NO. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ALBERT TAKHALOV,

Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF APPELLANT ALBERT TAKHALOV

HOWARD SREBNICK, ESQ.
Black Srebnick, Kornspan & Stumpf, PA
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131

MARCIA J. SILVERS, ESQ.
Marcia J. Silvers, PA
770 South Dixie Highway
Suite 113
Coral Gables, Florida 33146

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Albert Takhalov
Case No. 13-12385-C

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement listing the parties and entities interested in this appeal as required by 11th Cir. R. 26.1.

Bergendahl, John

Brown, Hon. Stephen T.

Clay, William

DeFabio, Joel

Docobo, Richard Douglas

Feldman, Isaac

Ferrer, Wilfredo A.

Fleischer, Bruce

Gregorie, Richard

Grove, Daren

Huynh, Joseph Hong

Klugh, Richard C.

Levin, Albert Zachary

Malman, Myles H.

Martinez, Hon. Jose E.

McAliley, Hon. Chris

Pavlenko, Stanislav

Salyer, Kathleen M.

Scola, Hon. Robert N.

Silvers, Marcia

Srebnick, Howard

Takhalov, Albert

Thakur, Michael Eric

Torres, Hon. Edwin G.

Vereen, Roderick Darrell

Zargari, Siavash

STATEMENT REGARDING ORAL ARGUMENT

Appellant Albert Takhalov respectfully requests oral argument and believes that oral argument would be beneficial to the Court in light of the multiple parties and complex arguments raised in this case.

STATEMENT REGARDING ADOPTION OF CO-APPELLANTS' BRIEFS

Appellant Takhalov respectfully adopts all Argument Sections of the Briefs filed by co-appellants Isaac Feldman and Stanislav Pavlenko applicable to him, which include [as modified by Takhalov] –

Pavlenko's Arguments:

I. The district court erroneously denied requests for theory of defense and related jury instructions on the applicability of the federal wire fraud statute to the operation of a bar or nightclub and erroneously permitted the jury to convict on legally impermissible theories, substantially impairing the presentation of a legal defense to the charges, undermining the exculpatory value of the defendants' testimony in their own behalf, and allowing the government to constructively amend the indictment and theories of prosecution to exceed the scope of the statute.

II. The district court erred by denying the motion to dismiss the indictment for failure to state an offense and failure to invoke federal jurisdiction over the underlying conduct, the operation of a bar or nightclub regulated under local law.

IV. The evidence was insufficient to sustain the defendant's convictions of: (a) conspiracy, where undisputed evidence of multiple business agreements, disputes, and dissolutions of business relationships disproved the conspiracy theory; and (b) substantive counts of overcharging customers or unfairly pursuing a credit card dispute, where the business practices that formed the predicate of the government's case fell outside the scope of federal fraud law and the proof was otherwise lacking . . . .

V. The district court erred at sentencing by:

(a) imposing a [14]-level amount-of-loss enhancement under U.S.S.G. § 2B1.1, for more than $[4]00,000 in total revenue received by the defendant's business, [DE1161:14] . . . where . . . the government failed to offer any evidence to support the theory that all business done by the nightclub was fraudulent or that charge disputes were resolved inequitably, and the defendant was given no credit for the value of the goods provided to customers;

(b) imposing an obstruction of justice enhancement under U.S.S.G. § 3C1.1, where the court failed to identify any perjurious testimony;

(f) imposing an order of restitution where no person or entity filed a restitution claim or responded to requests for submission of such a claim, there was no determination of whether a loss was ultimately sustained or in what amount, and no credit was given to the defendant for goods provided to the [] customer [s] as to whom the government sought restitution.

Feldman's Arguments:

II. The persistent and indelible prejudice from the presentation of evidence and argument as to Russian ethnicity and its association with violent lawlessness foreign to American values violated the defendant's due process rights and warrants a new trial.

III. Given the great difficulty faced by the jury in clearly understanding the heavily-accented testimony of native several Russian speakers, including the defendant, who testified without interpreters, the district court's reversal of its initial position that it would permit testimonial read-backs requested by the jury, undermined the fairness and reliability of the jury verdict and warrants a new trial.

IV. Evidentiary rulings, permitting the introduction of guilt-opinion evidence offered by government witnesses and permitting the government's key cooperating witness to bolster his testimony with credibility findings from prior proceedings, considered in light of the cumulative trial errors, warrants a new trial.

V. The sentencing court erred in imposing unfounded guideline enhancements based on speculative loss calculations . . . and obstruction of justice where no specific findings of false testimony were made and in varying above the guidelines for the same conduct adequately addressed by the guidelines.

PLEASE NOTE: Appellants recommend that of the three initial briefs filed by appellants, this brief for Albert Takhalov be read first, as it contains the most comprehensive presentation of the procedural history and the statement of the facts, which co-appellants are adopting.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because Takhalov was charged with offenses against the laws of the United States. This court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT SHOULD HAVE REJECTED THE PROSECUTION THEORY OR AT LEAST INSTRUCTED THE JURY ON THE THEORY OF DEFENSE?

II. WHETHER THE ADMISSION OF "OTHER CRIMES" EVIDENCE VIOLATED DUE PROCESS AND FEDERAL RULES OF EVIDENCE 402, 403 AND 404(b)?

III. WHETHER THE DISTRICT COURT'S REFUSAL TO SEVER TAKHALOV FROM THE ACQUITTED CO-DEFENDANT RENDERED THE TRIAL UNFAIR?

IV. WHETHER THE DISTRICT COURT ERRED IN COMPUTING THE SENTENCING GUIDELINES AND IMPOSING RESTITUTION?

STATEMENT OF THE CASE

Men spending money in the false hope of persuading women to follow them from the bar to the bedroom is a theme as old as recorded history. The exploits of men, emboldened by liquor, vainly trying to lure women with gilded coins, finds a home in poetry books, not the nation's courthouses: "Entertain him with hope, till the wicked fire of lust have melted him in his own grease." -- William Shakespeare, "The Merry Wives of Windsor."

Course of Proceedings and Disposition in the District Court

Appellants Albert Takhalov, Isaac Feldman and Stanislav Pavlenko, Russian nationals who immigrated to the United States, DE1150:239-43, stand convicted of offenses arising out of the operation of several bars in Miami Beach, Florida. The Superseding Indictment alleged wire fraud, conspiracy to defraud the United States Department of Homeland Security, conspiracy to commit money laundering and bribery of a public official (as to Takhalov only).

The gravamen of the alleged fraud was a scheme to use attractive females ("B-girls" or "Bar-girls") to lure male patrons into the clubs for a night of drinking, without disclosing that the females were earning a commission. The Superseding Indictment, redacted and renumbered for jury deliberations, DE953 (emphasis added), alleged that the object of the co-conspirators was to

> unjustly enrich themselves through an organized fraudulent scheme whereby co-conspirators would use illegally employed female co-conspirators imported from Eastern Europe (referred to as "Bar Girls" or "B-girls") ***to lure victim credit card holders***, that is, tourists, visiting businessmen and patrons of legitimate restaurants, hotels, and bars in Miami Beach, in the Southern District of Florida, to clubs operated by co-conspirators ***by deceiving the victim credit card holders about the B-girls' connection to the clubs*** and by inducing the victim credit card holders to become intoxicated both before bringing them to the clubs and while in the clubs. It was further the object and purpose of the conspiracy for the defendants and other co-conspirators to mislead the victim credit card companies during the companies' review of the circumstances leading to any disputed credit card charges. DE953:5-6, 23.

The "manner and means" by which the conspirators allegedly accomplished their objective included the following:

> Once a victim credit card holder had been identified at legitimate bars in Miami Beach, B-girls approached the target, engaged him in flirtatious banter, and plied him with alcohol. B-girls enticed the victim credit card holder to return to one of the [] Clubs, ***concealing the B-girls' employment and their commissions on the sale of alcohol at the [] Clubs.*** DE953:7.
>
> The B-girls . . . would entice the victim credit card holder to order the alcohol for them, in violation of Florida Statute 562.131, which prohibits employees of a bar from soliciting customers to purchase drinks for them. DE953:8.
>
> ***B-girls received approximately 20% of a bill, split between the B-girls who brought the victim credit card holder to the [] Club.*** Each manager received 10% of the bill and each bartender 5% for their involvement in the fraud. The remainder was distributed to defendants . . . . DE953:10.

As would become a recurring theme of the case, appellants little disputed that

the compensation arrangement between the clubs and the B-girls was concealed from the male patrons. Rather, appellants contested the additional allegations in the regarding "ultra vires" acts by the B-girls and club managers. For example, the Superseding Indictment alleged that, at times, male patrons were

> not told the price of the alcohol, told an incorrect price, or were purposely distracted when they attempted to inquire about the price of the alcohol. The B-girls continued to order additional bottles of wine and champagne, surreptitiously pouring out drinks and bottles into plants, ice buckets, or other receptacles so that more alcohol could be brought. Frequently, additional bottles were brought that were not ordered or authorized by the victim credit card holders. DE953:8.
>
> In other instances, bartenders or managers processed the victim credit card holder's credit card by forging the victim credit card holder's signature on credit card receipts or processing the charge without any authorization from a victim credit card holder. In some other cases, the bartenders would disguise or conceal the full amount of the charge on the credit card when requesting the victim credit card holder's signature on the credit card receipt. DE953:9.

Appellants filed numerous pretrial motions. The court denied Takhalov's pretrial motion to exclude "other crimes" evidence. DE826. The court did grant a motion in limine to preclude the government from making reference to the Russian Mafia in the Government's case in chief. DE826; DE1120:42.

Appellants proceeded to trial with two other co-defendants: Kristina Takhalov (Albert's wife), who pled guilty in the middle of trial and was sentenced to two years probation; and Saivash Zargari (nicknamed "Sammy"), who was ultimately acquitted

by the jury of all charges. Under the trial judge's ground rules, an objection/motion by one counsel was deemed an objection/motion by all, unless counsel opted out. DE1121:28; DE1153:48.

All appellants testified. They denied involvement in the "ultra-vires" acts of the B-girls. DE1146;199,200; 1147:186,191 (Pavlenko); DE1150:115,118,139 (Feldman); DE1151:184,188,233 (Takhalov). Appellants moved for judgments of acquittal, DE1146:63; DE1146:70; DE1146:79; DE1153:276-279, which were denied as to most counts. DE1146:94,99; DE1153:279.

Appellants submitted seven proposed jury instructions regarding their theory of the defense:

> There is no duty to disclose the financial arrangement between the B-girls and the Bar.
>
> Failure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense.
>
> So long as the Bar delivers to the patron the goods/beverages paid for there is no fraud even if no one disclosed the financial arrangement between the B-girls and the Bar.
>
> A scheme to have attractive women induce patrons to purchase and consume alcoholic beverages under the illusion that the patron may later persuade the women to have sexual relations is NOT sufficient to convict of the federal crimes charged.
>
> The law does not recognize as reasonable or legal a patron's expectation

> that a woman will have sexual relations with him if he buys her alcoholic beverages, so such a patron is not a victim of fraud if the patron received from the establishment the beverages/goods that he paid for.
>
> The law does not excuse a patron from his obligation to pay for beverages/goods just because he became intoxicated voluntarily. Even if the establishment uses attractive women to encourage a patron to purchase and consume increasing amounts of alcoholic beverages, the patron is not a victim of a fraud when he becomes intoxicated voluntarily and later has buyer's remorse.
>
> Unless the establishment forces the patron to consume the beverage or adulterates the beverage, a patron remains responsible for his consumption of alcoholic beverages and is deemed to be intoxicated voluntarily, even if the establishment uses attractive women to encourage a patron to purchase and consume increasing amounts of alcoholic beverages.

DE921. All seven instructions were overruled and not otherwise covered by the court's instructions. DE923.

After 36 days of trial over two months, the case was submitted to the jury. During deliberations, the jury sent two notes, DE928, 929, requesting the testimony of Takhalov, Feldman, Officer King, Simchuk and Anastasia Nefodova (Feldman's secretary). The trial court refused to provide transcripts or read back the testimony, instead instructing the jury to "rely on your individual and collective recollections to make your decision." DE1156:4-8.

Several days later, the jury returned its verdicts, DE954, 956, 957:

RENUMBERED SUPERSEDING INDICTMENT DE:953			
Count	**Charge**	**Defendant**	**Verdict**
1	Conspiracy to Commit Wire Fraud at Caviar Bar, Stars Lounge and VIP Diamond Club	Takhalov Pavlenko Feldman	Guilty Guilty Guilty
2 - 5	Wire Fraud	Pavlenko	Not guilty
6 - 8	Wire Fraud	Pavlenko	Guilty
9 - 12	Wire Fraud	Pavlenko	Not Guilty
13	Wire Fraud	Pavlenko	Guilty
14 - 17	Wire Fraud	Pavlenko	Not Guilty
18 - 21	Wire Fraud	Pavlenko	Guilty
22 - 27	Wire Fraud	Takhalov Feldman	Not Guilty Not Guilty
28	Conspiracy to Defraud the United States Department of Homeland Security	Takhalov Pavlenko Feldman	Judgment of Acquittal, Rule 29 Not guilty Judgment of Acquittal, Rule 29

RENUMBERED SUPERSEDING INDICTMENT DE:953			
Count	**Charge**	**Defendant**	**Verdict**
29	Conspiracy to Commit Money Laundering	Takhalov Pavlenko Feldman	Guilty (Concealment) Guilty (Transmission) Guilty (Transmission)
30	Conspiracy to Commit Wire Fraud at Tangia Club, Club Moreno, Nowhere Bar and Steel Toast	Takhalov	Guilty
31 - 33	Wire Fraud	Takhalov	Not Guilty
34, 35	Wire Fraud	Takhalov	Guilty
36	Wire Fraud	Takhalov	Not Guilty
37	Wire Fraud	Takhalov	Guilty
38	Conspiracy to Defraud the United States Department of Homeland Security	Takhalov	Guilty
39	Conspiracy to Commit Money Laundering	Takhalov	Guilty (Concealment)
40	Bribery of Public Official	Takhalov	Not Guilty

The district judge revoked bond and remanded appellants into custody. Appellants' post-trial motions, including a motion to dismiss, DE 1009, were denied. DE1047.

Takhalov filed a second motion for new trial based upon newly discovered evidence that would have significantly impeached the belatedly disclosed testimony of government witness Alec Simchuk. DE1069,1073. The district court denied the motion. DE1086.

The district court sentenced appellants to prison: Takhalov for 144 months, Feldman for 100 months, and Pavlenko for 78 months. DE1094, DE1096, DE1112. Amended judgments imposed restitution as to: Feldman $15,498.05; Pavlenko $6,491.60; and Takhalov $68,757.57. DE1194, DE1195, DE1203, DE1211:29.

Appellants timely filed notices of appeal. DE1098, DE1111, DE1118, DE1201, DE1204, DE1206. They are all incarcerated serving their respective sentences.

Statement of the Facts

Appellants operated nightclubs in South Beach. To generate business, they paid young women from Eastern Europe – the "B-girls" – to flirt with male tourists on Miami Beach, suggest that the men join them at the nightclubs, and encourage the men to spend large sums of money drinking, without disclosing that the B-girls were working for the club and earning a commission from the expenditures. DE953:5. The government accused the appellants of fraud. Appellants argued that the failure to disclose the financial arrangement did not defraud the patrons, provided that the nightclub delivered to the patrons the goods/beverages paid for by the patron. Appellants denied authorizing the B-girls to commit other acts described in the Superseding Indictment.

A. The Government's Case

The government called patrons to testify about their visits to the clubs, but their hazy memories and limited (*i.e.*, lack of) interaction with appellants offered little to prove the government's case. The key witnesses, therefore, were lead defendant Alec Simchuk and two B-girls – Julija Vinogradova and Marina Turcina – who testified pursuant to plea agreements to reduce their sentences.[1]

[1] The "B-Girls" received reduced sentences of time served, approximately six to seven months of incarceration.

1. Alec Simchuk

Paying B-girls to lure men into the nightclubs was the brainchild of co-defendant Simchuk, a Russian-born U.S. citizen who had employed B-girls to work for him at nightclubs in Europe. He introduced this business model and several B-girls to South Beach, where he operated nightclubs together with appellants.

Simchuk was a self-described member of the Russian Mafia,[2] a man with many enemies, DE1128:138-148; DE1129:47-48, and a prior conviction for insurance fraud in Pennsylvania. DE1127:83-83; DE1128:70. In 2009, Simchuk met Pavlenko in Florida. With two other partners, they opened Club Dolce in Miami Beach using B-girls who Simchuk supplied from Latvia. Simchuk claimed that with Pavlenko's consent, the B-girls operated at Club Dolce in the same manner as they had done at Simchuk's European nightclubs. DE1125:142-162. Simchuk described the B-girls as "sharks" who needed to be controlled to ensure that they did not get carried away in trying to get the customers to spend money. DE1125:184-188. According to

[2] Although the court granted the motion in limine to exclude references to the Russian Mafia, DE826, the government, in its opening statement, implied that Russian organized crime had infiltrated the Miami Beach club scene. The court overruled appellants' timely objection, motion for mistrial, and request for a cautionary instruction. DE1127:47-53. After the court erroneously admitted untimely-disclosed "other crimes" evidence implicating Takhalov in breaking Simchuk's leg, Takhalov's counsel reluctantly questioned Simchuk about his ties to the Russian Mafia to establish that Simchuk had many enemies with a motive to do him harm.

Simchuk, on one occasion, the Club Dolce bartender, Kristina Takhalov (Albert's wife), let two customers leave the club without signing their credit card bill, and Pavlenko told her that she needed to get the customer's signature even if she had to forge it. DE1125:164-165.

After Club Dolce closed, Simchuk and Pavlenko opened Caviar Bar using B-girls who would secretly dump their own alcoholic beverages so that their customers would order more. DE1125:168-171. Simchuk conceded that Takhalov "had nothing to do with" Club Dolce or Caviar Bar. He also conceded that he disliked Takhalov. DE1128:88; DE1129:10-11.

According to Simchuk, the B-girls at Club Dolce were paid with checks from Rose Entertainment Corporation, a corporation formed by Pavlenko. When Caviar Bar opened, he and Pavlenko agreed to open a second corporation to "wash the money" paid to the B-girls because they did not have work visas. DE1125:165-166.

According to Simchuk, he and Pavlenko advised the European B-girls to tell Customs Officers upon entry into the United States that they were tourists - not nightclub employees. Otherwise, they would not be permitted to enter the United States. DE1126:47-50.

In the Spring of 2010, Simchuk left the United States because American Express put a hold on Caviar Bar's account. Pavlenko sold out of Caviar Bar soon

after. DE1125:193-196.

In early summer 2010, Simchuk met Feldman, a realtor and the owner of VIP Lounge in Miami Beach. They agreed that Simchuk would bring his best B-girl, bartender, and manager to VIP Lounge and that Feldman would be paid the first $15,000 of the net profits from that club and thereafter 25% of those profits. Simchuk claimed that he told Feldman that the B-girls could sometimes behave like "sharks" feeding on the customers. DE1125:196-201.

Simchuk claimed that VIP Lounge operated the same way as the other clubs and that Feldman knew it. DE1125:206-207. Feldman told Simchuk that Takhalov was responsible for credit card processing at VIP Lounge. DE1125:203. Soon, there were 16 European B-girls working at VIP Lounge. Simchuk testified that Feldman paid for their airfare from Europe to Miami. DE1125:206, 208.

Simchuk told Feldman to set up a corporation to contract with a fictitious company in order to "wash the money" to pay the B-girls who did not have social security numbers. According to Simchuk, Feldman then set up a corporation named IEVA Marketing for that purpose. DE1125:213-216.

Credit card "charge backs" were numerous at VIP Lounge due to customers complaining about their bills. DE1125:217-218. Simchuk testified that it was Takhalov's responsibility to resolve charge backs by communicating with credit card

companies. DE1125:220.

Simchuk had his mother form a corporation to fund Stars Lounge, a Miami Beach nightclub that Simchuk opened in September 2010. DE1125:218-220. At Stars Lounge, the B-girls were paid a 20% commission, the manager 10%, and the bartenders 5%. DE1125:229. According to Simchuk, Feldman acquired Simchuk's 25% interest in Stars Lounge. DE1126:18-20.

The financial records of VIP Lounge and Stars Lounge were kept at Feldman's Miami real estate office. DE1125:223-227. The bookkeeper for VIP Lounge and Stars Lounge was Feldman's sister, Alex Burrlader, who signed the IEVA Marketing checks that were cashed to pay the B-girls, the manager and the bartenders each week. These checks were also used to pay the partners and to pay club expenses. DE1125:229-237, 240-242.

According to Simchuk, Feldman knew that bartenders at Stars Lounge would secretly pour vodka into customers' drinks to get them intoxicated and would falsely tell the customers that their card was declined so that they could obtain the card a second time and charge for a second bottle of champagne that was not, in fact, ordered. DE1126:32-35. Simchuk testified that B-girls would sometimes stand behind an intoxicated customer and physically nod his head up and down when he was asked if he wanted to purchase bottles of wine or champagne so that the surveillance

cameras would record it in case a customer disputed the charge. DE1126:35-36. However, Simchuk acknowledged that menus with the correct prices were displayed on the tables at all of his Miami Beach nightclubs. DE1126:35-36.

According to Simchuk, Takhalov was promoted by Feldman to be the manager of Stars Lounge and was responsible for arranging housing for the B-girls. Takhalov also installed the credit card terminal at Stars Lounge. DE1125:239-240; DE1126:18. Simchuk claimed that, in Feldman's presence, he taught Takhalov how to operate Stars Lounge like Simchuk had operated his clubs in Europe. DE1126:42-44. According to Simchuk, Feldman and Takhalov were in charge of the daily operation of Stars Lounge. DE1126:51-57.

Simchuk learned that the FBI was investigating Stars Lounge, so he shut it down. DE1126:58-59. Simchuk concentrated on managing his European nightclubs and had no involvement with Club Moreno, Nowhere Bar, Steel Toast or Club Tangia, all of which opened in Miami Beach after Stars Lounge closed. DE1126:62.

In April 2011, while still in Europe, Simchuk learned that he had been indicted in this case. He fled to Russia because it has no extradition treaty with the United States. In March 2012, Simchuk decided he would return to the United States to cooperate with the government.

Over the objection of Takhalov, Simchuk testified that, while still in Russia,

he received a telephone call from Takhalov, who told Simchuk not to return to the United States or he would have problems. According to Simchuk, a few days later two men approached him and said, "Good people from Miami don't want you to testify. You have beautiful a [sic] wife. Stay at home." According to Simchuk, one man pointed a gun at Simchuk and the other broke his leg. DE1125:111-116.

When Simchuk came to the United States, he told FBI agents that he had broken his leg in a fall. A few days before the trial he changed his story and, for the first time, told the FBI the story about the men who broke his leg. DE1125:117-119.

2. The B-Girls

Two B-girls testified: Julija Vinogradova and Marina Turcina. When Marina was first arrested in this case, she told FBI agents that she did not think that the promotion of the nightclubs by the B-girls was illegal. DE1131:113-114. Marina acknowledged that she drank heavily while working as a B-girl on Miami Beach and, accordingly, her recollection was often sketchy. DE1134:5-8. Marina disliked Takhalov for multiple reasons, including that he reported her and Julija to INS for illegally being in the United States. DE1134:41-44.

Both Julija and Marina testified that they had worked for Simchuk as B-girls in Europe. Simchuk persuaded them to work at his nightclubs in Miami Beach. DE1121:146-154. Simchuk advised them and other B-girls to falsely claim on their

ESTA immigration applications that they were coming to the United States for a vacation when, in fact, they were going to be working as B-girls.[3] DE1121:150-161; DE1131:102-112.

In the fall of 2009, Julija and the other B-girls arrived at the Fort Lauderdale airport. They were met by Pavlenko and others. While Pavlenko was driving them from the airport, he told them they would all live together in a rented house. Julija testified that Pavlenko also told them that their job was to lure wealthy men to the nightclub for drinks by pretending to be Russian tourists. DE1121:162-175.

According to Julija, Caviar Bar was not open to the public and anyone who wanted to enter without a B-girl would be told that the club was closed for a private party. Julija and the other B-girls would go out nightly in pairs looking for wealthy men at restaurants and bars in Miami Beach. They would falsely say that they were vacationing and suggest that the men accompany them to Caviar Bar because it had good music.

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[3] The B-girls entered the United States through the U.S. Visa Waiver Program. They typically obtained permission to enter the United States by submitting an application via the U.S. Department of Homeland Security Electronic System for Travel Authorization (ESTA), an automated system accessible through the internet. ESTA is used to determine the eligibility of visitors traveling to the United States under the Visa Waiver Program. To qualify for the Visa Waiver Program, applicants must state on the application that they are neither entering the United States for any criminal purpose, nor to seek employment. DE1124:146-155; Govt. Ex. 138.

Once the men were lured to Caviar Bar, Julija and other B-girls would pretend to be unaffiliated with the club and encourage the men to drink a lot of wine and champagne. Although Julija sometimes told the men that she would have sex with them later, she never did. Marina testified that the club owners never instructed her to suggest to customers that she would have sex with them. Neither Marina nor any of the other Miami B-girls had sex with any of their nightclub customers.

Julija and Marina acknowledged that the true prices of the wine and champagne were published on the menus sitting on the tables. DE1121:179; 1122:78-80; 1131:114-116, 145. However, the B-girls used their sex appeal to distract the men from studying the menus. Also, Julija and another B-girl would pretend that they were drinking when, in fact, they would often surreptitiously pour their drinks into vases or other receptacles so that more alcohol could be ordered. Julija testified that Simchuk was responsible for coaching the B-girls while Pavlenko was responsible for the credit card terminal transactions and the paperwork involved with operating Caviar Bar.

According to Julija and Marina, the B-girls were paid in cash each week and received 20% of what was spent by the men they brought to the clubs. Those B-girls who worked as bartenders got 5% of the liquor they sold. Taxes were not withheld from the B-girls' commissions, as their compensation was not reported to the IRS. A

separate logbook recorded their earnings. DE1121:175-189; DE1122:1-24, 55-57; DE1131:114-116.

Marina testified that she and another B-girl were approached by John Bolaris at the Delano Hotel. They had drinks there and then invited Bolaris to Caviar Bar. Bolaris, a television weatherman from Pennsylvania, was very drunk. In two consecutive nights at Caviar Bar, Bolaris charged approximately $46,000 on his American Express card for bottles of expensive champagne, caviar and a painting that hung on the wall. Bolaris disputed the charge, claiming to American Express that he had not even been to Caviar Bar, so American Express imposed a "charge back" on Caviar Bar. Pavlenko provided American Express with proof, including a photograph, a copy of his driver's license and signed receipts, to rebut the Bolaris charge back. American Express resolved the dispute in favor of Caviar Bar. DE1131:179-201. By May 2010, Caviar Bar closed.

Julija and three other B-girls resumed work at VIP Diamond Club and then at Stars Lounge. Simchuk told Julija that Feldman was his partner at Stars Lounge. For one month, Julija was the manager of Stars Lounge with access to its books and records. The B-girls at Stars Lounge were again paid "off the books," as they were at Caviar Bar. As the manager, Julija would receive a check payable to her, cash it and then distribute the cash to the B-girls.

According to Julija, Takhalov was responsible for the credit card processing at Stars Lounge and was there almost every day. Julija testified that Stars Lounge was not open to the public. The most expensive champagne at Stars, a magnum of Dom Perignon, was priced at $7,500. Julija claimed that, on one occasion when a customer did not sign his bill from a previous night, at Takhalov's direction and in his presence, she forged the customer's signature on that bill. DE1122:34-58, 69-87, 94.

According to Julija, a patron at Stars Lounge who came to that club two nights in a row did not fully understand the bills that he signed because, although he could walk and speak, he was intoxicated. This customer ultimately requested a charge back. Julija testified that Takhalov was present when the customer signed the bills and had to deal with the credit card company regarding this charge back. DE1122:82-87.

Marina claimed that at Stars Lounge a drunken customer gave his Rolex watch to a B-girl who later gave it to Takhalov. According to Marina, Takhalov gave them about $600 to $900 for giving him the watch. DE1131:150-153.

Marina also recalled a phone conversation with Simchuk, in which she asked him to pay her the money that he owed her for working at Stars Lounge. Simchuk responded that he was not going to pay her and threatened her that he had friends in Riga who could harm her and her family. DE1131:224-225.

From mid-November to December 2010, Julija and Marina worked at Club Moreno for Takhalov, whose wife, Kristina, worked there as a bartender. According to Marina, once she began working at Club Moreno, Takhalov paid for the Miami Beach residence of the B-girls. DE1131:241. According to Marina, Takhalov instructed her and another B-girl not to let any customers use the same credit card more than three times, but she could let them use more than one credit card at a time. DE1131:212-213.

In mid-December 2010, all the employees moved to Club Nowhere, also operated by Takhalov. The Club Nowhere menus advertised prices of the champagne and wines. However, B-girls would distract customers from reading the menus. When customers would ask Kristina Takhalov about the price of the champagne or wine, Kristina would either say the price quietly, leave without answering or give a misleading answer like 7-9-9 which could mean either $7.99 or $799.

In mid-January 2011, the operation relocated to a smaller venue under the name Steel Toast. Julija claimed that sometimes Steel Toast patrons would be served a different champagne than they had ordered but did not notice. When Steel Toast ran out of wine or champagne, someone would buy more from a nearby store and sell it at a much higher price. Julija identified a ledger from Steel Toast to which Takhalov had access delineating the liquor charges there and the money paid to B-girls. She

also identified a receipt dated February 10, 2011, which she testified reflected a cash payment to her by Takhalov of $640 which she used to pay another B-girl for working at Steel Toast. DE1122:116-133.

At Club Moreno, Club Nowhere and Steel Toast, B-girls were paid a 20% cash commission based upon what their customers spent. Takhalov, among others, would issue a check to a club employee, which would be cashed to pay the B-girls their commissions. DE1132:4-26.

3. Officer Luis King

In 2010, law enforcement began investigating the use of B-girls at the nightclubs. Luis King, a Miami Beach police officer, testified that, on August 20, 2010, he met with Feldman at a restaurant. Feldman invited King to work as an off-duty police officer at VIP Diamond Club and Stars Lounge to handle problems that might arise. Feldman would pay King cash "under the table" and King agreed to the arrangement. However, while working at the clubs, King was also paid by checks, sometimes given to him by Takhalov. DE1135:75-82. Unbeknownst to Feldman and Takhalov, FBI agents had enlisted King to work in an undercover capacity. DE1134:239-248, 266-267; DE1135:10-11.

King worked at Stars Lounge, Steel Toast and Club Tangia. He also would intermittently enter Club Moreno but did not work there. DE1136:80-82, 96, 119-121.

He did not work at Caviar Bar and never interacted with appellant Pavlenko. DE1134:243, 245. King's duties included preventing the public from entering the clubs unless accompanied by a B-girl, pretending not to know the B-girls by checking their identifications when they were entering the clubs, and ensuring that customers paid their bills by identifying himself as a police officer or contacting the police if necessary. DE1134:248-263.

At Stars Lounge, Marina told King that Simchuk, Feldman, and Takhalov were "in charge." DE1135:31. At Stars Lounge, King saw B-girls surreptitiously dumping their drinks in vases, ice buckets, pots and in the bathroom. He also saw Kristina Takhalov pouring Red Bull, instead of champagne, into the champagne glasses of the B-girls after the B-girls would dump their champagne. DE1135:17, 77-80. He claimed that, although there were menus at Stars Lounge, he never saw the B-girls presenting the menus to customers. DE1135:28.

According to King, surveillance cameras were installed in the clubs in case the owners needed to prove to the credit card companies that the customers had been present and had approved their bills. When customers complained about their bills, King tried to resolve the problem. He had a tape recorder hidden on his person that recorded conversations at the clubs, including that of an intoxicated Stars Lounge customer complaining about his bill in the presence of Takhalov, King and two B-

girls, but paying it after the police were called. According to King, Takhalov told him to arrest anyone who refused to pay their bill. DE1135:55-70.

King observed two B-girls with a customer at Stars Lounge who drank so much that he became unconscious. B-girls dumped a bucket of ice water on his head to awaken him. DE1135:112-120.

King videotaped a customer disputing a bill for $4,500. King testified that Takhalov coaxed the customer into signing the bill for two bottles of champagne by telling him he could always call the credit card company later to dispute it. DE1136:97-101.

King recorded Feldman explaining that to prevent a credit card charge from being declined, Feldman developed a method of charging a one cent difference for each bottle of champagne ordered. Feldman said that this was a "red line" but it was not illegal. DE1135:73-75. King recorded conversations with Takhalov discussing large charge backs on credit card bills at VIP Diamond Club and Stars Lounge, in amounts as high as $17,000. DE1135:75-80,107-120. King testified about a conversation he had with Takhalov on February 14, 2011, in which Takhalov said that the B-girls needed to wait at least ten minutes before allowing a customer to order another bottle of liquor so as to lessen the chance that the credit card companies would think that something was amiss. DE1136:105-106.

King recorded Takhalov saying that he was going to open his own nightclub, take the B-girls from Stars Lounge, and pay them by commission in the usual manner. DE1135:121-135. King recorded Takhalov purportedly saying that he knew what the girls were doing at the clubs and how they operated. DE1136:40-49.

King recorded Takhalov purportedly admitting that he had recruited B-girls from Stars Lounge and from Europe to work at Club Moreno. King also recorded Takhalov saying he handled the finances and controlled the data processing at all of the clubs for the credit cards. DE1136:49-59.

On one occasion, Takhalov sent a text message to a female promoter telling her that she had to submit her ESTA immigration form by the next day and that he would pay for the airfare. DE1143:170. On January 27, 2010, King secretly videotaped Takhalov kissing B-girls at the Miami airport who were arriving from Europe to work at Club Tangia. DE1136:66-71.

According to King, Takhalov proposed to pay $500 to a fictitious friend of King's who supposedly worked at INS to obtain that friend's assistance in helping B-girls get into the United States. Takhalov also proposed to pay another $500 for this fictitious INS officer to have B-girls Julija and Marina arrested and removed from the United States. King testified that Takhalov paid him $1,000 for King to give to the fictitious INS officer. DE1135:84; DE1136:54-59.

King further testified that Takhalov gave him $100 and a bottle of vodka for King to have two of his friends' traffic tickets dismissed. King subsequently arranged for the dismissal of those tickets. DE1135:84; DE1136:36-37.

B. Albert Takhalov's Defense Case

Takhalov and the other appellants testified. They did not dispute that the B-girls were paid to invite men into the clubs without disclosing to the men that the B-girls worked there. However, all appellants denied knowing that the B-girls – who he referred to as female "promoters" – were forging signatures, charging patrons for bottles the patrons never ordered, or engaging in other fraudulent practices. DE1151:38-39, 188-189.

Takhalov testified that he had no involvement in Club Dolce or Caviar Bar. DE1150:248-249; DE1151:29-30. At VIP Diamond Club and the clubs that opened thereafter, Takhalov was responsible for credit card processing. DE1152:58. He would explain to the owners that they needed to properly document the credit card charges because patrons in nightclubs drank a lot and would go "overboard" with their spending. When patrons sobered up the next day, they would often seek a charge back. DE1151:31-34. Takhalov would respond to questions posed by the credit card companies regarding claimed charge backs. DE1152:58-59.

After Takhalov set up the credit card terminals at Stars Lounge, Simchuk made

Takhalov the new day manager. DE1151:35-38. However, Takhalov had no financial interest in Stars Lounge. DE1151:94.

Simchuk assured Takhalov that the B-girls entered the United States legally, were authorized to work in the United States for up to 90 days and that the B-girls' work as "promoters" at Stars Lounge was legitimate. DE1151:33-34. Takhalov never directed the B-girls how to interact with patrons because the B-girls had many years of experience in promoting Simchuk's nightclubs in Europe. Takhalov testified that he never intended to cheat or trick the customers of any of the clubs. DE1151:38-39, 188-189.

Takhalov never told the female promoters to dump their drinks or offer sex to induce patrons to buy more liquor. However, if a patron was ever coercing a female promoter to drink too much alcohol and she did not want to do so, she could dump it in the bathroom to avoid getting drunk and possibly hurt. DE1151:86-88. With regard to all the charge backs, Takhalov testified that, unbeknownst to him, King and other law enforcement officials were suggesting to patrons (as they exited the clubs) that they had been defrauded and encouraged them to lodge complaints with the credit card companies. DE1151:55-56, 190-193.

After Stars Lounge closed, Takhalov became a partner in Club Moreno, DE1152:59-60, which had a full restaurant and was open to the public. DE1151:52.

Takhalov was the night manager, maintaining the business records and paying the bills. His wife Kristina worked there as a bartender. Another partner was responsible for managing the female promoters. DE1151:54.

Takhalov witnessed Julija and Marina get drunk and behave abusively to customers. He saw Marina dump a customer's bottle of champagne so that he would order another one. Takhalov explained that he was upset by this behavior and, as a result, he disciplined Julija and Marina. DE1151:62-63.

Julija and Marina tried to get Kristina Takhalov to steal cash that a Club Moreno customer had used to pay his bill and split the cash with them. Kristina reported this incident to Takhalov, who then reported it to the other partner. From that point on, Julija and Marina held a grudge against the Takhalovs. DE1151:54-62, 102-106.

About one month after Club Moreno opened, Kristina Takhalov, who was pregnant, became violently ill while working at the club. A female promoter told Kristina that Julija and Marina had tried to persuade her and the other female promoters to put drugs in Kristina's cranberry juice. DE1151:64-69, 105-106. This incident, coupled with another in which Julija and Marina beat up two female promoters, motivated Takhalov to arrange for Julija and Marina to be deported from the United States. Takhalov had overheard that they had gained asylum by falsely

claiming that they had been abused in Latvia. Takhalov reported to the local INS office that they had lied on their application for asylum. When Takhalov told Officer King that he had reported this fraud, King volunteered that he had a friend at INS who could get promoted there for discovering this type of fraud. DE1151:69-75. Subsequently, Takhalov discussed this immigration fraud with King's friend.

As to Club Nowhere, Takhalov testified that he received no proceeds because he held no ownership interest. DE1151:111-113. Club Nowhere's lease was terminated because Julija and Marina got drunk and broke many bottles of liquor one night. DE1151:109-110.

Takhalov had no ownership interest or any involvement in Steel Toast, which his former partners formed. The money used to pay Steel Toast's rent came from the bank account Takhalov previously shared with his former partners, because they still had money belonging to them in that account. DE1151:52-54, 60-61.

Takhalov was invited by Fady Kaldas and co-defendant Sammy Zargari to join them in the ownership of Club Tangia. They were having financial difficulties and liked the business model of having female promoters. DE1151:127-128. Takhalov testified that Kaldas and another partner were his superiors at Club Tangia. DE1152:28. Takhalov received a salary there plus 30% of the net profits. DE909:233.

On each table at Club Tangia, the menus were prominently displayed with the

correct prices on them. He never told the female promoters at Club Tangia to distract customers from looking at the menu. Club Tangia bought alcoholic beverages from Southern Wine, a well-established supplier of restaurants and nightclubs in Florida. A Southern Wine representative suggested the prices that were on Club Tangia's menu after reviewing prices at other nightclubs. Takhalov noted prices at three other popular nightclubs on Miami Beach, whose menus listed champagne as much as $40,000 per bottle. DE1151:120-124; Tak.Ex.13,17,20,21.

At Club Moreno and Club Tangia, the only nightclubs at which he received a percentage of the profits, the female promoters were treated as subcontractors, responsible for paying their own taxes based upon how much they earned in commissions. He testified that he never intended to violate the federal tax laws or to launder money.

Takhalov denied calling Simchuk in Russia in March 2012 or at any time. He denied threatening Simchuk or arranging to break his leg. DE1150:244-245. Takhalov denied asking King to "fix" traffic tickets. Takhalov explained that, when his friend, Igor, got a traffic ticket, King saw it and offered to help. Takhalov did not know the disposition of that ticket. However, he knew that Igor wanted to give King a tip because he was happy with the disposition. DE1151:95-101, 204-06. Takhalov admitted he arranged for the travel of some of the female promoters from Europe to

the United States but never told the female promoters to lie on ESTA applications. DE1151:126-127, 143.

In support of his defense, Takhalov called to the stand Robert Arthur, a fellow member of the condominium building where Takhalov resided. Arthur opined that Takhalov had a good reputation for truthfulness and honesty. DE1150:234-239.

John Francois Jard testified that, in September 2010, a woman he met at a hotel bar on Miami Beach invited him to Club Tangia. He was not pressured to buy anything. He ordered two bottles of champagne. He was not drunk when he paid the bill. Although the champagne was more expensive than he had expected, he nevertheless enjoyed his evening at Club Tangia. A few months later, an FBI agent contacted Jard and informed him that the woman with whom he went to the club worked for Club Tangia. Jard told the FBI agent that he always realized that the woman was pretending not to work at the club, but it did not matter to him. It was apparent to Jard that the promoter was getting a commission. DE1152:9-19.

STANDARDS OF REVIEW

I. Denial of a motion to dismiss is reviewed *de novo*; denial of defense theory instructions is reviewed for abuse of discretion. *United States v. Morris*, 20 F.3d 1111, 1114 (11th Cir. 1994).

II. Rulings on admissibility of evidence of uncharged conduct are reviewed for abuse of discretion. *United States v. Baker*, 432 F.3d 1189, 1205-06 (11th Cir. 2005). Where there is cumulative error, the total prejudicial effect of the errors is weighed to determine whether reversal is warranted. *United States v. Dohan*, 508 F.3d 989, 993 (11th Cir. 2007) ("cumulative impact of multiple evidentiary and instructional errors" reviewed *de novo*).

III. Denial of a severance is reviewed for abuse of discretion. *United States v. Liss*, 265 F.3d 1220, 1227 (11th Cir. 2001).

IV. The district court's interpretation of the guidelines is reviewed *de novo*; its factual findings are reviewed for clear error. *United States v. Barner*, 572 F.3d 1239, 1247-48 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

This case presents a challenge to the expanded use of the wire fraud and money laundering statutes to prosecute gray area business practices. Appellants stand convicted on the novel theory that bar owners defraud male patrons by concealing that the flirtatious women who entice the men to buy expensive spirits are actually paid promoters. Given case law in the Second Circuit, the district court should have rejected the prosecution's fraud theory or at least instructed the jury on the theory of defense. *See United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181-82 (2d Cir. 1970) (false statements that lure a customer into a transaction are not sufficient to support the charge of wire fraud if the customer obtained what he bargained for); *United States v. Starr*, 816 F.2d 94, 98-99 (2d Cir. 1987) (same).

In addition, the district court should not have allowed evidence about Russian organized crime, belatedly-disclosed uncorroborated testimony of violence, and "other crimes" evidence to permeate the trial and overshadow the jury's consideration of the fraud-based charges. *See United States v. Carrasco*, 381 F.3d 1237 (11th Cir. 2004) (per curiam) (reversing conviction where government failed to give adequate notice of "other crimes" evidence), *cert. denied*, 543 U.S. 1177 (2005); *United States v. Utter*, 97 F.3d 509, 514-15 (11th Cir. 1996) (reversing convictions for fraud related activity due to the introduction of violent crime evidence). Making matters worse, the

district court's refusal to sever Takhalov allowed his acquitted co-defendant and defense attorney to reinforce the character attack, acting as a "second prosecutor . . . not [] held to the limitations and standards imposed on the government prosecutor." *Zafiro v. United States*, 506 U.S. 534, 544 and n.3 (1993) (Stevens, J., concurring).

In the end, the district court sentenced Takhalov to 144 months imprisonment on this flawed theory of prosecution, relying on exaggerated "loss" figures and mischaracterizing as "vulnerable victims" able-bodied men out for a night on the town, who drank too much, partied too hard and – some of whom – regretted spending so much on sexually-tinged interactions with young, attractive women.

ARGUMENT

I.

THE DISTRICT COURT SHOULD HAVE REJECTED THE PROSECUTION THEORY OR AT LEAST INSTRUCTED THE JURY ON THE THEORY OF DEFENSE

According to the Superseding Indictment, the "object" of the conspiracy and the scheme to defraud was

> to lure . . . patrons . . . to clubs ... by deceiving the victim credit card holders about the B-girls' connection to the clubs and by inducing the victim credit card holders to become intoxicated both before bringing them to the clubs and while in the clubs.

DE953:5-6, 22-23. This was not a viable theory for a federal fraud prosecution. *See*

United States v. Regent Office Supply Co., 421 F.2d 1174, 1181-82 (2d Cir. 1970) (false statements that lure a customer into a transaction are not sufficient to support the charge of wire fraud if the customer obtained what he bargained for); *United States v. Starr*, 816 F.2d 94, 98-99 (2d Cir. 1987) (same). The district court should have dismissed all wire fraud related counts, as well as the money laundering conspiracies (which alleged wire fraud as one of the specified unlawful activities).[4] *See United States v. Shotts*, 145 F.3d 1289, 1293 n.3 (11th Cir. 1998) ("A general verdict which may rest on an insufficient legal theory must be reversed").[5] At a minimum, the district court should have instructed the jury on the proposed theory of defense. DE921.

The money laundering conspiracies are independently defective, as they fail to allege "a monetary transaction that was separate from and in addition to the underlying criminal activity." *United States v. Christo*, 129 F.3d 578, 580 (11th Cir.

[4] All counts are premised on the flawed theory of prosecution, except for Count 38 (Conspiracy to Defraud the United States Department of Homeland Security). DE953.

[5] The money laundering counts also allege "fraud in the misuse of a visa document," in violation of 18 U.S.C. § 1546, as an alternative specified unlawful activity. DE953:21. However, the government did not press this theory at trial; instead, in closing argument, the government emphasized concealed payments to the B-Girls as advancing the "scheme to defraud." DE1154:78, DE1155:59,65-66. Regardless, a defect in either theory of the specified unlawful activity warrants reversal of the money laundering counts. *See Shotts*, 145 F.3d at 1293 n.3.

1997). Here, the underlying criminal activity included wire fraud, which, as set forth in Count 1, alleged as to the "means" to conduct the fraud: "***concealing*** the B-girls' employment and their ***commissions*** on the sale of alcohol . . . ." DE953:7; *see also* DE953:25 (Superseding Indictment, Count 30) (emphasis added). Indeed, deceiving patrons by concealing the payments to the B-girls was the very object of the wire fraud conspiracy. DE953:6-7. That was likewise the "purpose" of the money laundering conspiracies: "***to conceal payment*** to B-girls, who were employed illegally by co-conspirators." DE953:21,33 (Superseding Indictment, Counts 29 and 39) (emphasis added). Because payments to the B-girls constituting the money laundering were not "separate from and in addition to" payments to the B-girls that defined the fraud, the money laundering counts must be dismissed. *See Christo*, 129 F.3d 578, 580.

For more about the flawed theory of prosecution and denial of defense theory jury instructions, Takhalov adopts the arguments in co-appellant Pavlenko's brief.

II.

THE ADMISSION OF "OTHER CRIMES" EVIDENCE VIOLATED DUE PROCESS AND FEDERAL RULES OF EVIDENCE 402, 403 AND 404(b)

Rules 403 and 404(b) of the Federal Rules of Evidence were promulgated in an effort to prevent trials from becoming forums for character assassination.

Evidence of a defendant's character and extraneous conduct "'tends to draw attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial.'" *United States v. Bledsoe*, 531 F.2d 888, 891 (5th Cir. 1976) (citation omitted). Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case ***shall provide reasonable notice in advance of trial***, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(emphasis added). The rule follows the venerable principle that evidence of extrinsic offenses is "***not admissible*** to prove defendant's character in order to show action in conformity therewith." *United States v. Utter*, 97 F.3d 509, 513 (11th Cir. 1996) (emphasis added).

Rule 404(b), as amended in 1991, includes a pretrial notice requirement: "[T]he prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." The Advisory Committee

Notes indicate that this notice requirement is meant to "reduce surprise and promote early resolution on the issue of admissibility." Because the notice requirement is a "condition precedent" to admissibility, "if the court decides that the notice requirement has not been met," the evidence must be excluded. *Id*.

A. The Uncharged Violent Crime

One week into the trial, the prosecutor disclosed that Simchuk, who would testify the next day, would accuse Takhalov of a post-indictment act of violence. The prosecutor proffered that Simchuk would testify that while in Russia, Simchuk received a telephone call from Takhalov warning Simchuk not to testify. A few days later, two strangers approached Simchuk; one pointed a gun at him while the other broke his leg. DE1124:169

According to the prosecutor, Simchuk first told the government about the telephone call and violent incident on the day before the disclosure was made to defense counsel. Until then, Simchuk had told the government that he broke his leg by slipping and falling on ice. Simchuk's explanation for changing his story was that he had feared for his wife's safety in Riga, but that she had recently moved to a safer place. *Id*.

Defense counsel asked for a hearing outside the presence of the jury to evaluate the veracity of the allegation. The judge denied that request on the spot without

explanation. DE1124:171. Defense counsel moved to exclude this testimony based on late notice – in the midst of trial and only one day before Simchuk was to testify; alternatively, he requested a postponement of Simchuk's testimony in order to investigate and confront the allegations. The judge denied those motions, DE1124:172, even while acknowledging that "this is such a ***devastating piece of evidence***." DE1124:173.

Counsel for the co-defendants objected to this "other crimes" testimony and moved for a mistrial based upon unfair prejudicial spillover. The judge denied the motions but ordered the government to provide to defense counsel, by the next day, Simchuk's telephone number in Russia on which he had allegedly received the allegedly threatening telephone call. DE1124:174. The record does not reveal whether the government complied with that court order.

The next day, counsel renewed motions to exclude and for an opportunity to question Simchuk outside the presence of the jury about the allegations of violence, complaining that they were "hamstrung" from conducting any overseas investigation into the veracity of Simchuk's allegations. DE1125:6. Counsel also objected on the ground that these acts of violence would create the impression with the jury, fueled by media reports, that this was a "Russian Mob case":

[A]s the Court knows and has cautioned the jury already, there has been

> story or stories in national media and in the local media that this is a Russian Mob case. Even though the jury doesn't know about it, the fact is if the evidence comes in that's the mind-set of this jury: Oh, threats, broken legs in Russia, this is the Russian Mob. Nothing could be more clear without saying it, that that would be a Mob case.

DE1125:7. The court denied the motions, but gave a cautionary instruction that emphasized that Simchuk's testimony about alleged acts of violence could be considered against Takhalov, not his co-defendants. DE1125:8, 99-100, 112-13.

Simchuk then testified that in March 2012, while in Russia, he spoke to his wife and some friends about his intention to surrender and plead guilty. Soon after, he received a telephone call from Takhalov, who told him that he should not return to the United States, or he would have problems. Simchuk could not recall Takhalov's exact words. Although Takhalov spoke politely, Simchuk claimed that he felt threatened. DE1125:114.

According to Simchuk, a few days after this telephone conversation, on April 2, 2012, when he was standing outside his home in Russia, two men who appeared to be from Southern Russia and whom he did not recognize approached him and said: "Good people from Miami don't want you to testify. You have [sic] beautiful wife. Stay at home." One of the men pointed a gun at him and the other one squeezed his leg very quickly and broke it. DE1125:114-17; DE1128:155-56. According to Simchuk, he was taken by ambulance to a hospital and, on April 5, 2012, he had

surgery on his broken leg. DE1125:118.

Simchuk conceded that, when he came to the United States on July 26, 2012, he told the government that he had broken his leg when he slipped and fell on ice. However, on the eve of his testimony, he changed his story and, for the first time, told the government the story about the alleged telephone call from Takhalov and the man who broke his leg. Simchuk claimed that he did not reveal this incident earlier because he feared for his wife's safety. He claimed he changed the story once his wife told him that she had sold her apartment in Riga, received part of the money from the sale and was able to move. DE1125:117-19; DE1128:156-61, 167-70.

Simchuk testified that, due to his leg having been broken, he now has to walk with a crutch. At the request of the prosecutor and over the objection of Takhalov, Simchuk stood and displayed his crutch to the jury for them to view. DE1126:62-63. At one point during direct examination, Simchuk blurted out to the prosecutor, "Come on guys, I mean, I give [sic] you my leg for this!" Defense counsel moved to strike this statement, but that motion was denied without explanation. DE1125:197.

Takhalov timely objected to and moved for a mistrial on the ground that testimony about the alleged incident was so prejudicial and of such little probative value that it deprived Takhalov of a fair trial and his rights under Rules 401 and 403 of the Federal Rules of Evidence. His co-defendants adopted that motion which was

denied by the trial court without explanation. DE1125:114, 244-45. Takhalov subsequently filed a motion for a new trial based upon the improper admission of this uncharged violent crime but that motion was denied without explanation. DE1007, 1041, 1047.

During cross-examination, Simchuk testified that all cellular telephones in Russia are prepaid and, accordingly, there is no detailed billing provided to customers. He further testified that, for this reason, the alleged threatening phone call from Takhalov to Simchuk could not be corroborated. DE1128:149.

At the outset, the admission of this "devastating" testimony with only one day of notice, in the midst of trial, is inconsistent with the plain language of Fed. R. Evid. 404(b) (requiring "reasonable notice in advance of trial") and S.D. Fla. L. R. 88.10(h) (requiring evidence to be disclosed 14 days after the court's pre-trial discovery order was entered on April 20, 2011). The government provided no pretrial notice of this violent crime evidence, presumably because Simchuk never before trial alleged that Takhalov was responsible for the broken leg. Simchuk had been telling a different story. While that would excuse the government from a defense claim of bad-faith, it does not justify sand-bagging Takhalov and depriving him of a fair trial.

United States v. Carrasco, 381 F.3d 1237 (11th Cir. 2004) (per curiam), *cert. denied*, 543 U.S. 1177 (2005), reversed a drug conviction where 404(b) evidence was

introduced at trial without pretrial notice. In that case, after defendant Carrasco testified in his own defense, the government put on a rebuttal witness to testify about Carrasco's involvement in another uncharged drug operation. Carrasco objected on notice grounds, but the district court overruled the objection, ruling that the testimony was for "rebuttal and therefore did not fall within Rule 404(b)." *Id.* at 1239. Quoting from an advisory committee note to the 1991 amendment, this court reversed the conviction, finding that "[t]he rule requires 'the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal.'" *Id.* at 1240.

Even before Rule 404(b) was amended in 1991 to expressly require advance notice before trial, courts criticized, and occasionally reversed convictions based on, the government's unfair use of surprise evidence of other crimes. *See Riggs v. United States*, 280 F.2d 750, 753 (5th Cir. 1960) ("the defendant was deprived of a fair trial by the cloak and dagger manner of getting this surprise testimony [about uncharged criminal conduct] into evidence"); *United States v. Baum*, 482 F.2d 1325, 1331-32 (2nd Cir. 1973) ("We hold a new trial is required to afford the defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment.").

The notice requirement was intended to place "Rule 404(b) in the mainstream

with notice and disclosure provisions in other rules of evidence." Rule 404(b) Advisory Committee's note (1991 amendment). Indeed, other rules of evidence require advanced notice as a condition precedent to admissibility of the evidence. *See, e.g., United States v. Benavente Gomez*, 921 F.2d 378, 384-85 (1st Cir. 1990) (telephone toll records inadmissible under former Rule 803(24) where government failed to satisfy pretrial notice requirement); *Willco Kuwait (Trading) S.A.K. v. DeSavary*, 843 F.2d 618, 628 (1st Cir. 1988) (telex inadmissible under former Rule 803(24) where plaintiff failed to give defendant advance notice).

One day's notice was insufficient to defend against what the judge himself described as "such a devastating piece of evidence." DE1124:173. Without timely disclosure of this sensational allegation that occurred overseas in Russia, there was no meaningful way to investigate and rebut the testimony mid-trial. Notably, after the trial ended, Takhalov filed a motion for a new trial, DE1069, asserting that he had since conducted an overseas investigation and unearthed records reflecting that, among other things, there was no reported treatment of Simchuk for a broken leg in any hospital or emergency room during the relevant time period. Nor were there any law enforcement reports reflecting that Simchuk was ever attacked. There was substantial doubt about the veracity of the untimely allegations of violence and threats. Takhalov was irreparably prejudiced by the cooperating government witness

intentionally delaying disclosure until the middle of trial.

Even had the government provided timely notice, this evidence was still inadmissible under Rule 404(b). Other crimes evidence is not admissible unless the government first proves that a crime was, in fact, committed and that the defendant committed it. *Huddleston v. United States*, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is only reasonable if the jury can reasonably conclude that . . . the defendant was the actor;" the government cannot "parade past the jury potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo"); *United States v. Beechum*, 582 F.2d 912 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979) (same). Relying upon *Huddleston, supra,* this court, in *Veltmann,* 6 F.3d 1483, 1499 (11th Cir. 1993), recognized that "[p]roof that defendants committed other relevant offenses . . . must be sufficient to permit a jury, acting reasonably, to find the preliminary facts by a preponderance of the evidence" and reversed the defendant's conviction because, *inter alia,* the government did not meet this burden of proof. *Id.*

Here, the judge overruled the objection to the admissibility of the evidence within a minute or two of first learning of the untimely disclosure. The judge did not hold a hearing. Nor did the judge make any findings before ruling. DE1124:171; DE1125:6. He admitted the testimony without requiring the government to meet its

burden of proving, even by a preponderance of the evidence, that Takhalov directed others to break Simchuk's leg.

Simchuk's belatedly-disclosed account of his broken leg reflected a completely different version than he had recounted previously. It was totally uncorroborated. Simchuk was already a convicted felon with a prior conviction for insurance fraud. He had every "reason to make a false statement because [he] want[ed] to strike a good bargain with the Government." 11th Circuit Pattern Jury Instruction 1.2. The uncorroborated, self-serving testimony of a felon previously convicted of fraud who has a motive to testify falsely against the accused does not satisfy Rule 404(b)'s threshold requirement of proof by a preponderance of the evidence. *See Veltmann*, 6 F.3d at 1499.

Even if the judge had held a hearing or made sustainable findings, Simchuk's testimony was inadmissible because (1) it was not relevant to an issue other than Takhalov's character, and (2) the minimal probative value, if any, was substantially outweighed by the danger of unfair prejudice. This highly inflammatory testimony, therefore, should have been excluded under Rules 403 and 404(b).

As this court held in *United States v. Utter*, 97 F.3d 509, 514-15 (11th Cir. 1996), some forms of evidence are so overwhelmingly prejudicial – or in this case so frightening – that they are inadmissible, despite their intrinsic connection to the case

> Accordingly, even if evidence of the [other crime] is considered "intrinsic" evidence of the alleged conspiracy, the district court abused its discretion in failing to exclude the evidence under Rule 403. Although Rule 403 is an "extraordinary remedy," [*United States v.*] *Veltmann*, 6 F.3d [1483,] 1500 [(11th Cir.1993)], its major function of excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect is required here.

Id. (footnote and citations omitted). *Utter* and *Veltmann* reversed fraud-related convictions because the violent crime evidence caused overwhelming prejudice by playing on the jury's revulsion to perceived wrongs and undermining the jury's willingness to accept the appellant's theory of the case. *See, e.g., United States v. Baker,* 432 F.3d 1189, 1212 (11th Cir. 2005) (admission of acts of violence outside the temporal scope of the charged drug crimes was error requiring reversal as to certain defendants).

Making matters worse for Takhalov, the judge highlighted the evidence when he cautioned the jury to consider it specifically against Takhalov, but not the others. And at the prosecutor's urging, Simchuk was permitted to stand and display his crutch to the jury, later proclaiming he had "given his leg" to the government by agreeing to be a witness. Simchuk's inflammatory theatrics underscored the gratuitous and unsupported innuendo that appellants were somehow affiliated with the Russian Mafia.

Notably, there were no acts of violence alleged in the Superseding Indictment.

Acts of alleged violence had no bearing on whether Takhalov engaged in wire fraud and other economic crimes. In evaluating the hazy memories of nightclub patrons and biased testimony of cooperators, the jury should not have been distracted by untimely disclosed evidence of leg breaking that could not adequately be investigated not rebutted mid-trial. As a matter of basic fairness, Takhalov's convictions should be reversed.

For more about the unfairness of injecting into a fraud trial references to the Russian Mafia and alleged acts of violence, Takhalov adopts the arguments in the brief of co-appellant Feldman.

B. The Uncharged Tax Crime.

Over Takhalov's objection, the government introduced "other crimes" evidence of alleged income tax fraud committed by Takhalov. An IRS custodian of records testified that Takhalov did not file an income tax return for 2009. DE1130:169-171, 185-186. It is undisputed that Takhalov first became involved with the clubs in July 2010, when he set up the credit card terminals at VIP Diamond Club. DE1125:196-203). Evidence that Takhalov failed to file his 2009 income tax return was irrelevant to the charged crimes. *See* Fed.R.Evid. 402 ("Irrelevant evidence is not admissible").

Evidence of a defendant's failure to file a tax return is inadmissible where, as here, the failure to file lacks "substantial similarity" to the charged crimes. *United*

States v. Cadet, 08-CR-458(NGG), 2009 WL 2959606 at *2 (E.D.N.Y. 2009) ("[d]efendant's failure to file various tax forms" inadmissible because "marginally relevant to the issue of whether Defendant willfully aided in the preparation of fraudulent tax returns."), *aff'd*, 664 F.3d 27 (2d Cir. 2011); *United States v. Reiss*, CRIM.04-156 PAM/RLE, 2005 WL 2337917 at *3 (D. Minn. 2005) (same), *aff'd*, 230 F. App'x 629 (8th Cir. 2007); *United States v. Safiedine*, CRIM. 08-20148, 2011 WL 3204739 at *4 (E.D. Mich. 2011) (filing false state sales tax returns inadmissible in federal tax evasion case).

This evidence plainly was presented by the government solely to damage Takhalov's character. There is a grave danger that the jury was misled by this evidence to believe that if Takhalov had the propensity to commit income tax fraud, he had a similar propensity to commit the charged fraud. However, this court has made it clear that "other crimes" evidence is inadmissible for the purpose of "establish[ing] the criminal propensities of those involved." *See, e.g.*, *Baker*, 432 F.3d at 1212; *see also United States v. Mills,* 138 F.3d 928 (11th Cir. 1998) (where defendant was charged with violating 18 U.S.C. § 1001, it was error to admit "other crimes" evidence that defendant lied to Customs about a jewelry purchase, as that only served to suggest that she was the type of person who would lie to the government – propensity evidence forbidden by Rule 404 (b)). Accordingly, the

admission of this evidence also violated Rule 403 of the Federal Rules of Evidence, requiring reversal.

C. The Uncharged Bribery of An Undercover Police Officer to "Fix" Traffic Tickets

Takhalov filed a pretrial motion to preclude the government from introducing evidence that he asked Officer King to fix traffic tickets. Takhalov asserted that admission of these uncharged collateral crimes violated Rule 403 because this evidence would confuse and mislead the jury, and because any minimal probative value would be substantially outweighed by the danger of unfair prejudice. DE787. The trial court denied his motion without explanation. DE826; DE1120:33-38.

Over objection, undercover officer King testified that Takhalov paid him $100 on one occasion and gave him a bottle of vodka on another for King to "fix" traffic tickets for Takhalov's friends. DE1135:83-85. This testimony plainly was "dragged in by the heels for the sake of its prejudicial effect." *See Utter,* 97 F.3d at 515.

The trial court instructed the jury that this testimony was ***not*** admissible to prove the charged crimes, but was admissible to explain Takhalov's "state of mind and relationship to King." DE1135:85. The court did not explain why Takhalov's "relationship to King" through alleged ticket fixing was relevant to the charged offenses, particularly where Takhalov's relationship to King was not a contested fact

in the case. And instructing the jury to use the evidence of other crimes to prove a defendant's "state of mind" to commit crimes in general is precisely the rationale for excluding, not admitting, such extrinsic evidence. Evidence of fixing traffic tickets could not possibly establish a "state of mind" probative of whether Takhalov intended to defraud bar patrons, and the court did not articulate any basis for a contrary finding. The limiting instruction thus failed to mitigate – actually, it may have increased – the prejudice.

When this evidence is considered in combination with all of the previously described evidence of "other crimes" allegedly committed by Takhalov, it is all too likely that the jury was unable to reach a fair verdict based solely upon admissible relevant evidence. Instead, the jury rendered its verdict based on inadmissible evidence portraying him as a leg-breaking, tax-cheating, traffic-ticket-fixing, "bad" man.

III.

THE DISTRICT COURT'S REFUSAL TO SEVER TAKHALOV FROM THE ACQUITTED CO-DEFENDANT RENDERED THE TRIAL UNFAIR

Takhalov was forced to be tried with a co-defendant who acted like a second prosecutor in the courtroom. A severance was necessary to assure a fair trial.

Takhalov's defense was that he acted in good faith and did not intend to

defraud. He so testified. E.g., DE1151:184.

Co-defendant Zargari's defense was that he got "tangled up in this web of so-called alleged deceit," that Takhalov and other club owners were "unscrupulous business partners" engaged in fraud, who "didn't do things the right way." DE1155:27, 37, 35, 40. Zagari's counsel emphasized that, while Takhalov and the other appellants are Russians, Zargari is Persian, DE1139:176, thus distancing Zagari from any alleged affiliation between Takhalov and Russian organized crime. DE1140:15-16. Zagari effectively concurred with the government's assessment that the Russian appellants were guilty, while tactfully distinguishing himself as the Persian outsider who was innocent.

Zagari's defense worked. Appellants were convicted; Zargari was acquitted of all charges.

Takhalov complained that this adversarial stance, in effect, made Zargari's counsel a second prosecutor. DE1139:189. Takhalov repeatedly objected to Zargari's attacks and moved for a severance, a mistrial and a new trial. DE1139:188-189; DE1140:38-39, 59-60; DE1153:47-48, 68; DE1007:7-17. These motions were denied without explanation. DE1140:60; DE1153:48, 68; DE1047.

Thus, from the outset of the trial, Takhalov was forced to defend against both the government and Zargari. Due to the order in which the case was presented to the

jury, the prosecution would question its witness, followed by cross-examination from Takhalov's attorney and then the "second prosecutor," Zargari's counsel, would cross-examine the witness, leaving no opportunity for Takhalov to re-examine the witness. So after Takhalov would fend off the prosecutor's frontal assault, counsel for Zargari would attack from the flank and inflict low blows that would have been deemed foul if delivered by the prosecutor.

Zargari's counsel repeatedly elicited testimony from Officer King that Takhalov owned Club Tangia, was in charge of that club and directed the actions of the employees there, including the B-girls. DE1139:157-158, 160, 168, 170, 173-174, 196, 200; DE1140:6-7, 27-28, 30, 32-38. In addition, Zargari's counsel questioned Officer King about "other crimes" evidence that included Takhalov allegedly paying King to "fix" traffic tickets, DE1139:179-182, and allegedly bribing an ICE agent. (DE1139:195;DE1140: 23-24, 35-36, 39-40, 47, 49-51). Zargari's counsel elicited testimony that the co-defendants on trial with Zargari, including Takhalov, were Russians who may have been affiliated with the Russian Mafia. (DE1139:176-177; DE1140:15-16).

To drive his point home, Zargari's counsel invited Officer King to impermissibly vouch for the government's theory of fraud. *See United States v. Young*, 470 U.S. 1, 8-9 (1985) (neither the government nor the defense may express

a personal belief in the defendant's guilt or innocence or offer personal views of the evidence). In direct conflict with Takhalov, Zargari's counsel suggested that Takhalov and the other defendants were indeed engaged in a fraud, but that Zargari was unaware of it:

> Q. Okay. Now, when you got involved in this investigation and you saw or met these so-called B-girls, you said that you were investigating them and then, after awhile, you were investigating the principals, correct?
>
> A. Yes, sir.
>
> Q. And once you saw what the girls were doing, you had certain preconceived notions about the bottle club business; isn't that correct?
>
> A. From what I learned, yes, sir.
>
> Q. Okay. And you believed through your investigation that the principals were conducting a fraud, isn't that right?
>
> A. Yes, sir.
>
> Q. So when you went to Club Tangia to work for Albert Takhalov, you assumed that everyone connected with Tangia was involved in fraudulent activity?
>
> A. Well, there was a meeting between me, Albert Takhalov and Fady. Mr. Zargari was not present during that meeting.
>
> Q. Okay.
>
> A. And we discussed what would be -- how things would be run in Tangia.

DE1139:159.

> Q. When the new girls came to the club was it [Takhalov] and Fady that gave them the tour of the club, showed them where everything was, you know...gave them some direction?
>
> A. Yes, sir.

DE1139:203.

> Q. Now, do you remember...that you had conversations with Anna Kilimatova [one of the B-girls] - - and this is March 27, 2011, - - where she was talking about Sammy [Zargari] where she said to you, "Sammy is not my boss, that Sammy cannot tell me what to do. I will tell [Takhalov] about Sammy. I only take directions from [Takhalov]...?
>
> A. Yes, sir.

DE1140:31.

> Q. Do you agree that Albert Takhalov told you he was handling the finances at Club Tangia?
>
> A. I don't know the specifics of the finance for the club but I do know that Albert Takhalov handled the charge backs at Tangia.

DE1140:40.

The assault continued during cross-examination of Takhalov and during Zagari's own direct examination. DE1151:155-156, 162-165, 168-169, 173,179,181; DE1153:15,24,35,39,41, 43-47, 49-50, 75, 80-82, 89. Zargari's assault of Takhalov was so effective that, during the prosecutor's closing argument, the prosecutor twice reminded the jurors about Zargari's testimony that Takhalov was "the boss of everyone" and had knowledge of everything that went on in the clubs. DE1154:77-79.

Zargari's closing argument echoed that Takhalov was "the boss" at Club Tangia, the B-girls operated under Takhalov's "system," and that Takhalov was among the "unscrupulous" people who "didn't do things the right way." DE1155: 7-8, 14, 17, 20-23, 27,31,35, 37, 39-40. Here are some of the highlights (emphasis added):

> She [B-girl Anna Kilimatova] ... said she was a manager at Tangia Club, not Sammy's Tangia Restaurant and Lounge. ***She was hired by Albert Takhalov***, not Sammy; that ***Takhalov ran the club***....
>
> * * *
>
> ***And [Takhalov] told her*** if there is a problem do not deal with Sammy, deal with me, that Sammy had no authority at Tangia Club.

DE1155:14.

> The Indictment talks about the Simchuk clubs and ***the Takhalov clubs,*** not the Zargari clubs.

DE1155:17.

> ***[Takhalov] was the boss. It was [Takhalov]'s club. It was [Takhalov]'s system***....

DE1155:22.

> If you recall my cross-examination of Luis King, he basically affirmed the fact that Sammy did not run Tangia Club. ***[Takhalov] did***.
>
> * * *
>
> ***[Takhalov] was totally in charge*** of Tangia Club.

DE1155:23.

> They [law enforcement officials] let it go on because Luis King believed that ***anything that was connected to*** Mr. Rasner and ***Mr. Takhalov, you know, was fraudulent***....

DE1155:27.

> He [Zargari] told Mr. Porter I was scammed by Fady, the girls and the FBI, and he says that because there was ***a preconceived notion that the Takhalov clubs were fraudulent*** and they allowed Sammy to be tangled up in this ***web of so-called alleged deceit***.

DE1155:35.

> The problem was that the people that he [Zargari] was involved in business with, ***some of them didn't do things the right way***.

DE1155:37.

> He [Zargari] said, I didn't willfully defraud any customer who was at Tangia Club. Tangia Club wasn't even mine. It was Ciao Miami. ***It was Takhalov*** and Rasner.

DE1155:39-40.

> He didn't profit from the business deal with Tangia. He didn't willfully conspire with anyone listed in this Indictment. He didn't intend to defraud anybody. He didn't knowingly personally defraud any person. ***He had a good faith belief that the parties he had contracted with were going to conduct their business within the law***.
>
> Lifetime investment, lifetime work, sweat equity, everything down the drain ***because of unscrupulous business partners*** and the FBI who thought that Sammy was in business with them. Well, he was in business with them on paper pursuant to the contracts, but not in Sammy's mind and not within his heart to do anything wrong.

DE1155:40.

Zargari's strategy was to build credibility with the jury by embracing the government's view that the co-defendants were engaged in fraud, then to distinguish Zargari. Thus, Zagari's counsel joined the government in condemning the business model of paying B-girls to lure men into the clubs, while appellants' attorneys challenged the government's ***legal*** theory. In Zagari's counsel, the government had a *de facto amicus curiae* seated at the defense table.

Moreover, Zargari's counsel was untethered from the constitutional and ethical limitations imposed upon the prosecutor, an advantage he masterfully exploited by making reference to Takhalov's nationality as a Russian while making thinly veiled references to Russian organized crime.

Rule 14(a) of the Federal Rules of Criminal Procedure provides that "[i]f the joinder of . . . defendants . . . for trial appears to prejudice a defendant . . ., the court may sever the defendants' trials, or provide any other relief that justice requires." In *Zafiro v. United States,* 506 U.S. 534 (1993), the Supreme Court declined to establish a bright line rule for when a severance should be granted. Rather, when presented with antagonistic defenses, "severance should be granted where there is a serious risk that a joint trial would compromise a specific right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at

539*; see also United States v. Mayfield*, 189 F.3d 895, 904 (9th Cir. 1999) (reversing conviction based upon antagonistic defenses and noting that "[t]he holding in *Zafiro* simply rejects a *per se* rule requiring reversal based solely upon mutual antagonistic defenses and acknowledges a range of circumstances in which . . . severance may be required because the inconsistent defenses suggest a heightened risk of prejudice").

In his concurring opinion in *Zafiro*, Justice Stevens recognized that there are two dangers presented by a joint trial of defendants with antagonistic defenses. First, joinder in such a situation may operate to reduce the prosecution's burden of proof by introducing "what is in effect a second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary . . . [which] is particularly troublesome because defense counsel are not always held to the limitations and standards imposed on the government prosecutor." *Zafiro*, 506 U.S. at 544 and n.3 (Stevens, J., concurring). Indeed, this court has recognized the danger of having an attorney for an interested party act as the prosecutor in a criminal proceeding. *See In re Yanks,* 882 F.2d 497-98 (11th Cir. 1989) (reversing contempt conviction in a bankruptcy proceeding because district judge appointed the trustee to prosecute the contempt charge). So too has the Supreme Court. *See Young v. U.S. ex rel. Vuitton et Fils, S.A.,* 481 U.S. 787, 807, 809 (1987) ("In a case where a prosecutor represents an interested party, however, the ethics of the legal profession require that an interest

other than the Government's be taken into account. Given this inherent conflict in roles . . . counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.").

Second, joinder may invite a jury to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant. *Zafiro*, 506 U.S. at 544 (Stevens, J., concurring) *Id*. Justice Stevens noted that, "where one defendant is found not guilty, it becomes likely under these circumstances that the conviction of the losing defendant is more a result of his co-defendant's success in defending himself than it is a product of the State's satisfaction of its constitutional duty to prove the accused guilty beyond a reasonable doubt." *Id*. at 544 n. 4. Although the second risk can be minimized by instructions insisting on separate consideration of the evidence as to each co-defendant, "the danger will remain relevant to the prejudice inquiry in cases where, as here, the defendant who acts as the second prosecutor is found not guilty." *Id*. at 544.

The dangers of a joint trial came to fruition here. Counsel for Zargari was able to engage in a not-so-subtle, ethnic-based, character assassination. He joined forces with the United States government in condemning the self described "unscrupulous," if not outright fraudulent, business practices of the Russian appellants.

The success of this strategy can be measured by the verdict: The jury found Zargari not guilty of all charged crimes, but convicted appellants of many. The denial of severance was devastatingly prejudicial and compromised the fairness of the trial.

For more about improper vouching and ethnic-based character attacks, Takhalov adopts the arguments made in the brief of co-appellant Feldman.

IV.

THE DISTRICT COURT ERRED IN COMPUTING THE SENTENCING GUIDELINES AND IMPOSING RESTITUTION

Takhalov adopts the sentencing and restitution arguments made in the briefs of his co-appellants. Only Takhalov received 2-level upward adjustments for "sophisticated means" under USSG § 2B1.1(b)(10), and "vulnerable victim" USSG § 3A1.1(b)(1), to which he objected, DE1161:7, so he adds the following argument:

The scheme to entice men to spend extravagantly in the hope of seducing attractive woman was far from "sophisticated." Indeed, it was quite primitive, capitalizing on the men's prurient interests. The mere use of a company, IEVA Marketing, to . . . hide payment[s] to the B-girls," DE1063-1:4 (Addendum to PSR), did not make the scheme "especially complex or especially intricate," USSG § 2B1.1(b)(10) comment. (n.8), particularly given that the gravamen of the fraud was the very concealment of those payments. *See United States v. Valdez*, 726 F.3d 684,

695 (5th Cir. 2013) (reviewing for clear error and reversing enhancement where defendant concealed Medicare fraud by depositing proceeds into personal investment accounts rather than business operating account); *United States v. Hance*, 501 F.3d 900, 909 (8th Cir. 2007) (reviewing de novo and reversing enhancement where defendant rented post-office box in fictitious name and solicited 234,000 people nationwide for "wealth building program" using false testimonials); *United States v. Rice*, 52 F.3d 843, 844-45, 848-49 (10th Cir. 1995) (reviewing under due-deference standard and reversing enhancement where defendant, a certified public accountant, utilized corporate structures and false withholding reports to procure fraudulent tax refunds).

Nor should a "vulnerable victim" enhancement have applied to men-about-town spending lavishly on champagne, fantasizing that they might woo a woman (or two) into the bedroom. The Superseding Indictment alleged a scheme that encouraged ordinary men to pay for and consume alcohol as a means of defrauding. "A victim's consumption of alcohol is not, by itself, enough to qualify a victim as vulnerable." *United States v. Heath*, 2010 WL 145476 (N.D. Iowa 2010), *aff'd*, 624 F.3d 884 (8th Cir. 2010).

The vulnerable victim enhancement is meant to address the characteristics of the victims, where the "defendant knows or should have known of the victim's

unusual vulnerability." USSG § 3A1.1(b)(1) comment. (n.2). "This enhancement requires a fact-based explanation of why advanced age or some other characteristic made one or more victims 'unusually vulnerable' to the offense conduct." *United States v. Vega-Iturrino*, 565 F.3d 430, 434 (8th Cir. 2009) (citation omitted). Where a fraud scheme is directed at the general public, the vulnerable victim enhancement does not typically apply. *United States v. Arguedas*, 86 F.3d 1054, 1058 (11th Cir. 1996).

Here, the so-called victims were not recovering alcoholics or persons with a low tolerance for drink, just ordinary men with active libidos and wild imaginations – grown men, drinking and partying with young women, dreaming it might lead to something more intimate. No doubt, most of the men hoped that plying the women with increasing amounts of champagne would make the women more receptive, if not more "vulnerable," to the men's advances. Turns out it did not, but if it had, then surely the men would not have been victims at all.

CONCLUSION

For these reasons and those advanced in the briefs of Pavlenko and Feldman, the convictions and sentence of Albert Takhalov should be reversed.

Respectfully submitted,

s/ Howard Srebnick
HOWARD SREBNICK, ESQ.
Florida Bar No. 919063
Black, Srebnick, Kornspan & Stumpf, P.A.
201 S. Biscayne Blvd., Suite 1300
Miami, Florida 33131
Telephone: 305/371-6421
hsrebnick@royblack.com
Counsel for Albert Takhalov

s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQ.
Florida Bar No. 342459
Marcia J. Silvers, P.A.
770 S. Dixie Highway, Ste. 113
Coral Gables, Florida 33146
Telephone: 305/774-1544
marcia@marciasilvers.com
Counsel for Albert Takhalov

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 13,751 words.

s/ Howard Srebnick
Howard Srebnick

CERTIFICATE OF SERVICE

I HEREBY certify that on the 19th day of September 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF; the ECF system will automatically serve counsel of record Assistant U.S. Attorney John C. Shipley at john.shipley@usdoj.gov.

s/ Howard Srebnick
Howard Srebnick