

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CONRAD M. BLACK,
PETER Y. ATKINSON,
JOHN A. BOULTBEE, and
MARK S. KIPNIS

Defendants-Appellants

Appeal from the District Court
for the Northern District of Illinois,
Eastern Division

No. 05-CR-727

Judge Amy J. St Eve

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INTRODUCTION

From reading the government's brief, one would never suspect that the jury acquitted on 12 of the 16 submitted counts. This confusion is no accident: the government devotes its first dozen pages to a detailed description of a fraud scheme it never proved. The government's principal theory was that International's senior executives used newspaper sales as "opportunit[ies] to siphon money from the deal proceeds." GB2.¹ As the district court found, the jury rejected that theory in every count that depended on it.

This appeal is not about "payments for purported non-competition agreements that buyers of the newspapers did not ask for and did not care about" (*id.*). Nor is it about defendants' alleged attempt to push shareholder money up the Hollinger Group's corporate ladder. It is instead about the government's charge that defendants accepted two specific sets of payments from International knowing that they were or came from misappropriated funds. The central problem with the convictions, as our opening brief showed, is that the government's evidence could not support that theory. The government offered no proof that the APC payments were unauthorized. Just the opposite: it elicited from its principal witness unequivocal evidence (never contradicted) that the payments were legitimate. And in any case, there was no proof that any defendant *knowingly* misappropriated either set of payments (APC or Supplemental). Presented with no evidence of theft — and with direct contrary

¹ GB__ refers to the government's brief; DB__ refers to defendants' opening brief.

evidence – the jury returned a verdict that makes sense only if it were misled by flawed jury instructions into (1) finding an “honest services” violation unsupported by statute (that is, a purported “misuse” of position that did not harm International or result in illegitimate gain), (2) improperly basing its convictions on false-disclosure evidence (uncharged conduct), or (3) using the unwarranted “conscious avoidance” shortcut to bypass the requirement of guilty knowledge.

To make up for the fundamental weakness of its case, the government blurs the lines among charges and defendants. It talks of “testimony from scores of witnesses” and “hundreds of exhibits” received in evidence (GB29), most of which related only to acquitted counts. It describes at length a “general scheme” of purported diversions not proved at trial. But when the smoke clears, and the government must marshal the evidence supporting the convictions, it comes up well short.

ARGUMENT²

We first address the government’s “clarification” of the contours of the verdicts. It is “flawed logic,” the government asserts (GB32), to assume that by acquitting on the vast majority of charges the jury rejected the evidentiary theory underlying those charges. This debate is ultimately a sideshow, because the lengthy descriptions of the

² For the Court’s convenience, and to avoid duplication, a common reply is presented on the common issues, and arguments unique to individual defendants are contained in defendant-specific sections at the end of the brief. See *infra* at 26 (Black); 38 (Atkinson); 46 (Boulton); 54 (Kipnis). Each defendant adopts and incorporates the arguments of the others to the extent relevant.

acquitted conduct establish neither innocence *nor* guilt on the counts of conviction. But the suggestion that guilt has been proven when it has not cannot go unanswered.

Two reasons are offered for ignoring the acquittals: (1) they could have resulted from “mistake, compromise, or lenity” (GB33, citing *Powell*, 469 U.S. at 65), and therefore are irrelevant to sufficiency review; and (2) the entire “U.S. Community non-compete scheme” was described in Count 1, so that conviction can legitimately be read to find guilt on the entire scheme.

We do not ask the Court, contrary to *Powell*, to assume innocence on convicted counts simply because there were acquittals on other, potentially overlapping counts. But that does not mean that the government can either tar defendants on appeal with allegations rejected by the jury or secure the benefit of favorable factual inferences on those allegations, when a coherent theory, not dependent on jury irrationality, explains the distinction between the acquitted counts and the counts of conviction.

It is simply wrong to read the Count 1 conviction as endorsing the entire charged scheme. “Count 1” filled the Information’s first 22 pages and alleged a vast array of fraudulent conduct, but the charged mailing related only to the APC payments. Counts 2-5 and 7 each “reallege[d] and incorporate[d] by reference” the paragraphs describing the entire charged “scheme,” and charged mailings associated with other, *discrete* transactions. If conviction on Count 1 signifies endorsement of the entire “scheme” there alleged, then the acquittals on Counts 2-5 signify a rejection of the entire “scheme.” The government is asking this Court to treat conviction on any one of the first seven counts as equivalent to conviction on all, ignoring that under its reading the

acquittals make no sense at all. Ultimately, it asks the Court to read inconsistency into otherwise perfectly consistent verdicts.

As the district court recognized (DB9-10), the jury convicted only on counts that lacked non-compete agreements connected to the sale of a newspaper; it acquitted on every count in which a non-compete payment was part of a newspaper transaction. This observation (accompanied by a finding that the government failed to prove a “general scheme,” even by a preponderance) is plainly correct. There is no reason to displace it by assuming irrationality, especially because (unlike in *Powell* and similar cases) the assumption is not the most plausible explanation of the verdicts.³ And if the only way to affirm is on a theory the jury clearly did not actually accept, then this case cries out for a new trial in the interests of justice. 28 U.S.C. §2106.

I. APC

A. Radler’s Testimony Cannot Simply Be Ignored.

The government contends that defendants defrauded International by stealing \$5.5 million from APC. The Ravelston executives undeniably received this money from the company; the key factual questions before the jury were whether the APC money belonged to International and defendants knowingly misappropriated it.

We contend that the government failed because it never countered its own star witness’s testimony. Radler testified that the \$5.5 million was *not* stolen from

³ This Court regularly reconciles purported inconsistencies by interpreting jury verdicts as rational. See *United States v. Anderson*, 517 F.3d 953, 960 (7th Cir. 2008) (no “unexplained inconsistency” when conviction rested on recorded phone calls and acquittal on unrecorded calls); *United States v. Walker*, 9 F.3d 1245, 1248 (7th Cir. 1993).

International, but was rather drawn from approved fees owed to Ravelston for management services. The question is whether the evidence allowed a rational juror to conclude that Radler was wrong and defendants knew it.

The government denies any obligation to prove the APC payments were not management fees, claiming that it need not “disprove every alternative account of the evidence.” GB35. Instead, the government would have the Court simply cast aside Radler’s testimony, assessing sufficiency as though Radler did not exist.

We accept the government’s bromide that it “need not exclude every reasonable hypothesis of innocence”; if there were no Radler testimony, the government would not be obliged to refute the management-fee hypothesis. But when the government itself adduces testimony supplying an innocuous explanation for the charged conduct, a reviewing court must examine whether that evidence is anywhere satisfactorily refuted. After all, it is also axiomatic that a conviction cannot be sustained unless “the total evidence permits a conclusion of guilt beyond a reasonable doubt.” *United States v. Whitlow*, 381 F.3d 679, 685 (7th Cir. 2004). And when, after viewing the evidence in its totality, “the prosecution’s theory and [an] alternative theory [are] equiprobable or close to it, [the defendant] would have to be acquitted.” *Morales*, 902 F.2d at 608. Here, the evidence, taken as a whole, is *more* consistent with innocence than guilt.

The government promoted Radler’s anticipated testimony at the start of trial:

Radler will give you an inside look at how *** [defendants] stole \$60 million.

Radler will tell you how it worked. And he'll give you a view into it. He'll tell you what they did – what memos they produced.

*** [Y]ou'll have a chance to judge him; he will be supported by the other witnesses who testify; and, he will be supported by documents.

T.888. It then elicited Radler's testimony that at the time he issued the APC payments, he believed they were coming from unpaid management fees, approved by the Audit Committee in February 2000. SA382-83. Radler expanded upon this testimony during cross-examination. SA385-86, 393-94. Not once did the government suggest to the jury, during the entire four-month trial, that Radler was lying, or even that he was mistaken. (In closing argument, its only acknowledgment of this testimony was an *ipse dixit* brush-off: "But why didn't the government tell you that APC money was simply pre-approved management fees? *** Because it wasn't." T.15086.)

The government never suggested that Radler was lying, because he was *not* lying, and the government knew it. Radler gave the same explanation to the grand jury; indeed, he *read* his grand jury testimony from a government-prepared script. DB37 n.11; T.9274-78. This did not undermine the government's principal theory at the time: that defendants' recharacterization of management fees as non-compete proceeds constituted tax fraud on Canada. While the government abandoned its questionable "fraud-on-Canada" theory before trial, it could not change the facts. The APC payments were, according to the man who directed them, pre-approved compensation paid to the four Ravelston executives out of money International owed to Ravelston. To legitimately avoid Canadian tax, Radler ordered that APC pay the executives directly,

rather than through Ravelston, and had the executives sign binding non-compete agreements.

This was not some fanciful defense theory. It was, until the eve of trial, the government's own theory. When that theory became inconvenient, the government's first response (answering defendants' Rule 29 motions after the government rested) was to argue that Radler had a "mistaken belief." R.717 at 10-12. Its second response (in summation and post-trial motions) was simply to ignore Radler's exculpatory testimony and even to tell the jury Radler was "the defense case." T.14910. Now, on appeal, the government for the first time suggests that the testimony it knowingly elicited from Radler was a lie. See GB36 ("Radler knew this money belonged to International and [was] stealing it."). When the backpedaling stops, we are left with unchallenged exculpatory testimony from the witness the government claims masterminded the purported scheme. The government may not have the burden to disprove every conceivable theory of innocence, but on this record it was certainly obliged to provide the jury a sufficient basis for believing that the APC payments were stolen funds, rather than the approved compensation its own knowledgeable witness unequivocally claimed. See *Peterson*, 236 F.3d at 855 (reversal for insufficiency when government expert admitted possibility that element was unproven, and government "witness with the most knowledge as to this matter" could have provided "benchmark" evidence but didn't).

The government chides us for purportedly "analyz[ing] each piece of evidence in isolation, and argu[ing] how it is insufficient alone to establish guilt," because the Court

does not “view every bit of evidence in isolation.” GB37-38. We agree. The government cannot establish the sufficiency of its case without confronting the entire record and explaining how a rational jury could find guilt though lacking any basis to reject Radler’s testimony.

B. The Evidence Failed To Refute Radler’s Management-Fee Testimony.

Radler’s testimony, the government asserts, “was not the beginning or end of the evidence.” GB37. Instead, “numerous witnesses” purportedly gave testimony sufficient for a rational juror to conclude beyond a reasonable doubt that (1) the payments were stolen, and (2) defendants knew it. But as predicted (DB35-37), none of the government’s proffered evidence carries the load the government assigns it. That the Court views the evidence as a whole does not mean that a string of insubstantial or irrelevant record snippets can magically transform into sufficient evidence of fraud. See, e.g., *United States v. Martinez*, 54 F.3d 1040, 1045 (2d Cir. 1995) (Calabresi, J., concurring) (“[T]he aggregation of many small pieces of data – which are not evidence at all because every one is in equipoise – can never establish proof beyond a reasonable doubt. The adding of zeros to zeros, no matter how many, cannot amount to more than zero.”).

1. No Basis To Believe The Funds Were Stolen

After poking fun at defendants for relying on “about ten pages” of transcript (GB37) to show that the APC payments were approved management fees, the government bases its counterargument on five pages from International’s accountant, Fred Creasey, and one sentence spoken by CEO Gordon Paris. GB38-40.

Paris's testimony (that all payments at issue in the trial came "*from Hollinger International*") gets the government nowhere. That was undisputed; the question was whether International *owed* this money to Ravelston. Evidence that the checks were drawn on APC's account is meaningless; if APC owed the money, as Radler testified, then of course it would come from APC. It is similarly irrelevant how APC funded the payments, including the government's unsupported allegation (n.4, *infra*) that they were taken from the CNHI(2) reserve fund. The independent directors' testimony – that they had not approved extra bonus payments to the Ravelston executives (GB37, 42) – is meaningless as well. Radler testified that he did not seek approval because the management fees had already been approved, a year before the APC payments issued. These "bonuses" were *Ravelston's* bonuses, not International's.

Creasey's testimony, discussed by both sides (GB38-39; DB36-37), is more consistent with defendants' position than the government's: (1) while Creasey had no knowledge of the payments when they were made, "as best as I can recall, there were management fees that had not yet been paid by American Publishing – or, sorry Community Group – to Ravelston" (GA116); (2) examining the records in 2003, he understood that the payments were not credited against APC's "management fee accrual account" (GA115-18); and (3) he had no idea whether the management fees still owed to Ravelston had otherwise been paid (GA118). This testimony does nothing to undermine Radler's explanation that the APC payments were intended to offset management fees APC still owed Ravelston. Those fees were properly authorized, and as we argued (DB36-37), there is a gaping hole in the government's proof: had the

(legitimate, approved) management fees been fully satisfied without regard to the APC payment at issue, that should have been easily proved. The government offers no response.⁴

2. No Evidence Of Knowledge

Even had the evidence somehow proven the APC payments were not approved management fees, the government itself acknowledges (GB40-47) that it still needed to prove culpable knowledge to secure a conviction. But the government proffers only deficient circumstantial evidence of knowledge: (a) defendants signed what the government considers sham non-compete agreements (supposedly binding them to refrain from competing only with a single, small Northern California newspaper); (b) they received checks from the account of an APC subsidiary rather than from the “management fee accrual account”; and (c) they failed to correct subsequent misdescriptions of the payments in public filings.

a. The *Mammoth Times* argument may be amusing, but it is very misleading. For one thing, the government’s “snowboarder” refrain ignores the fact that the APC non-

⁴ The government also suggests (GB40) that the APC payments came from “the company’s profit” from the CNHI(2) sale. The claim is both unsupported and irrelevant. KPMG audited that sale, issuing a memorandum (DXJBKPMG 8) stating that the transaction was “properly accounted for” and that “the gain recognized on the sale appears fairly stated in all material respects.” T.5233-34. The memorandum does not mention the APC payments. The government relies (without discussion) on a different exhibit, GA599 (GB13, 39, 59), a typed transaction summary identical to that in the KPMG memo, except for an unexplained handwritten note referencing a \$5.5 (or perhaps \$5.2) million payment. The government neither asked any witness about this exhibit nor explored the notations’ meaning or source. The notion that the jury could have concluded the payments came from CNHI(2) based on this dubious evidence, when no witness was asked to explain it, is far-fetched.

compete agreements were not limited to the *Mammoth Times*, but prohibited competition against “any Publication then owned by [APC] or any of its affiliates at the time of Officer’s termination of employment.” GA409. APC “affiliates” owned scores of newspapers when these agreements were signed. DB42. In any event, we have never contended that defendants thought they were signing agreements that had been negotiated at arm’s length or that the impetus was to benefit the company by prohibiting competition with the *Mammoth Times* or any other publication. To the contrary, each defendant had learned from Radler before these agreements were signed that re-labeling compensation as payment for binding non-compete agreements rendered those payments non-taxable in Canada. SA138-44; T.7776-79. Thus, when we observed that the agreements provided “benefits” to International (DB80), this was not a claim that the non-competes were *motivated* by a desire to serve “International’s best interests” (GB88); it was simply an acknowledgment that the agreements actually bound the executives not to compete and therefore satisfied Canadian law. Certainly, they intended International no harm.

Moreover, if these agreements were the self-evident shams the government claims, they were hardly likely to fool International. As the government itself notes (GB13), it had been publicly announced that APC was winding down. Indeed, the only potential reader of these agreements who *would* be satisfied with their legitimacy, under the government’s theory, is the Canadian government – exactly the audience Radler explained the agreements were designed to satisfy. In short, the purported sham

character of the APC non-competes, though much trumpeted by the government, does not advance its case at all.

b. The “management fee accrual account” argument is equally mistaken. The government claims defendants must have known the payments were not management fees because the checks were not drawn on the “management fee accrual account.” But that “account” was just a bookkeeping entry, not an actual bank account. See GX-APC17. APC’s accountants made journal entries in the company’s books to track its “accrued” liabilities. Creasey testified that he had failed – perhaps through an “unintentional error” (SA254) – to make an entry in the management fee account to record the APC payments. But entry or no entry, no check ever would have “issued *** from a management fee accrual account.” GB41. Management fees, non-compete payments, and other sundry expenses were all paid out of the “APMS” account on which these payments were drawn. The checks themselves thus prove nothing about the nature of the payments or defendants’ knowledge of any fraud.

c. As for purported acts of “concealment,” they are no more probative of fraudulent intent than the snowboarding straw men in Mammoth Lakes.⁵ First, there is simply nothing suspicious about Radler’s failure to seek separate approval for these payments from the Board or Audit Committee (GB42-43). Radler believed the

⁵ And in any case, such post-scheme concealment evidence cannot by itself support a conviction. The government’s efforts to distinguish *Rose* (GB43-44) fail. There, the court found a “plethora” of contemporaneous evidence to show criminal intent and allowed the jury to consider false exculpatory statements as “*additional* circumstantial evidence of [defendant’s] consciousness of guilt.” 12 F.3d at 1417, 1421 (emphasis added).

payments were already-approved management fees; further approval was unnecessary. SA382-83. In any case, the evidence was clear that Radler and Kipnis were the ones who presented related party transactions to the Audit Committee; that the other three defendants (who rarely if ever attended the meetings) did not separately make such disclosures proves nothing.

The government next charges (GB43) that it was somehow suspicious that the Ravelston executives failed to include the APC payments on their proxy questionnaires. Because the payments represented a distribution of Ravelston's already approved and disclosed management fees, they did not constitute additional "compensation" from International and thus were not responsive to the questionnaire.

The government also insinuates that there is something "damning" about the APC checks being "backdated" to December 2000. GB43 n.2. But no defendant had any role in dating the APC checks; it was an internal accounting decision to make the payments "effective 12/31/00." SA532; T.3613. In any event, there is nothing wrong with the way the checks were dated, particularly because they were issued to accompany agreements effective "as of" December 31, 2000. SA535. If anything, the dating corroborates Radler's testimony that the APC payments satisfied a management-fee obligation owed for 2000.⁶

⁶ The government argues that the APC checks were "backdated" because the money was coming from the proceeds of the CNHI(2) transaction that closed in November 2000. GB15. The assertion that these payments "came from" CNHI(2) is completely unsupported (see n.4, *supra*). It also makes no sense. The Supplemental Payments, which came from the proceeds of the Forum and Paxton sales in September and

The government's opposition thus reduces to one thing: the much-bruited "false statements" in International's SEC disclosures. The government disputes neither that these disclosures were drafted by one of International's outside lawyers nor that they accurately disclosed the total sums the executives received. And we do not dispute that the outside lawyer erred in lumping the APC payments in with other non-compete payments and describing them as all associated with newspaper sales, or that defendants did not catch the error. But that is the most that can be said about what occurred: everyone – outside lawyers, auditors, the Audit Committee – failed to correct an error no defendant caused or could have anticipated, made more than a year after the charged scheme terminated. This cannot be a sufficient basis for finding fraudulent intent.

The government's remaining arguments are all sallies into speculation. There was assertedly no "track record" (GB46) of management fees previously being paid directly to the executives. So what? Radler testified that he first learned of the non-compete tax loophole in July 2000, and he promptly exploited it. SA138-44. This rationale for direct payments never previously existed. The contention (GB46) that Radler's explanation is undermined by the fact that other Ravelston employees received no APC payments is fatuous. Ravelston was no cooperative; it was a privately owned corporation controlled by Radler and Black. If Ravelston earned money, its owners could direct that money however they wanted. Radler testified that Black authorized

October 2000 (SA572), were all dated April 2001. Radler clearly did not believe backdating was necessary in order to redirect sale proceeds.

“bonuses” to the four executives who had scored great recent successes in effectuating highly favorable newspaper sales, including the hugely profitable CanWest deal. Like “backdating,” “bonuses” are unremarkable. Ravelston could issue bonuses to whomever it chose. The government’s insinuation that Black and Radler intended the word “bonus” to refer to unauthorized compensation from International is completely unwarranted and unsupported.

Finally, the argument that defendants must be guilty because, if they were innocent, they would have taken “their full salaries and bonuses from APC” (GB47) cannot be taken seriously. The undisputed evidence showed that for a non-compete agreement to be valid, the consideration must be reasonable in comparison to industry standards. T.12321, 12325-26. Defendants’ payments met this criterion. T.12057-61. Characterizing their entire compensation as tax-exempt consideration for non-compete agreements would, like the government’s argument, be obviously unreasonable.

C. The Honest Services Charge Was Improper And Prejudicial.

The government begins its discussion of honest services with a gross misdescription of our position. Citing defendants’ statement that “the jury was instructed that it could convict on honest services without ever finding that defendants had sought to deprive International of money or property” (GB53, quoting DB45), the government concludes that we are arguing that “it is error to instruct a jury that an honest-services fraud does not require a contemplated loss of money or property to the victim.” GB54. That is not our argument. Of course, if §1346 means nothing else, it certainly means

that one can commit mail fraud by depriving his victim of “honest services,” rather than “money or property.” The question is what “honest services” means.

The problem here is that the government never articulated a proper theory under which defendants deprived International of anything *but* money or property – and its brief makes little serious effort to rely on anything beyond the alleged “thefts” as the honest-services violation, describing the honest-services fraud as defendants’ “misuse[of] their positions as officers of the company to siphon off \$5.5 million of *the company’s money.*” GB57 (emphasis original). Insofar as this was the government’s theory, there never should have been *any* honest services charge. As this Court recently explained, “[i]t takes more than citing §1346 to make a scheme an intangible-rights fraud. *** The intangible-rights gloss on §1341 was devised to deal with people who took cash from third parties (via bribes or kickbacks),” *not* to deal with defendants accused of “st[ea]ling] money from their employer.” *United States v. Orsburn*, 2008 U.S. App. LEXIS 9825, *5-*6 (7th Cir. May 8, 2008). If mere theft were enough to satisfy the honest-services statute, “then every violation of §1341 by an employee or fiduciary is honest-services fraud. That’s not how *McNally* and many opinions before and since have understood the relation between tangible and intangible losses.” *Id.* at *6.

Thus, the government cannot justify an honest services charge with the argument that theft of International’s money is *also* a deprivation of International’s right to honest services. The fact is, the jury was told that it did not have to find theft in order to convict. So one is left to wonder: what conclusion could the jury rationally have drawn that would have supported conviction if it did not accept the government’s tale of

misappropriation? The answer, of course, is that the jury could have rested its verdict on the very theory the government propounded up to the eve of trial: that defendants “misused” their positions at International for personal gain in the form of Canadian tax benefits. SA56b. As we explained (DB45-50), that theory is a dramatic and unwarranted extension of the statute insofar as it abandons any requirement to prove that a defendant misused his fiduciary relationship for private gain “at the expense of the party to whom the fiduciary duty was owed.” *Hausmann*, 345 F.3d at 956.

In any event, the government fails to show any plausible non-theft theory of harm to International. Certainly, signing a non-compete agreement, even if it did not meaningfully benefit International, did not harm it either. The best the government can offer is that defendants deprived International of its supposed right to know that fees it was paying were receiving advantageous tax treatment in Canada. Without this critical knowledge, the government asserts, the company was prevented from “potentially negotiating for a share of the tax savings.” GB62. This is insufficient. An employee has no duty to inform his employer of his tax-minimization strategy in order to give the employer an opportunity to renegotiate compensation. If Black increased his charitable contributions, or chose to deduct child-care expenses or mortgage interest, he would have been under no obligation to tell International. The government suggests that co-opting International to consummate the tax strategy is worse – arguably a fiduciary breach. But §1346 is not designed to police mere fiduciary breaches. Indeed, as *United States v. Sorich* confirms, courts have interpreted the statute specifically “to prevent the conviction of individuals who have breached a fiduciary duty to an employer or the

public, but have not done so for *illegitimate* gain.” 2008 U.S. App. LEXIS 7996, *18 (7th Cir. April 15, 2008) (emphasis added). In 2001, restructuring salary as non-competition compensation to minimize Canadian taxes was commonplace and not “illegitimate.”

Finally, a word about preservation, both of the instructional error and of the *Yates* argument: The government’s waiver arguments are wrong. Defendants objected from the trial’s start to including any honest services charge, either in the Information or in the jury instructions. R.261; T.62-65. And, we now know from *Orsburn*, the theory that the government insists (GB57) was actually its only honest-services theory (stealing from your employer violates the duty of honest services), is not a valid basis for inserting a §1346 charge into what should be a straightforward money/property fraud case. By overruling defendants’ objection, the court allowed the jury to consider a confusing and improper honest-service alternative theory of liability, to defendants’ great prejudice.

When the court denied the broad objection to any inclusion of an honest-services charge, defendants made clear their belief the jury should be charged that any private gain had to come as a result of a fraud upon International. The prosecutor’s crystallization of the issue makes clear that all concerned knew that defendants believed harm to International should be a required element: “[Prosecutor]: I don’t think that [the case law] supports the notion that the defendant can enrich himself via fraud even if he believes that it won’t harm the corporation in the long run, which is, I think, more what [defense counsel is] arguing than that these non-competes in some way actually benefited the corporation.” T.88.

The Supreme Court has recognized that the basis for an appellate challenge to a jury instruction does not necessarily have to “mirror” language a defendant proposed and advocated at trial (*Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 n.10 (2005)), so long as the judge is adequately “apprised of the grounds for the objection.” *United States v. Martinez*, 988 F.2d 685, 698 (7th Cir. 1993). On three separate occasions, defendants offered instructions that would have told the jury not to convict on honest services without proof of harm to International. R.471 at 16; R.610 at 12-13; R.743 at 3. The court twice acknowledged and considered the merits of defendants’ requests. T.85-88; T.13487. The objection was preserved.

As for *Yates*, our position stands. Defendants had a right to a general verdict (DB53 n.18) and were not obliged to surrender it to preserve their separate right to assurance that the verdict was not based on an erroneous legal theory. And the government has offered no compelling reason to believe that the post-verdict interrogatories the defense requested would have done anything other than resolve the ambiguity the government now claims prevents a remedy for the erroneous submission of the honest-services charge. The government offers no meaningful response to our citation of *Riccobene* (DB53) (approving this procedure), nor does it cite any authority at all for the proposition that a *Riccobene* procedure would be somehow harmful. The government worries that perhaps, faced with a special interrogatory after returning its verdict, the jury may “start[] reconsidering.” GB65. But so precarious a verdict surely does not warrant preservation at all costs. There is nothing unusual about applying *Yates* to a case like this one; indeed, this Court recently recognized the doctrine’s

applicability to our precise type of challenge. *Sorich*, 2008 U.S. App. LEXIS 7996, at *6-
*7.

II. SUPPLEMENTAL PAYMENTS

A. No Evidence Of Knowledge

The government's argument on this point is largely specific to the individual defendants and is addressed in each defendant's separate arguments. See *infra*, at 28 (Black); 42 (Atkinson); 47 (Boulton).

B. No Proof Of The Charged Mailing

The linchpin of the government's argument that it proved the charged mailing – “an envelope [containing the Supplemental Payments] addressed to MARK S. KIPNIS [in Chicago] to be sent” from Marion, Illinois (SA84) – is the claim that the circumstantial evidence proved that “each of the [McBride] memo's instructions was followed.” GB82. But this overlooks the court's contrary finding acquitting Kipnis on Count 7 because, notwithstanding the memo's direction to carbon-copy Kipnis and Radler, there was no evidence that the direction was followed. SA204; DB71.

The mere fact that checks were thereafter deposited proves only that defendants eventually received them in Toronto – not that they were routed (as Count 7 alleges) from Marion to Kipnis in Chicago. And because there is no proof the mailing ever made it to Chicago, Angela Ways' testimony – concerning how mail typically arrived there – is beside the point.

The Count 7 convictions must be reversed because the government simply failed to prove the charged mailing.

III. THE OSTRICH INSTRUCTION

The standard of review for an ostrich instruction — *de novo* versus abuse of discretion — appears to matter deeply to the government since it puts all its eggs in the discretionary basket (GB85-86). Understandably so. Only under the most deferential review could the instruction even arguably be justified, though the argument would still fail. Ultimately, whether reviewed for legal error or abuse of discretion, the ostrich instruction cannot be justified here. DB74 n.25.

The government relies on the same facts here as in opposing defendants' sufficiency arguments. Compare GB87-88 with GB48-51; compare GB89-90 with GB70-77. Those facts are no more persuasive in the ostrich instruction context — in fact, they are less persuasive — and certainly this record does not demonstrate that defendants "forced [their] suspicions aside and deliberately avoided confirming" that they were engaged in criminal activity, the conceded standard. GB87.

The government's legal arguments are neither persuasive nor supported. It argues that, even if the district court abused its discretion, the error was harmless because (1) the jury was told it could not convict if defendants were only negligent in failing to inquire, (2) the government made limited use of the ostrich instruction during closing, (3) there was substantial evidence of actual knowledge, and (4) if the instruction was appropriate for even one defendant, it was harmless error as to the rest because the jury was instructed to examine the evidence against each defendant individually. GB92-95.

Telling the jury that it could not “conclude that a defendant had knowledge if he was merely negligent in not discovering the truth” (GA39) is useless as a curative instruction without a definition of “negligence,” particularly when the government misleadingly filled in that gap by improperly inviting the jury to convict based on the “objectively reasonable person” standard (GA377-79), which *is* negligence, though expressed in different words. The government’s invocation of conscious avoidance in summation was not as limited as the government now insists; in addition to the three conceded occasions (GB93-94), the government made the same point in its principal summation. GA350. The government also ignores the fact that, no matter how limited *its* invocation of the conscious avoidance doctrine, defendants were required to anticipate and address the instruction – and therefore highlight the issue – in their own summations, which by the government’s count occurred at least five times. GB93. Thus, the jury heard the conscious avoidance doctrine addressed at least 10 times, belying the government’s insistence that there were only “minimal references to [conscious avoidance] during closing argument.” GB32. Nor is there any more validity, in view of defendants’ compelling sufficiency arguments, to the government’s present claim that the ostrich instruction was harmless because there was “substantial” evidence of defendants’ actual knowledge.

Finally, whether the ostrich instruction was appropriate as to one defendant – and defendants argue it was justified as to none – it cannot be harmless error as to the remaining defendants for whom it was unjustified. Circuit law does not support the government’s proposition. See *Caliendo*, 910 F.2d at 434-35 (conducting separate

ostrich-instruction analysis for each of four co-defendants; finding that “giving of an ostrich instruction with respect to [one defendant but not others] amounted to an abuse of discretion”). Because the government failed to establish that any defendant cast “suspicions aside and deliberately avoided confirming” that criminal activity was afoot, the instruction was reversible error as to all.

IV. FAILURE TO GIVE A LIMITING INSTRUCTION REGARDING POST-SCHEME CONDUCT

The government erroneously suggests (GB95) that defendants argue that the district court “improperly admitted evidence of their false statements in SEC public filings.” What we do argue is that, in view of the great emphasis the government placed on those filings and their potentially inflammatory nature, it was essential to apprise the jury in clear terms that conviction could not rest solely on inaccuracies in filings. The government cannot effectively answer the real argument.⁷

Contrary to its current claim that it did not “suggest that filing false SEC disclosures was the crime” (GB97), the government explicitly urged the jury to convict based on post-scheme, erroneous SEC filings. During summation, it said point blank that the crime was “not about the fact that defendants got money. It’s not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money.” SA510. As the government later described its position, “the fraud in this case was not simply that money was paid to the executives; the fraud was that

⁷ The claim (GB97-98) that false SEC disclosures were an “integral part” of the charged scheme is fanciful. The Information alleged that the charged scheme ended in May 2001; the SEC filings were made in 2002 and 2003. SA65.

defendants lied to the shareholders about *why* they were receiving money.” R.904 at 19 (original emphasis). See also SA517 (“The crime here is the defendants’ lies to the shareholders about why over \$60 million went to Inc. and [the individuals]”); T.13880 (“The crime in this case is that the defendants hid and lied about the true reasons why money was paid. This is what we’re talking about”).

Nor can the heavy emphasis on the post-scheme filings be sloughed off as only responding to defense efforts. GB96. While citing a cross-examination snippet in which the defense used the disclosures, the government neglects to mention that it first elicited testimony about these documents on direct. *E.g.*, T.3101-05. Defendants’ cross-examination merely sought to limit the damage. *Cunningham*, 462 F.3d at 715 (“damage from [government evidence] had already been done; [counsel] was only making the best of an already bad situation”).

The government likewise errs when it criticizes defendants’ proposed limiting instruction. It mischaracterizes the instruction as supposedly conveying that the jury could not “consider” disclosure evidence. GB99-100. There was no dispute that the jury could consider post-scheme disclosure evidence concerning intent. But defendants’ proposed instruction would have made clear that the SEC disclosures were not the charged conduct, and that the jury could not convict based *only* on a finding that those disclosures were false. SA273 (“Now, I’m not saying it’s not relevant evidence; but, what I’m saying is that this jury runs a risk of being confused, and they should be – we think they should be – told, ‘Look, the charged criminal conduct here are not the disclosures’”); SA273-74 (court suggested instructing that “defendants are not charged

with defrauding the SEC"; defense counsel said, "I would welcome that instruction, but it's really — it's more than that. They're not charged with making false public disclosures. That's not the charge. The charge is obtaining the non-compete money. These disclosures, while perhaps relevant, are not the charges here."). Defendants' written and oral requests were more than sufficient to alert the court to the legally correct and critically-important limiting instruction.

The government asserts (GB99) that the court's limiting instruction — defendants were not "charged with securities fraud" — sufficed, but never explains why or how the instruction informed the jury that post-scheme disclosure evidence is not enough to convict defendants of mail fraud. The instruction ultimately given simply failed to cure the government's repeated exhortations to misuse the disclosure evidence as the basis for the fraud convictions.

BLACK'S INDIVIDUAL ARGUMENTS

The government goes to great lengths to depict Conrad Black as a schemer, greedily conspiring to skim shareholder money from International's coffers. Never mind that the evidence cited to support this fantasy relates almost exclusively to counts on which Black was acquitted; what is remarkable about the government's presentation is how heavily it relies on irrelevant and inflammatory innuendo rather than fact. The government would have this Court find something damning about Black having told Radler he thought the non-compete payments were "splendid" (GB21), as if there is something sinister about being pleased to receive money. The same goes for the government's out-of-context citation to Black's comment about Radler's view of the non-competes as a "vehicle for extracting money" (*id.*), and for Radler's claim that Black believed that Inc., like International a potential competitor of the newspaper purchasers, "deserved" a share of International's non-compete fees (GB9; GA226). Even if this evidence showed Black's satisfaction with his receipt of non-compete payments and (accurate) belief that he and his colleagues had done an outstanding job for International's shareholders for which they deserved to be well compensated, that is not evidence that Black stole, or believed he was stealing, anything.

In short, this case is simply not about whether Black received payments from International or thought he deserved to. He was the company's well-compensated founder, controlling shareholder, and chairman. The question is whether he knowingly received unauthorized or illegitimate payments. The government's evidence failed to show that he did, or that he obstructed justice by removing boxes from his offices in Toronto in the face of his pending eviction.

I. SUPPLEMENTAL PAYMENT

The government does not dispute that Forum/Paxton non-compete payments had been approved by International's Board of Directors or that Black knew these payments had been approved. The government quibbles with the method of approval — a method used to approve other deals on which the jury acquitted defendants — but it cannot deny that individual non-compete payments were contemplated and authorized. Nor can it dispute that Black was not told at the time of Kipnis's failure to include non-compete agreements in the transaction documents or to set aside money for individual non-compete payments. Absent proof that Black knew the Supplemental Payments were not the approved non-compete fees he was expecting, the evidence simply cannot support the conviction.

As our opening brief explained, Radler's testimony about the genesis of these payments was unambiguous: After receiving an inquiry from Black about the status of the non-compete payments, Radler learned from Kipnis that no money had been set aside for the executives. Radler then determined that \$600,000 remained in the Forum/Paxton reserve accounts and decided to use that money to satisfy the authorized payment of non-compete fees to the individuals. Radler never testified that he told Black about any of this.

The government asserts (GB71) that the jury was entitled "to reject Black's claim that he was a passive and unknowing participant in Radler's 'unilateral' decision to steal," encasing "unilateral" in quotes as if the notion were somehow far-fetched. But that is what Radler testified: that *he* — not he and Black — decided to direct \$600,000 to

the individuals. GA252. The government relies on sleight-of-hand for its contention that the jury could have found Black involved, invoking (GB70) Radler's testimony that "we allocated the \$600,000." But Radler plainly was not talking about involving Black in the initial decision to appropriate the \$600,000 for the executives; instead, he and Black "allocated" the money *among* the executives. GA252-53. The government suggests (GB70) that there was something suspicious about the fact that the allocations "did not come from a negotiated agreement with buyers, but from Black and Radler." But there was nothing remotely unusual about that. *None* of the non-compete agreements, in *any* of the transactions, specified how money would be divided among the individual executives. *E.g.*, GX CNHI 16; GX CanWest 36. Those amounts were never "negotiated *** with buyers"; rather, the agreements provided for a total amount for non-compete payments, which was allocated by Black and Radler among the covenantors. That Black helped Radler "allocate" the Supplemental Payments, as he did with every other such payment, says nothing about Black's knowledge of any misappropriation.

This trick pervades the government's argument. The jury could also conclude that Black was involved in a decision to steal, the government asserts, because "this was not the first or only time that Black discussed inserting executives into transactions as non-compete covenantors." GB70. Indeed, the government includes a long list of Black's multiple conversations with his co-defendants about "when to take *** non-compete payments, who should receive a share, and how much each person should receive." GB71. So what? The question for the jury was not whether Black was involved in deciding to pay non-compete fees to the executives, or in splitting non-

compete fees among the executives. Of course he was. The question was whether Black knew that these particular non-compete payments were drawn from stolen funds. And there was absolutely no evidence that he did. To the contrary, he had every reason to believe the payments had been requested by the buyers and approved by International's board.

It was undisputed that Black had little involvement in managing International's American business. That was Radler's job. Indeed, during the relevant period Black lived in England, running the *London Telegraph*. The sales of American newspapers, although Black's idea, were handled by Radler; a number of buyers even testified that they had never met Black or spoken to him. See T.1523, 1861, 1906-07, 2213-14, 2361. It was in this context that Black received Radler's memo (GXCNI25) explaining that the purchasers had requested individual non-compete agreements from Black and Radler. Radler joked in that memo (as the government notes) about moving to Wyoming to avoid prohibited competition, but Black had no reason to believe the rest of the memo was a joke. It told him the buyers requested non-compete agreements, and there was no evidence he was ever told anything to the contrary.

This brings us to the government's suggestion (GB69) that the method of approval – Executive Committee consents ratified by the full Board of Directors – was somehow indicative of fraud. It was not. First, the government pretends that Black and Radler were the only members of the Executive Committee (“Black and Radler did not have authority unilaterally to approve payments to themselves”). But the Executive Committee consents were also signed by Richard Perle, former Assistant Secretary of

Defense and Chairman of President Bush's defense policy board. Perle was not an alleged co-schemer, and the government presented no evidence to suggest that he was misled or uninformed about the nature of these payments. Indeed, the government never even called Perle as a witness. A scheme to defraud that depended for its success on the complicity of Richard Perle is impossible to imagine.

The fact is, the jury rejected the government's theory that Executive Committee consents, presented to and ratified by the full Board of Directors, were a ruse designed to fool the Board into approving illegitimate payments. The exact same method of approval was used not only in the Forum and Paxton deals, but also in the contemporaneous sale to CNHI. Indeed, the Forum and Paxton consents were presented at the same Board meeting as the consent approving CNHI(2). Had the jury believed that there was anything fraudulent about this method of approval, it would have convicted on Count 5, which concerned the CNHI payment. The jury clearly did not convict on this basis; to affirm based on this theory would be a perversion of justice.

II. OBSTRUCTION

Black's obstruction conviction turns on whether a reasonable inference of obstructive intent can be drawn where, as here, the government concedes that Black had been aware of U.S. investigations for at least two months; he had fully complied with five previous document requests; the subject files had been sifted and scoured by lawyers for months; and the government has no evidence that Black removed anything from the 13 boxes his secretary packed and arranged on her own to move from the

office from which he was being evicted, and which were promptly returned to his office after he was directed to do so.

On this record, the evidence was legally insufficient to support an inference of obstructive intent. On the contrary, it appears that the government threw in the charge for window dressing, and it somehow stuck.

The government glosses over the weakness of the evidence to support the critical *mens rea* requirement for a conviction under § 1512(c)(1). It relies instead on conclusory assertions that “circumstantial evidence” showed Black’s “corrupt intent” (GB108), assertions that cannot withstand analysis in light of conceded or undisputed facts.

The heart of the government’s obstruction argument is that Black “prevented investigators (and the jury) from having any confidence that they knew what documents were contained in Black’s files before May 20, 2005.” GB112. But depriving the government of “confidence” that it has obtained all relevant evidence is not obstruction or attempted obstruction, particularly when Black had consistently and fully cooperated for so long. The government’s theory is pure speculation.

The government points to seven facts which it claims support an inference of Black’s obstructive intent. Many of the bare facts are conceded, but none of them, individually or in combination, would satisfy even a preponderance standard, let alone the criminal standard for such a serious crime.

1. *Black knew of pending federal investigations.* GB109. We do not contest that Black was aware the government was investigating him. While that knowledge might provide a *motive* for obstruction, it is no substitute for evidence of obstructive *intent*. To

prove intent, the law requires a relationship “in time, causation, or logic” between an official proceeding and an obstructive act that the defendant knew would “have the natural and probable effect of interfering” with justice. *Aguilar*, 515 U.S. at 599.

Moreover, there was no order, process, or request from any U.S. authority that prohibited Black from transferring files from his office to his home.⁸ And there was never the slightest suggestion that Black ever destroyed, altered, withheld, or even misplaced any document. The government cannot explain how the act of transporting documents across town manifested any intent to impair their availability in the U.S. investigations. Obviously it was not unusual for Black to keep business and financial records at home, where his attorneys had been permitted and could again be given unhindered access to examine and copy them. SA485-96. Whether the contents of a file drawer sat in Black’s office or in his living room had no effect on his obligation to produce documents – obligations with which Black had unstintingly complied. If anything, losing control over the documents would have hindered Black’s ability to continue cooperating with U.S. officials.⁹

⁸ The Canadian court order the government repeatedly invoked at trial pertained to a proceeding irrelevant to the U.S. investigations. The order was not directed at Black individually, and there was not even evidence that Black was ever presented with the order or knew its contents.

⁹ The government propounds the theory (GB111-112) that even if Black assumed that everything relevant to the government’s investigations had already been produced, he might have thought the investigations could be usefully obstructed by preventing the government from ascertaining such information as where documents were filed and what else was contained in the same file. This is surely the creative invention of a lawyer scratching around for some argument for a brief, not a plausible inference of actual intent.

2. *Black removed boxes even after his assistant Joan Maida had been told they could not leave the building, and Black helped carry the boxes himself.* GB102. These facts show only that Black was determined to remove the boxes. They do not establish that by doing so he was intending to subvert any federal proceeding.

Black did not pack the boxes, tell his assistant what to put in them, or look inside. SA440-41. Moreover, there is no support, not even a record cite, for the government's insistence that Black knew of "a new document-retention protocol" restricting removal of documents from 10 Toronto. GB101. In fact, there is no evidence whatever that Maida or anyone else ever conveyed that edict to Black, who appears to have been told only that his secretary had been barred from moving the boxes. T.11500-01. What Black *did* know was that Inc. had evicted him, and that by then he had an adversarial relationship with Inc. Thus, it is not surprising that he would have balked when Maida informed him that Inc. sought to bar him from taking home his own possessions, including his own copies of documents that might be a subject of controversy.

3. *The boxes were taken to Black's home, not Maida's.* GB103. Black kept the boxes only over a holiday weekend, and returned them promptly when directed to do so the next business day. T.12977. That he and Maida did not arrange over the weekend to transfer the boxes to her custody is utterly inconsequential.

4. *After Black returned the boxes, they were found to contain some "relevant" documents.* GB103. The presence of relevant documents in the boxes hardly suggests corrupt intent: an obstructor would be expected to have *removed* them. What is telling is that the boxes were not shown to contain any previously unproduced documents that

were relevant to the government investigations.¹⁰ Moreover, to the extent they contained relevant documents, Black's antagonistic relationship with Inc., his codefendant in the SEC action, gave him every legitimate reason to assert control over his files.

5. There were still ten days before Black was to be evicted. GB104. In observing that Black still had a few days to go before eviction, the government harks back to Black's supposed knowledge that procedures had been adopted he might have thought would impede his ability to move the boxes the following week, insinuating that his moving them on the 20th suggested a desire to avoid an impediment to document destruction. But no evidence established the predicate fact for this supposition. Moreover, it was in fact Maida alone who decided to pack the boxes from file drawers whose contents she decided should be moved. SA447-48.

6. Black may have been unaware of a newly installed camera that filmed part of his actions. GB106 n27. While the government makes much of a new stairwell camera it speculates Black did not know about, it omits the fact there was another, older camera outside the building that Black would have known about and that was trained directly on Black's car. Black Video Cam6. This vitiates the government's fantasy that Black was planning a surreptitious route out of the building and was cautioning his driver to avoid the cameras.

¹⁰ The government's reference to Black's lawyer "copying five boxes worth of documents" (GB103) is misleading. Her work pertained to a different civil case involving Black, not the government investigations.

7. *One cannot know if Black removed any documents from the boxes.* GB112.

This argument highlights the degree to which the conviction rests on rank speculation. The theoretical possibility that unspecified documents were removed – supported by no evidence whatever, direct or circumstantial – is far too thin a reed to bolster any inference of corrupt intent.

* * *

Time and again, the government relies on unsupported premises and leaps of logic. For example, consider the government's tortured argument about the May 19 SEC call to one of Black's attorneys. First, the government urges that uncontradicted testimony by Black's attorneys that they did not tell him about this communication be discarded in favor of speculation that someone else might have. GB110. Then, it bootstraps this speculation to support further speculation: such "evidence" was "sufficient," it says, to support a "conclusion that Black intended to impair the availability of documents." GB111. Permissible inferences of corrupt motive may not arise from such shoddy reasoning.

Ultimately, the best the government can do is to assert that, "[b]y removing the boxes, Black prevented investigators (and the jury) from having any confidence that they knew what documents were contained in Black's files before May 20, 2005." GB112. But that is just another version of "maybe he removed something." It is not remotely sufficient to permit the legally required conclusion that Black actually believed that his actions were "likely to affect [a U.S.] proceeding." *Aguilar*, 515 U.S. at 599.

Finally, the government deals in only the most perfunctory manner with the nexus requirement for an obstruction conviction. *Id.* But in light of all the facts, there was no relationship in time, causation, or logic between his actions and any of the federal investigations. Taking evidence in the light most favorable to the government does not mean that the government may rest on guesswork and conjecture. In the face of Black's history of cooperation, and his knowledge that there had already been a thorough combing and extensive productions of documents, the fact he removed boxes his assistant had packed on a Friday afternoon a short time before eviction cannot show obstructive intent.

ATKINSON'S INDIVIDUAL ARGUMENTS

The government touts a “substantial body of evidence” showing that Atkinson was a “knowing and active participant[] in the non-compete scheme.” GB72-73. But there was no evidence of a single action by Atkinson, or any communication to or by him, from which a rational jury could conclude that he knowingly participated in a fraudulent scheme. Instead, the government relies on tenuous inferences squeezed from isolated facts, few of which bear any relevance to the APC or Supplemental Payments, much of which was not admitted against Atkinson, and virtually none of which sheds light on Atkinson’s mental state.

Indeed, most of the evidence marshaled by the government consists of events occurring long after Atkinson received the APC and Supplemental Payments. *E.g.*, GB18-24. After-the-fact proof of putative concealment is not enough to support a conviction, *Rose*, 12 F.3d at 1421, and in any event carries little force here. Taken as a whole, the evidence that Atkinson knowingly participated in any APC or Supplemental Payments fraud was plainly insufficient.

I. APC

The government asserts that “defendants decided on their own to take [the APC] money and hid the payments from the Board. Defendants then lied to the Board, Committee, auditors, lawyers and shareholders to make it appear the \$5.5 million was necessary to complete a newspaper sale.” GB30. But there was no evidence that Atkinson did any of these things. No evidence showed Atkinson participating in any decision to take money. It is undisputed that Radler decided to distribute the money

without discussing it with Atkinson. Nor was there evidence that Atkinson hid anything from the Board, or lied to or misled anyone.

It was uncontradicted that Radler told Atkinson the payments he received were approved (SA256, SA408-09, SA604), and that Atkinson had just learned the tax advantages of characterizing payments as non-compete consideration (SA138-44). Thus, no rational juror could have concluded that Atkinson signed the APC agreement intending to defraud *International*, rather simply to seek a tax benefit. Indeed, the lone evidence of Atkinson's APC-related conduct — that he returned copies of the executed agreements to Kipnis “for [*International's*] records” (SA533-34) — cuts against any inference of fraudulent intent.

The proof gains no additional luster when combined with the post-scheme SEC disclosures and other alleged omissions. Atkinson did not, for example, “hide” the “true nature” of the payments from the Special Committee. GB44. Committee counsel Rosenberg testified only that, when he interviewed Atkinson nearly three years after the APC payment, Atkinson “didn’t recall” details about the APC agreement. T.9407. Rosenberg also acknowledged that “there probably was more discussion about it” in the interview, and that, far from concealing the agreement, Atkinson advised the Special Committee where to find a copy. T.9516-18.¹¹

¹¹ The government’s contention that Atkinson failed to tell the Inc. Audit Committee about recharacterized management fees (GB23) is misleading. The district court precluded the defense from “go[ing] into the substance of what Mr. Atkinson presented” at that meeting. T.3848. With defense counsel thus shackled, the record is silent on whether Atkinson’s own understanding regarding the APC non-competes would have been relevant to the discussion. Indeed, as the government repeatedly

Nor do Atkinson's interactions with Cravath support any inference favoring the government. First, Atkinson had by then already told DeMerchant (of Torys) about his other non-compete payments. SA295-97.¹² His apparent failure to recount this to Cravath carries no meaning (much less the nefarious one the government ascribes). The government also ignores the context of the Cravath discussion. Atkinson reached out to Cravath for a second opinion on whether Torys' advice – that the CanWest non-compete payments need not be disclosed – was correct. SA318-20, 322. The suggestion that Atkinson initiated discussions with Cravath only to conceal facts is irrational. And the government's proposed inference becomes weaker still when coupled with the fact that Atkinson then heeded Cravath's advice over Torys', directing the company to *disclose the payments*, and retaining Cravath to draft satisfactory language.¹³ SA318-20, 322; SA324-27.

Nor do emails between Black and Atkinson in 2003, years after the payments, advance the government's case. It argues (GB21-22, 42, 80-81) that Atkinson's emails reflect an effort to "limit any inquiry into suspect payments." Even a cursory read of _____ points out, the money "came from" International, so it would make little sense for Atkinson to recount details of payments having nothing to do with Inc.

¹² The government's treatment of DeMerchant's testimony (GB78 n.17) is also misleading. In fact, DeMerchant acknowledged that, prior to Atkinson's conversation with Cravath, he had "told [her] about other deals where non-compete payments were made to individuals." SA295-97.

¹³ Similarly weak is the government's argument (GB43 n.2) that any inference can be drawn from the omission of the APC payments from the proxy questionnaires. This argument has no force for the reasons described in the opening brief (DB42-43) and above. The government's argument is particularly baseless as to Atkinson because his 2001 questionnaire was not even in evidence.

Atkinson's emails contradicts this interpretation. As the government argued to the jury, at the time these emails were written, "the Special Committee [was] in motion." T.13791. Thus, Atkinson's caution against adding additional directors until the review was complete could not have been intended to thwart the *already pending* Special Committee review. Rather, Atkinson's emails reflect his concern that a larger board might rush to judgment and dismiss management, while the Special Committee, if permitted to complete its review, would vindicate management. Indeed, there is no evidence (GB80-81) in which Atkinson suggested "limiting" the inquiry in any way. To the contrary, Atkinson worked directly with the Special Committee throughout its investigation and continued assisting International as a paid consultant long after its review ended. T.1425-26. In any event, because these emails occurred years after the charged scheme and are, at best, marginally relevant, the government's extensive reliance on them only underscores the overall insufficiency of the evidence against Atkinson.¹⁴

II. SUPPLEMENTAL PAYMENT

The evidence tying Atkinson to any knowing misappropriation regarding Count 7 is, if anything, weaker still. As explained (DB59-61), the evidence showed nothing more than Atkinson's receipt of a \$15,000 check, with a stub describing it as a non-compete payment. He did not know that the money came from the Forum/Paxton transactions. He was not aware that anyone else received a payment. A56. And the

¹⁴ The government's reliance on the Cravath discussion and the 2003 emails in connection with Count 7 (GB77-78, 80-81) is equally unpersuasive for identical reasons.

proof failed to show that Atkinson knew the agreement associated with the payment had not been required by purchasers or executed on his behalf.¹⁵ DB59-61. Without such evidence, the jury had no basis for inferring that Atkinson knew the critical facts underlying Count 7.

What *does* the government show? It points to only two things. First, Radler sent Atkinson “information about the tax treatment of non-compete payments.” GB73. While that evidence surely explains why Atkinson understood the tax benefits of non-compete agreements, it does not prove that he understood or believed that his \$15,000 payment was misappropriated from International.

The government’s reliance on Radler’s August 1, 2000 memo (GA454) is similarly misplaced. While a *portion* of that memo was obviously “tongue-in-cheek,” as Radler acknowledged (T.7798-7800), the balance emphatically supported Atkinson’s defense – that he believed in good faith that purchasers of U.S. community newspapers had requested non-compete agreements from Radler and Black: “I’m announcing the non-competes and I’m confirming the non-competes.” T.7799-7800. Since CanWest had at first requested non-compete agreements only from Black and Radler, and then during negotiations expanded the request to include Atkinson and Boulton, this memo

¹⁵ The government’s argument (GB78-79) that Atkinson remained silent at a December 2000 Board meeting at which the Executive Committee Consents were approved hardly suggests any fraudulent intent. Atkinson had no role in drafting the consents, nor is there evidence suggesting that Atkinson had any reason to believe the consents were deceptive. To the contrary, the approval of the consents was entirely consistent with Atkinson’s belief – as Radler had told him – that non-compete payments to executives in connection with the sales of U.S. Community papers had been approved.

informing Atkinson that other purchasers had also sought non-compete agreements could only have caused Atkinson to find his later receipt of a check perfectly innocuous. Given the evidence that Radler told Atkinson that the non-compete payments had been approved, that conclusion is practically compelled.

The government ignores this evidence and draws a sinister inference from Atkinson's omission of this payment from his 2002 proxy questionnaire, but only by distorting the facts. Atkinson completed the questionnaire on January 10, 2002. Three days earlier, he was copied on a request to Torys to "[c]onfirm whether and to what extent the various 2000 and 2001 non-compete payments must be disclosed" in the proxy. Several weeks later in January, Atkinson received a draft proxy disclosure specifically disclosing his \$15,000 payment as being made "in connection with the sales of United States newspaper properties in 2000." SA613-15. So while it is true that Atkinson did not include the Supplemental Payment in his proxy questionnaire, the sinister inference the government draws from its omission is completely unwarranted. Since Atkinson knew before completing his questionnaire that counsel already knew of his payment and was preparing disclosure advice, his failure to record receipt of that payment on the internal questionnaire could not possibly suggest an intent to conceal the payment.

III. OSTRICH INSTRUCTION

The uncontradicted evidence showed that Atkinson did not "bury his head in the sand," but was assured by Radler the payments were approved – an argument wholly unanswered by the government. The government has shown neither that Atkinson

confronted suspicious circumstances nor avoided acquiring knowledge. Because evidence of actual knowledge was lacking, the ostrich instruction was highly prejudicial to Atkinson and requires reversal.

BOULTBEE'S INDIVIDUAL ARGUMENTS

Despite an Information charging theft of more than \$80 million, the government managed to eke out guilty verdicts as to Boulton on three out of 11 counts, involving two transactions from which Boulton realized a total of \$152,500. The trial obviously did not go well for the government, which this Court would never know from the government's brief. GB29 ("the jury delivered a verdict: guilty on certain counts, not guilty on others").

Moreover, because of the misleading way the government's brief stitches together the evidence, one cannot discern or remember what evidence was admitted against which defendant. While the district court carefully limited the purposes for which certain highly prejudicial evidence was admitted, the government obliterates the limitations by failing to remind the Court, when it later pounces, that the particular evidence was not admitted against all defendants. As the court made clear at sentencing (A96-97), Boulton was unaware whether his codefendants were receiving non-compete payments (Count 7) or their full amounts (APC). Consequently, he is particularly prejudiced by government-engendered confusion concerning limitations on the evidence.

I. SUPPLEMENTAL PAYMENT

The evidence of guilt on the Supplemental Payments was inadequate as to any defendant (DB56-69), but as to Boulton the government's case fails for another reason: it omitted a critical piece of evidence — a check stub establishing Boulton's knowledge that his \$15,000 check was a non-compete payment. The missing stub was critical because Boulton had no part in 1) the decision to include individual non-competes in

the Forum and Paxton transactions (GB24); 2) the Executive Committee consents authorizing those agreements (GB26); or 3) the decision to distribute \$600,000 from the reserve funds. GB27.

Now the government resorts to arguments never made below. For example, it conceded at trial that it could find no stub for Boulton's check, but argued that the absence of the stub was irrelevant because Boulton knew from later public filings that his check was a non-compete payment. T.12374-76. The government understands it can no longer dismiss the absence of the stub, contending instead that "there was no evidence that Boulton's stub did *not* have the same notation as Atkinson's and Black's." GB76 (emphasis added). The argument is completely speculative; it assumes that, because some of his codefendants received a stub, Boulton must have also, even though the government also failed to prove that Radler received one. It also assumes Boulton's phantom stub was identical to his codefendants'. There is no record support for either assumption.¹⁶ Worse, the government's present formulation unconstitutionally shifts the burden to Boulton to prove he received no stub or, if he did, that it looked different from his codefendants'.

The government insists that Boulton had to know, or consciously avoided learning, that his payment was for a non-compete agreement because, according to the government, he received compensation "from Ravelston, not from International or its

¹⁶ If speculation, not evidence, is the standard, then it is just as reasonable to speculate that Radler kept from Boulton details like the nature of the payment, as the district court found Radler did with Kipnis in regard to these same payments. SA203.

subsidiaries.” GB75, 89-90. But in 2000 and 2001, Boulton and other Ravelston executives received nine bonuses from International or subsidiaries. SA569-70. The government’s argument that “there was simply no evidence” that Boulton ever received a bonus from APC (GB75 n.14) is beside the point.¹⁷ The record unequivocally demonstrates that Boulton knew there were occasional exceptions to the general rule that his compensation came from Ravelston.

According to the government, Boulton could only have believed that his \$15,000 check represented a non-compete payment – which, even if true, would not save the government’s case against Boulton (See DB65) – since it followed his receipt of a \$450,000 CNHI(2) payment in November 2000 and a \$137,500 APC payment in February 2001. But absent a check stub, Boulton had no reason to associate his check with a non-compete agreement because, *inter alia*, the two earlier payments were accompanied by non-compete agreements, while no writing accompanied Boulton’s check, and Boulton’s \$15,000 check was so much smaller than any of his previous non-compete payments. The jury could not have reasonably inferred that Boulton knew or consciously avoided learning that his check was a non-compete payment, let alone an illicit one. Certainly the check was not a “red flag.” GB89-90.

¹⁷ International was a holding company that acted only through its subsidiaries. Any International bonus payments that Boulton and other Ravelston executives received could only have been drawn on the account of subsidiaries like APC. T.3719-20, 5095-96.

II. APC

According to the government, Boulton argues two inconsistent defenses: his APC agreement was “either a way to avoid paying taxes [in Canada] on management fees or a genuine, post-termination non-compete agreement.” GB3, 51, 88. The government misunderstands Boulton’s position. In order to minimize Canadian taxes, Boulton signed an enforceable agreement barring him from competing with APC or its affiliates, including International, after his employment terminated. International gave up nothing by entering into this agreement. Instead, International obtained a benefit: a post-termination non-compete agreement from a knowledgeable executive who had one foot out the door. Moreover, uncontradicted expert testimony established that Boulton’s agreement was a kind common in the industry, and the consideration (\$137,500) was consistent with industry standards. T.12057-61. Boulton’s defenses are consistent.

Boulton telling the Committee that he “probably” did not read the agreement (GA265) is meaningless. Boulton was entitled to rely on the fact that the agreement was signed by the Company’s corporate counsel and received from counsel for the Company’s parent, who told Boulton the Audit Committee had approved the payment. SA402-04, 533-34.¹⁸

In reality, the government’s theory as to Boulton comes down to whether he made false statements after the fact, particularly to KPMG auditor Stitt. Of course that

¹⁸ Indeed, Rosenberg acknowledged that the Committee’s notes of Boulton’s interview revealed that Atkinson had gone over the APC agreement with Boulton. T.9487-88.

would not be enough to support the verdict. But it is also untrue. Stitt never testified that Boulton misled her. Nor did she ever identify to the Audit Committee any purported falsity by Boulton, even though, according to the government, she had learned “the truth” by the time she met with the Audit Committee in late February 2002 when she sought and received confirmation from the Committee that all the U.S. non-compete payments had been approved. SA339, 343-46. On the contrary, Stitt confirmed that, had she thought Boulton misled her, she would have felt obligated to bring that to the Committee’s attention and probably resign. T.4870-71 (“when we can’t rely on management’s representation, we generally have to resign from a client or an account”). She did neither.

Indeed, Audit Committee members confirmed that KPMG’s auditors never reported receiving anything but full and honest cooperation from management. T6280-81 (Kravis), 6999 (Thompson).

In light of the dispositive fact that KPMG never complained about Boulton, the government’s examples of purported falsity can be quickly dispatched. The government claims that Boulton lied when he told Stitt there were no non-compete payments other than from CanWest. GB18-19, 28, 52. In fact, Stitt’s question was whether there “were *** any other non-compete, related party transactions that would need to be disclosed – other ones that he had perhaps concluded didn’t fall within the definition of a related party transaction *** .” GA172. Boulton truthfully answered that there were no “others” because Boulton knew that International had already sent

KPMG a draft proxy disclosure revealing all the U.S. non-compete payments. SA606-15.¹⁹

The government points to another Boulton/Stitt conversation as evidence of dishonesty: Boulton told Stitt that “the non-compete payments were negotiated with third parties” in “arm’s length discussion,” and that “the Board determined those amounts would go to the individuals.” GB20, 43n2. The government incorrectly argues that Boulton’s statement encompassed the APC payments. GB20. Stitt testified that Boulton had informed her that he “believes [the non-competes were] negotiated with third parties,” a comment made, according to her contemporaneous notes, about “CanWest” (GA178; T4957), a transaction in which Boulton was heavily involved with a “third party” (CanWest) who requested individual non-competes from certain Ravelston executives. GXCanWest10. Neither Stitt’s testimony nor her notes support the claim that Boulton’s comments related to or included APC.

Nor did Boulton tell Stitt that “the Board determined what amounts would go to the individuals.” While Stitt testified that she assumed the Board had determined the amounts, she acknowledged that Boulton had actually said that he was “at a loss” as to how the amounts of the non-competes were determined. GA177-78.

In short, the government’s claim that Boulton misled Stitt is bogus.

¹⁹ For much the same reason, and contrary to the government’s argument (GB41-43, 88), there was nothing false or misleading in Boulton’s proxy questionnaire. Boulton’s questionnaire in fact disclosed precisely the information the Company’s draft proxy was missing, *i.e.*, the amount he received from the Osprey transaction. Compare SA615 (Company’s draft proxy containing “place holders” for the amounts Boulton received in Osprey) with GA499 (Boulton proxy questionnaire providing the missing amounts).

III. THE OSTRICH INSTRUCTION WAS PARTICULARLY UNFAIR TO BOULTBEE

The government argues that the APC and Supplemental Payments were sufficiently suspicious to impose on Boulton the obligation to inquire, but Boulton “asked no questions.” GB88. The government ignores the fact that when Boulton and others did inquire, they were always assured, including by Governor Thompson, that the payments were proper. DB76-77. There is nothing in this record suggesting that Boulton should have harbored “suspicions,” let alone that he “forced his suspicions aside and deliberately avoided confirming for himself that he was engaged in criminal activity.” GB87 (quoting *Carani*, 492 F.3d at 873).

The government made the ostrich argument most pointedly as to Boulton. For example, only as to Boulton did it argue conscious avoidance in *both* its summations. GA350, 377-79. Indeed, as to Boulton, conscious avoidance was the government’s principal rebuttal argument. In the process, the government improperly urged the jury to use a “reasonable person” negligence standard. Thus, the unjustified ostrich instruction was particularly unfair and prejudicial to Boulton, and his conviction should be reversed for that reason alone.

KIPNIS'S INDIVIDUAL ARGUMENTS

Proof beyond a reasonable doubt that defendants knew the \$5.5 million payment was misappropriated is a necessary, though alone an insufficient, condition to sustain the convictions on Counts 1 and 6. The government points to three categories of evidence (the APC non-competes, the payments, and purported concealment evidence), which it claims the jury could have relied on to infer that defendants knew they were stealing from International, or for Kipnis, facilitating theft. GB40-47. Defendants' common discussion shows why none proves knowledge. For Kipnis, there are additional, unique reasons why no reasonable jury could have inferred knowledge based on the supposed concealment evidence.

First, it is unreasonable to infer guilty knowledge based on Kipnis's failure to ask International's Audit Committee to approve the \$5.5 million payment. Labeling Kipnis's inaction "concealment" cannot carry the day – there is no evidence that Kipnis knew anything about the payments beyond what Radler told him: they were recharacterized, pre-approved management fees. There was accordingly nothing to seek approval for.

Second, it is unreasonable to infer knowledge from the inaccurate SEC filings because Kipnis *caused* the non-compete payments to be disclosed in the first place. To be sure, the disclosures characterized the payments inaccurately and Kipnis did not catch the error. But Kipnis was neither a securities lawyer nor the disclosure's drafter (Torys was). To infer knowledge, the jury had to believe that Kipnis pushed for disclosure, but secretly hoped Torys would err and then rejoiced on behalf of his alleged co-schemers when it did so. The government is not entitled to *any* inference

supporting knowledge, but only to reasonable inferences. For Kipnis, the inference the government asks the Court to draw is fantastic.

I. THE AUDIT COMMITTEE

Contrary to the government's assertion, the Audit Committee did not rely on Kipnis to identify related party transactions. Committee member Kravis testified that Kipnis typically *presented* related party transactions to the Audit Committee (T.6644-45), something distinct from *identifying* them (T.6450-51). There is a specific auditing standard governing related party transactions; Kravis expected KPMG, not Kipnis, to identify them and to investigate whether the Audit Committee had approved them. T.6458-59. During trial the government tried to blur the presentation-identification distinction (a blurring its brief renews). But Kravis's testimony was clear:

Q. And what you were addressing [earlier] was the *presentation* to the Audit Committee, correct?

A. That's correct.

Q. You were not saying *** that you had any understanding that it was the practice – that Mr. Kipnis should *identify*, out of the universe of transactions that take place, the related party transactions, figure that out and bring it to the Audit Committee, right?

A. That's correct.

Q. You were, instead, saying that when – however that got identified out of the universe of transactions, that once it's brought to him, you look to him to bring it to the Audit Committee, correct?

A. That's correct.

T.6644-45 (emphases added). Committee Chair Thompson confirmed the presentation-identification distinction (T.7094-95) and that it was KPMG's job both to identify related-party transactions and to investigate whether the Audit Committee had approved them (T.7099-7100). Kipnis's role with the Committee, combined with Radler's testimony concerning the tax-advantage recharacterization, precludes any reasonable inference of guilty knowledge.

II. THE DISCLOSURES

Concerning the inaccurate 2002 disclosure, the government does not argue what all of the evidence taken in the light most favorable to it shows, but rather what this single piece of evidence shows, divorced from its context. In context, the only reasonable inference to be drawn regarding Kipnis is that he lacked knowledge of any fraudulent scheme.

In January 2001, Kipnis contacted outside counsel, Sukonick of Torys, to discuss whether individual non-compete payments had to be disclosed in the proxy (the first drafted after any individual non-compete payments). KXTorys21. The conversation concerned CanWest, but the conclusion applied generally. It would be nonsensical for someone attempting to conceal criminal conduct (concealment essential for the scheme's success) to seek advice regarding disclosure. Sukonick said disclosure was unnecessary and none occurred. *Id.*

In April 2001, Kipnis spoke with Cravath's Rogers concerning disclosure. T.4546. Rogers called Kipnis to determine whether an amended proxy had been filed and Kipnis said it had. T.4557. The day before, Sukonick assured Kipnis that Cravath had

agreed with Torys' advice about disclosure for CanWest and that the issue was "dead." KXCanWest25. Rather than then hang up with Rogers (conduct consistent with fraud), Kipnis did the opposite, cross-checking Sukonick's representations by asking *Cravath's* advice. T.4557-58. Kipnis's conduct led directly to disclosure of the CanWest payments in the 2001 first quarter 10-Q. T.4557-59. Kipnis was excluded from the later discussions among Cravath, Torys, and others about disclosure language. T.4518-4519.

The government simply gets wrong Kipnis's conversations with Cravath. GB18. Following his initial conversation (pursuing public disclosure), Kipnis had only one brief conversation with Cravath. T.4497, 4502. Nothing was said about civil liability, let alone that it was "essential" or "urgent" that the non-compete payments be disclosed. T.4519.

Kipnis's good faith was in full evidence again in early 2002. The disclosure debated by Torys, Cravath, and others at International in mid-2001 focused exclusively on CanWest and did not include the U.S. Community Newspaper non-competition payments. KXTorys81; KXCanWest26; KXCanWest28; KXCanWest29. If Kipnis was complicit in a fraud, he would have done nothing further. But he instead caused outsider focus on the U.S. Community Newspaper payments. On January 7, 2002, he sent a memo to Torys, KPMG, and four International executives (Smith, Healy, Creasey, and Spencer) concerning the 2002 Proxy. KXTorys25. He assigned DeMerchant to "[c]onfirm whether and to what extent the various 2000 and 2001 non-compete payments must be disclosed." *Id.* He called Sukonick to get his advice about disclosure in 2002. Sukonick-T.138-39; 142-43. He volunteered to Stitt the existence of the U.S.

Community Newspaper non-compete payments.²⁰ T.4908; 4910-12; 5065-67. And he took steps to ensure that the U.S. Community Newspaper non-competes were disclosed in the 2002 proxy. DeMerchant-T.460-61; KXTorys25. This disclosure led directly to “contentious shareholder” meetings.

With this context, the government’s focus on the 2002 public filings is at best ironic. As noted, Torys, not Kipnis, drafted the disclosure language in 2002 for the proxy; it did so using the “same type of wording and formatting” used for the CanWest 10-Q disclosure. Sukonick-T.152-53. Torys gave Kipnis the language to include in the proxy (KXTorys72) and Kipnis circulated Torys’ draft disclosure language to all responsible for International’s proxy statement, including KPMG and those most knowledgeable about International’s finances – Smith and Creasey. KXDisclosure11.

The way Torys received the non-compete payment information made it clear that Kipnis was not trying to conceal. Sukonick testified that Kipnis called for advice about the non-compete payments’ disclosure; when he asked the amount, “[Kipnis] said something to the effect that he didn’t have – he didn’t have the information but that he would get it for me.” Sukonick-T.142. Kipnis asked International’s accounting department, they sent aggregated amounts for 2000, and Kipnis forwarded what he

²⁰ While citing other conversations with Stitt (GB18-19), the government omits any reference to the Kipnis-Stitt conversation, though Stitt testified that this conversation was the first time she had any knowledge that individuals received non-competition payments. T.5065-67. Indeed, the conversation led directly to KPMG bringing to the Audit Committee’s attention at the regular 02/25/02 meeting the public filing language about the U.S. non-compete payments, and obtaining confirmation from the Committee that it had approved those payments. GXKPMG5; T.4942, 5114, 5124.

received to Sukonick. GXCanWest81. There was no evidence Kipnis knew the APC payments were included.

In context, it is not reasonable to infer from the 2002 disclosure Kipnis's knowledge of any fraud.

CONCLUSION

This Court should reverse defendants' convictions and enter judgments of acquittal or order a new trial. Alternatively, the case should be remanded for resentencing and for modification of the forfeiture order.

Dated: May 22, 2008

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that the foregoing brief contains 13,933 words and complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), as modified by this Court's Order in this case allowing a consolidated reply brief not exceeding 14,000 words.

Dated: May 22, 2008

Stephen Sanders

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing brief, along with a digital version of the brief, to be served on the following counsel by overnight carrier, postage prepaid, on this 22nd day of May 2008:

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