corporation to discuss the | |
| 21 | fund certain long-term tribal financial objectives. The trust | | 21 | missing interest payments? | |
| 22 | indentures provides for annual payments of \$250,000 to WLCC, as | | 22 | A. Yes. | |
| 23 | you have indicated, within the first payment due on August 27, | | 23 | Q. And what has the community told them about its ability to | |
| 24 | 2016." | | 24 | pay? | |
| 25 | Q. Was that consistent with your understanding of the way in | | 25 | A. We spoke with them and said that we don't have functioning | |