NO. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

STANISLAV PAVLENKO,

Defendant/appellant.

REPLY BRIEF OF APPELLANT STANISLAV PAVLENKO

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Stanislav Pavlenko
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

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Ferrer, Wifredo A.

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Levin, Albert Zachary

Malman, Myles H.

Martinez, Hon. Jose E.

McAliley, Hon. Chris

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Scola, Hon. Robert N.

Shipley, John C.

Silvers, Marcia

Srebnick, Howard

Takhalov, Albert

Thakur, Michael Eric

Torres, Hon. Edwin G.

Vereen, Roderick Darrell

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REPLY

In support of his challenge to the theory of prosecution and inadequacy of the jury instructions, Pavlenko's initial brief cited settled Second Circuit law that misrepresentations inducing a customer to enter into a transaction are not "material," unless "the false representations are directed to the quality, adequacy or price of the goods themselves." Br:23. It is not enough that "the defendants intended to deceive their customers" to induce them to enter into a transaction the customers might choose to avoid. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (1970). The gravamen of the crime is "withholding or misrepresenting *material* facts." *Id.* (emphasis added)*; accord United States v. Starr*, 816 F.2d 94, 98-99 (2d Cir. 1987).

The government argues that the Second Circuit decisions conflict with *United States v. Svete*, 556 F.3d 1157, 1169 (11th Cir. 2009) (*en banc*). But *Svete* addressed a different challenge to the reach of federal fraud statutes: whether the government must establish that the misrepresentation was designed to deceive a person of ordinary prudence, as opposed to a gullible victim. In *Svete*, an investment scam involving viatical settlements, the defendants made oral misrepresentations to investors regarding the expected rate of return on the investment. *Id*. at 1160 ("sales agents [conveyed] literature that contained false statements about the life

expectancies of viators, the status of the life insurance contracts, and the risks associated with the investments"). It was undisputed that the oral misrepresentations were material to the value of the investment. Instead, the defendants claimed that the oral misrepresentations were not material because "[i]nvestors who purchased interests in the viatical settlements were required to sign contracts that acknowledged that the investors had not relied on any representations other than those contained in the [written] contracts;" that "a person of ordinary prudence and sophistication would have read the contracts and ignored the [oral] false statements." *Id*. at 1161. They complained they were denied a jury instruction that would require proof that "a reasonable person of average prudence and comprehension would have acted on the representation made by the defendant under consideration." *Id*.

This Court held that it was no defense that "ordinary prudence would have counseled the victims to rely on the documents that they signed, not the misrepresentations of salesmen." *Id.* at 1166. The *Svete* misrepresentations undeniably related to the value of the investment; there was no claim that the *content* of the misrepresentations were immaterial to the value of the transaction, only that a reasonable investor would have ignored the misrepresentations.

The Second Circuit cases, in contrast to *Svete*, addressed the materiality of the *content* of the misrepresentation—not the reasonableness of reliance by a prudent

customer. In *Regent*, the defendants *stipulated* that their scheme was designed to deceive persons of ordinary prudence. 421 F.2d at 1181. Thus, *Svete* is not in conflict with the Second Circuit line of cases, as it did not address the same elements of the crime. *See Svete*, 556 F.3d at 1170 (Edmonson, C.J., concurring in the result) ("Different elements, including materiality, must also be proved."). If, however, this Court were to adopt the government's view, then there would be a circuit conflict.

I. FUNDAMENTAL INSTRUCTIONAL ERRORS WARRANT A NEW TRIAL.

A. Denial of Defense-Theory Instructions as to the Wire Fraud Statute's Limits

Proposed Jury Instructions

> "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."

Pavlenko requested these instructions and others alike. DE:921. None were given.

The government disputes the need for the requested instructions that a scheme to have alluring women induce men through aggressive flirtation to buy alcohol without disclosing the financial relationship between the women and the bar is not sufficient to constitute fraud. The government erroneously claims it did not describe the scheme in that fashion, in the indictment or at trial.[1] The record refutes the government's position: The Superseding Indictment describes the scheme "to lure victim credit card holders . . . by deceiving the victim credit card holders about the B-girls' connection to the clubs. . . ." DE953:5-6, 23. At trial, the prosecution elicited testimony describing the scheme in that fashion. *See* DE:1121:189; DE:1123:16-18.

The government is also incorrect in asserting that there is no legal restriction on the type or subject matter of conduct that may qualify as a scheme to defraud. Courts "have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which ***do not*** violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)

[1] The government relies on a lone snippet of testimony bearing no relevance to the appropriateness of the requested theory of defense instruction, citing testimony of Alan Weitzman, a customer at the Tangia Club—a club with which Pavlenko had no involvement—indicating that he was not interested in engaging in sex and was at the Club to accompany his nephew.

(emphasis added); *accord United States v. Huff*, No. S2 12 CR 750 NRB, 2015 WL 463770, at *7 (S.D.N.Y. Feb. 4, 2015) (reaffirming vitality of *Regent* and *Starr* holdings linking materiality to the value or benefit of the exchange or bargain).

A plan or undertaking clearly cannot constitute fraud unless it is *material* to the *transaction*. Further, a commercial practice does not come within the statutory definition of financial fraud in the absence of a false statement concerning the transaction—a scheme to exchange a dollar for four quarters is not fraud. *See Marlborough Holding Co. v. Azimut–Benetti, Spa, Platinum Yacht Collection No. Two, Inc.*, 505 Fed.Appx. 899, 906 (11th Cir. 2013) (stressing importance of not merging statutory limitations on unfair trade practices with fraud actions, in light of authority distinguishing actions premised on fraud from those based on statutory liability). Nor does a fraud result when a sales promoter backs out of an immoral or other offer of sexual favors. It is unenforceable, as a matter of public policy, and ***no one*** can rely on it and is legally immaterial. Even in the extreme theory that a sexual relationship was the only object of the partying customers, failing to follow through with sex does not make the sale of alcohol fraud.

Pavlenko's theory was that whatever sexually- or companionship-tinged strategem was used was *immaterial* to the quality and cost of the drinks the customer bought and consumed while at the bar. Because evidence in the record—including

the defendant's own testimony substantiates this theory, the denial of the defense instruction was improper.

The government does not identify any authority imposing on a bar employee a duty to disclose a financial arrangement with the bar. Florida Statute § 562.131 prohibits solicitation of drinks for the bar *employee*; it does not ban any customer from buying drinks for himself, nor does it impose a duty on a bar employee to divulge his or her employment status to a customer, or indicate that failure to do so is fraudulent or otherwise illegal, or insulate a customer from the consequences of his own drinking. *See also* Fla. Stat. § 768.36.[2]

The government mistakenly suggests that the pattern, good-faith instruction was an adequate substitute for the requested defense theory instructions. The good-faith instruction did not capture the defense theory at all. The district court instructed the jury that the good-fath defense was not applicable if "the defendant or other coconspirator, with the defendant's knowledge, knowingly made false or fraudulent representations to others with the *specific intent to deceive* them." DE1154:38 (emphasis added). The Second Circuit cases, by contrast, permit an acquittal *even if* the defendants had the specific intent to deceive – so long as the deception did not relate to a material matter. *E.g.*, *Regent Office Supply*, 421 F.2d at

[2] In appellant's initial brief, due to a scrivener's error, the citation for this statutory section (§ 768.36) inadvertently appeared as § 786.36.

1182 (reversing conviction even though "the defendants intended to deceive their customers"). The instructional error requires reversal of all fraud-related counts.

Proposed Jury Instruction

> "The law does not excuse a patron from his obligation to pay for beverages/goods just because he became intoxicated voluntarily."

Pavlenko requested this instruction and others alike. DE921. None were given. The government concedes it cannot claim that bar patrons were excused from paying for their drinks because they became intoxicated. GB:56. This critical admission reflects *precisely* what Pavlenko argued at trial and confirms error in denying the requested theory of defense instructions. The federal fraud statutes cannot be construed so broadly as to overcome substantive law in Florida that specifically precludes liability where loss is attributable to the customer's voluntary intoxication. *See* Fla. Stat. § 768.36 (precluding a finding of civil injury where drunkenness was the principal cause of the occurrence of the injury). Moreover, in view of Florida substantive law, of which the jury was not apprised, to contend otherwise raises an issue of constitutional dimension. *See* U.S. Const. amend X (reserving to the states all powers not delegated to the federal government); *United States v. Locke*, 529 U.S. 89, 108 (2000) (under federal structure, states retain vast residual powers).

The government's contention that there was substantial evidence that patrons drank unknowingly or without their consent distorts the record; nor, even assuming

such a *possible* interpretation of evidence as to any of the bars, would that support the denial of Pavlenko's theory of defense instruction where there was evidence in the record, including the defendant's own testimony, that customers at Caviar Bar—including repeat customers—drank voluntarily.

The government's claim of adulterated beverages finds no support in the record pertaining to Caviar Bar, nor was evidence adduced that Pavlenko had any awareness of, or participation in, the adulteration of drinks or assisted drinking imposed on any customers either there or at different bars opened, run, and invested in entirely by other individuals. DE:1126:198-99 (Simchuk: while Caviar Bar was open, he and Pavlenko fell out, Pavlenko told him he no longer wanted to do business with him, they ceased all communication, and Pavlenko had no involvement with Stars or VIP); *see also*, *e.g.,* DE:1121:182, 1123:33; DE:1127:209; DE:1129:23; DE:1151:226.

The speculative reeds of evidence invoked by the government do not substantiate the government's portrayal of the record—which instead establishes that Caviar Bar customers routinely drank of their own volition—nor do they support depriving the defendant of a theory of a defense instruction that the government concedes is legally proper and which has factual support in the record, including from testimony of the defendant. The fact that the government finds testimonial shreds to support a theory opposing the defendant's evidence does not support denial of the defendant's instruction. *United States v. Ruiz,* 59 F.3d 1151, 1154 (11th Cir. 1995)

(defendant entitled to theory of defense instruction if there is any evidence in the record to support the defense, *viewed in the light most favorable to the defendant*).

The deprivation of a theory of defense instruction was significantly prejudicial, where—as to Pavlenko—the government rested on fragments of anecdotal recollections offered by biased and impeached witnesses seeking sentencing and other benefits from the government, *see, e.g.*, DE:1123:59-60, 1124:10-13 (Vinogradova); the conduct at issue arose in the gray area of how local bars and their customers relate; and the jury rejected all fraud charges as to one customer and rendered inconsistent verdicts as to others, reflecting that a clarifying theory of defense instruction would likely have resulted in a full acquittal.

B. Denial of a Multiple Conspiracies Instruction

The government is flatly wrong in claiming that Pavlenko's challenge to the failure to afford a pattern multiple conspiracies instruction is subject to plain error review. At trial, the district court explicitly deemed any request or objection by counsel for one defendant to apply to every other defendant. DE:1121:28. Pavlenko did not opt out from the request for a multiple conspiracies instruction made by counsel for codefendant Feldman, nor did the district court in any way suggest that Pavlenko or Takhalov had opted out. The district court, in denying defense instructional requests, specifically advised the parties that all previous objections were preserved. D.E.1152:293-94.

The government's brief appears to have reversed the government's prior position that the evidence at trial supported a finding of numerous separate conspiracies. *See* DE:1152:288 (prosecutor stating that "in this case there are *six different conspiracies*")(emphasis added). Thus, under *United States v. Orr*, 825 F.2d 1537, 1542-43 (11th Cir. 1987)(cited by the government), reversal for failing to grant a multiple conspiracies instruction is appropriate because the record reflects a genuine factual basis for a finding of multiple conspiracies. Given the substantial trial evidence that Pavlenko's involvement was limited to Caviar Bar and that bar operations materially changed when he ended his involvement, denial of the pattern multiple conspiracies instruction was not remedied by an instruction to consider each count separately. *United States v. Calderon*, 127 F.3d 1314 (11th Cir. 1997), cited by the government, does not hold to the contrary. *Id.* at 1328 (multiple conspiracy instruction is required where jury could reasonably conclude defendant was involved in separate unrelated conspiracy).

The government's statement that "[t]here is no dispute that Pavlenko never legally withdrew from the conspiracy he formed with Simchuk to open the sham clubs," GB:51, is inaccurate. Pavlenko did not agree to open "clubs" (plural), much less a "sham" club. His theory at trial was, first, that he was not part of any criminal conspiracy, and, secondly, any agreement on his part ended when he closed Caviar Bar and terminated his relationship with Simchuk, his partner at the Bar. The

indictment's notion that people who have a falling out and go on to other business ventures are—as a matter of law—tied to each other indefinitely in the sense of shared criminal responsibility was not one that was borne out by evidence or analysis in this case. *See, e.g.,* DE:1126:198-99 (Simchuk: Pavlenko had no involvement at all in, or responsibility for, later bars Simchuk opened); DE:1123:33 (Vinogradova: no dealings with Pavlenko at bars opened after Caviar Bar closed). The modus operandi theory of a never-ending conspiracy—under which the government sought to make Pavlenko liable for whatever business practices Simchuk sought to engage in after the permanent dissolution of their ties—deserved to be the subject of jury resolution with a multiple conspiracy instruction.

The government invokes, inaptly, arguments about whether the evidence was sufficient to support a conspiracy conviction. However, a defendant's entitlement to a theory of defense instruction does not hinge on evidentiary sufficiency viewed in the light most favorable to the government, but, instead, on *whether there is any evidence in the record to support the instruction, viewed in the light most favorable to the defendant*.

Evidence was presented that the business model at Caviar was markedly different from those at the later-opened bars, as to which there were allegations of adulterated, lesser-quality drinks than indicated on the menus and forging customers' signatures, DE:1131:147-48 (Club Moreno); DE:1124:144, 1134:138 (Steel Toast,

Tangia). No such evidence was presented with respect to Caviar Bar, which operated on a business model involving high-quality champagne and other gourmet items sold at *market prices* which were clearly indicated on menus *at each table*. DE:1121:179 (Vinogradova: at Caviar Bar, "a menu was on each table").

The government's overexpansive view of criminal liability and merging of different alleged conspiracies prejudicially affected the jury's consideration of the evidence. Pavlenko's alleged awareness of Takhalov or others who worked at or were otherwise involved in Stars and VIP does not place him in such a conspiracy at those bars, both of which, according to evidence presented at trial, were opened and run by others after Caviar Bar had closed and supposedly involved sales and service patterns as to the quality and prices of alcohol sold that differed markedly from the business model at Caviar Bar. There was no evidence that Pavlenko knew anything, much less details, about the alcohol sales at Stars or VIP, much less that he was involved in any activities at either of those bars.

The government's assertion that Pavlenko's role was essential to the ensuing bars is belied by the record, which shows, first, that the business models at Caviar and the subsequent clubs were materially different, and, second, that it was Simchuk—*not* Pavlenko—who brought his various business practices from overseas to South Florida, enlisting and hiring B-girls who had previously worked with him in Eastern Europe, setting alcohol-sales standards at Stars and VIP that were critically below

those at Caviar Bar, and controlling whether the operations at later bars violated any laws. DE:1125:190; DE:1127:209; DE:1129:23. Pavlenko was a merely disgusted investor in Caviar Bar who got out. In any event, none of these government claims support the refusal to grant a requested multiple conspiracies instruction.

II. THE INDICTMENT FAILS TO STATE AN OFFENSE OR INVOKE FEDERAL JURISDICTION.

The government offers no principled basis for importing federal fraud into a quintessentially local activity of carousing at bars. The indictment allegations, considered singly or cumulatively, were insufficient to convert a municipal matter relating to bar patronage into federal fraud. *See Bond v. United States*, 131 S.Ct. 2355, 2366 (2011) (principles of limited national powers and state sovereignty are intertwined). The government argues that state regulation of at least one aspect of the B-girls' conduct does not immunize the case from federal prosecution, but ignores Florida statutory law *barring* a finding of civil injury attributable to voluntary drunkenness, Fla. Stat. § 768.36. That Pavlenko contested, in a pre-litigation context, a customer's efforts not to pay a bill in this circumstance is thus encouraged by Florida law. Nor does the B-girl statute provide an independent basis to support a prosecution for fraud, where that statute does not impose a duty to disclose anything, but merely proscribes a bar employee's begging drinks for herself.

The government argues that credit card companies were purported victims. At trial, however, the government never suggested that Pavlenko, or any other conspirator, sought to cheat a credit card company. To the contrary, the government conceded that Pavlenko never sought to have the companies lose as much as a nickel–nor did they. Pavlenko did not at any time intend to damage his standing with any credit card company, and the government's assertion on appeal to the contrary is unsupportable.

As discussed *supra* at pages 1-2, this Court's ruling in *United States v. Svete*, 556 F.3d at 1169, does not eliminate the government's burden to prove the essential element of materiality—that the misrepresentation was material to the value of the item sold or offered for sale, nor does it address the all-important distinction between deceptive sales-enticement practices and federal fraud. *See, e.g.*, *United States v. Shellef*, 507 F.3d at 108. In this case, B-girls' non-disclosure of their connection to Caviar Bar was not material to the champagne purchased by customers, nor did the government furnish substantial proof of any other material misrepresentation attributable to the defendant.

III. THE DISTRICT COURT ERRED BY DENYING MOTIONS FOR SEVERANCE.

The government fails to address key features of the Caviar Bar that differentiate it significantly from clubs with which Pavlenko had no involvement and

which arose after Pavlenko ended any business dealings with Simchuk. The government's mischaracterization of the nature of the operation at Caviar Bar and blurring of the differences in what occurred at the bars and what Pavlenko knew or could have known heightens the showing of prejudicial misjoinder under Fed. R. Crim. P. 8. Contrary to the government's efforts to meld the diverse bars and their respective employees, owners, investors, and managers into an amorphous melange of unvarying improprieties or immoralities, the record demonstrates that Caviar Bar—the only bar Pavlenko was tied to–was unlike the rest. Caviar Bar did not utilize strategems such as bouncers, texting by B-girls, forging of signatures, and misrepresentations as to quantity, price, and type of alcohol. The government does not dispute that Pavlenko furnished Caviar Bar richly, kept its alcohol licenses and other required documentation fully compliant, and paid all bar debts, including after it closed. Whatever impropriety the government attributes to Caviar Bar with respect to paying women to drum up customers does not extend to the misleading as to the quality, identity, and price of champagne and other luxury items sold. This distinguishes the Caviar Bar from allegations as to other bars, reflecting both improper joinder and improper denial of severance.

The improper joinder of charges resulted in the prejudicial spillover of evidence of fraud with respect to items purchased at other bars. This prejudice was heightened by testimony and taped conversations of undercover agent, Luis King,

based on his observations at bars in which Pavlenko had no involvement, and by inflammatory, speculative evidence of violence and witness intimidation involving Russian organized crime that would never be admissible had Pavlenko been granted a separate trial.[3] The government's contention that King's conversations with individuals other than Pavlenko regarding Stars and VIP were relevant because Pavlenko was charged with conspiracy as to those clubs does not address the defendant's challenge to such a charge as improperly joined in the first place; nor does it address the dearth of proof that Pavlenko was connected with any bar opened after Caviar Bar's closing, including with respect to investment, ownership, or operation.

The court's standard instructions to the jury as to the presumption of innocence and the consideration of evidence as to each defendant separately were inadequate to remedy the substantial prejudice from denial of a severance.

IV. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

A. Wire Fraud Conspiracy and Substantive Counts

Apart from Pavlenko's investment in one bar for a brief period of time, the government's answer brief presents a tangled set of undifferentiated allegations

[3] The government's attribution to co-defendant's counsel the eliciting of testimony as to Simchuk's involvement in organized crime only confirms the prejudice arising from the failure to afford Pavlenko a separate trial.

against the defendants, merging facts as to "Russian" bars to create an overall conspiratorial image that the investigation of defendant Pavlenko's activities and the evidence adduced at trial did not support. Knowledge that customers were being drawn to the bar through the efforts of Eastern European women, who, unbeknownst to the customers, were being paid is inadequate to show Pavlenko was aware of a fraud scheme, where such activity does not amount to fraud within the meaning of the statute charged and where there was no showing of any other fraudulent wrongdoing with respect to the items sold at Caviar Bar, let alone that he knew of any there. Testimony as to a one-time "attempt" by an unidentified individual to pour a drink into a customer's mouth, DE:1129:129, does not show fraud, nor is doing so a material misrepresentation of anything. The government's suggestion that B-girls' pouring out of drinks—even if there were any substantial proof of such conduct at Caviar Bar, which there is not—establishes wire fraud does not comport with the indictment, which alleges a scheme to conceal with respect B-girls' employee status.

The government's generalized assertion that conspirators misrepresented the price, quantity, and type of alcohol is wholly incorrect as to Pavlenko. In *United States v. Rodriguez*, 732 F.3d 1299, 1304 (11th Cir. 2013), the defendant and his sales associates made extensive, specific transaction-related promises to customers, all of

which were unfounded and unfulfilled. Here, by contrast, there was no evidence that alcohol sold at Caviar Bar was anything other than as indicated on the menu.

Neither did the government establish any misrepresentation by Pavlenko regarding what customers owed. Pavlenko's dispute as to a customer's attempt to avoid paying a bill is encouraged by Florida law in this circumstance. In all of his dealings with credit companies, even the district court stated that Pavlenko's statement that he did not intend to send false information was not perjurious. They were not—to Pavlenko's knowledge—fraudulent charges, but were instead disputed charges, with which every business deals.

With respect to the email to AmEx, the district court itself concluded that it was not false, nor has the government identified any statement in the communication that was materially inaccurate with respect to the customer's debt obligation. Pavlenko had no obligation to explain to AmEx his business model or detail the nature of his promoters. Evidence of material impropriety regarding the type, quality or price of alcohol occurring at bars that were opened after Pavlenko closed Caviar Bar and severed all ties with Simchuk, and as to which there was no substantial proof of any involvement on his part at all, is patently insufficient to establish Pavlenko's culpability for the fraud conspiracy and substantive wire fraud charges of which he was convicted.

B. Promotional Money Laundering Theory

The government does not articulate any evidence showing that at the time Pavlenko allegedly gave funds to Simchuk in 2009, he was aware of wrongful conduct, nor that he could have known of improprieties, where any misconduct at diverse bars neither occurred nor came to light until months subsequently; and where, further, the government did not establish Pavlenko's participation in a scheme to defraud at Caviar Bar. Neither does the government address the novel extension of its promotional money laundering theory to the mere use of credit cards, contrary to the limits of the money laundering statute.

The government's reliance on *Regalado-Cuellar v. United States*, 553 U.S. 550 (2008), for its contention that § 1956(a)(2)(A) does not require that the funds be sourced from any criminal activity is based on an incomplete footnote excerpt that § 1956(a)(2)(A) "punishes the mere transportation of lawfully-derived proceeds." *Id.* at 561 n.3, 128 S.Ct. at 2001 n.3. The full quote, however, recognizes that § 1956(a)(2)(A) "imposes the additional requirement ... that the defendant must have 'inten[ded] to promote the carrying on of specified unlawful activity.'" *Id.* The lack of substantial proof of Pavlenko's participation in a fraud scheme—much less his lack of knowledge that funds expended in 2009 would be used for such offense—invalidates the government's promotional theory of conviction. Contrary to the government, evidence of laundering was insubstantial.

V. SENTENCING COURT ERRED IN APPLYING GUIDELINES AND CALCULATING RESTITUTION.

A. Loss Calculation legally and factually unfounded

The government offers no specific, reliable evidence that all Caviar Bar proceeds were derived from fraud. The government does not refute that of the 168 Caviar Bar customers identified, only three of them (less than 2% of the total) ever claimed to be dissatisfied in any way; that the jury substantially discounted the disputed claims of two of those three individuals and entirely rejected the claim of the third such customer; and that not a single customer ever requested restitution for any charge made by the bar. The government's theory that all of Caviar Bar's business was fraudulent is at odds with evidence that: customers returned there, DE:1123:96-97; the alcohol and food served was *exactly* as listed on the menu; the furnishings, decor, champagne, caviar, and other items were genuinely luxurious; all requisite licenses and insurance were fully compliant; and all Caviar Bar debts were paid by Pavlenko, despite the fact that Simchuk stole the assets Pavlenko had invested in the bar—such that the traditional indicia of a business that was wholly fraudulent were utterly lacking.

The adoption of a loss calculation in *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996), based on the difference between the paid amount and the value of goods or services, is directly pertinent to the appropriate calculation of loss in this

case. *Id.* at 1308 (clients of lawyer who did not disclose his disbarment suffered no tangible loss where services provided were not deficient). Unlike cases cited by the government, goods and services provided to the Caviar Bar customers who ordered them were not "costs" of the fraud, but reflect actual value received by the customers. The costs referenced in *United States v. Pelle*, 263 Fed.Appx. 833, 840 (11th Cir. 2008), and cases cited therein, were operational expenses that resulted in no benefit to any victim. By contrast, the items and services available at Caviar Bar provided actual value to the customers, who consumed luxury champagne amid a well-appointed, intimate ambience. DE:144:11 (Caviar Bar customer Michalak: "It was a nice place. There were couches and curtains and paintings on the wall and that sort of thing, but it was much more intimate than either of the two places we had been.").

United States v. Faust, 456 F.3d 1342, 1348 (11th Cir. 2006), in which acquitted conduct was deemed appropriate for consideration in determining the advisory sentencing guidelines, did not involve the large disparity at issue here resulting from the acceptance of facts specifically rejected by the jury's verdict. Given the near-total lack of complaints by customers with respect to the sales and service at Caviar Bar, as well as supervening authority recognizing that sentencing calculations are subject to constitutional limits, *see Peugh v. United States*, 133 S.Ct. 2072, 2083-84 (2013); *Alleyne v. United States*, 133 S.Ct. 2151, 2159-62 (2013), a remand for resentencing pursuant to a theory of actual loss is warranted.

B. Erroneous application of money laundering guidelines and enhancements, rather than fraud guideline as stated in PSI

The government concedes that it failed to file "a formal objection" to the PSI's recommended use of the fraud guideline, U.S.S.G. § 2B1.1, contrary to the requirement of Fed. R. Crim. P. 32. GB:76. In fact, the government failed to file *any* objection at all. Moreover, the government specifically waived objections and averred at the outset of the sentencing hearing that it had no objections at all to the Revised PSI, which *reiterated* the recommended use of the fraud guideline. DE:1219:5 ("[Court]: [D]oes the Government have any objections to the revised PSI? [Prosecutor:]: *No, Your Honor*.")(emphasis added).[4]

The government's violation of Fed. R. Crim. P. 32 was not harmless. The contention that Pavlenko was placed on notice of the government's position by a numerical notation in a chart contained in the government's sentencing memorandum,

[4] The government is incorrect in claiming that "probation agreed" the money laundering guideline should be used. GB:76. To the contrary, the PSI and Revised PSI state that the fraud guideline should be used. Immediately prior to the sentencing hearing, a probation officer who was not assigned to the case and did not prepare the PSI, Addendum to the PSI, or the Revised PSI, appeared and indicated to counsel she had a problem with the guideline calculation. Despite defense counsel's admonition to the prosecutor that any objection needed to be explicitly raised with the court, DE:1219:46, upon the commencement of the sentencing hearing, the prosecutor chose to advise the court that the government did not have any objections to the PSI. DE:1219:5. To this day, the PSI and Revised PSI still indicate that the fraud guideline should be used, compelling, at the very least, a remand to the district court.

DE:1079:2, is incorrect—particularly where the chart pertained to all of the defendants and the notation did not convey any objection to the PSI's fraud guideline recommendation for Pavlenko.

The government's position is at odds with the decision in *United States v. Aguilar-Ibarra*, 740 F.3d 587, 591 (11th Cir. 2014). In *Aguilar-Ibarra*, the government, prior to sentencing, had expressly agreed with the defendant that the PSI's recommended bodily-injury enhancement should not apply. The district court nevertheless rejected as untimely the defendant's agreed objection to the enhancement, made at the outset of the sentencing hearing; and this Court upheld the district court's ruling, stressing the importance of Fed. R. Crim. P. 32's requirement of filing written objections to the PSI. *Id.* at 590-92. To apply one rule to a defendant, as articulated in *Aguilar-Ibarra*, and another to the prosecution—as the government requests here—is impermissible. *Irizarry v. United States*, 553 U.S. 708, 715-16 (2008), creating an exception to the notice rule for variances, only highlights further the impropriety of the Rule 32 violation in this case, which pertained not to a mere variance but to the underlying structure of the guideline calculation in Pavlenko's case.

Further harm ensued from the district court's allowance of the government's *ore tenus* money laundering argument made after all actual objections were litigated and resolved, given the substantive impropriety of applying the money laundering

guideline, U.S.S.G. § 2S1.1, which the defendant was impeded in fully briefing and addressing—because the government had failed until all filed objections were resolved at sentencing to ever make any legal argument for application of such a guideline—and because the imposition of erroneous enhancements for aggravated role and for money laundering would not have occurred if the government had been required to follow the rules.

The money laundering guideline was erroneously applied given that Pavlenko was not convicted of a proceeds money laundering offense; instead, he was convicted of sending *untainted* funds to a foreign country to promote a fraud offense in the United States. DE:956. The commentary to the guideline indicating that § 2S1.1 applies to § 1956 convictions does not overcome the specific limitations with respect to applicability of § 2S1.1(a)(1) as to the incorporation of the fraud loss table, which explicitly requires the laundered funds to be "derived from" specified unlawful activity, § 2S1.1(a)(1). The fact that Pavlenko was *not* convicted of an offense involving funds derived from unlawful activity, but rather was convicted of an offense involving transportation of funds contrary to 18 U.S.C. § 1956(a)(2)(A), precludes the applicability of the money laundering guideline. As the PSI and Revised PSI indicate, the sentence should have been calculated under the fraud guideline; there were no laundered proceeds under the § 1956(a)(2)(A) count of

conviction and thus merging the transportation offense with the fraud table exaggerated the guideline level contrary to the express terms of the guideline.[5]

The government, conceding that a money laundering enhancement would not have applied to Pavlenko under the fraud guideline, nevertheless argues that Pavlenko would have been subject to the vulnerable victim enhancement had the fraud guideline been applied. This speculation as to a mere *argument* for the imposition of a different enhancement, which the district court never indicated any inclination to grant, is insufficient to overcome the clear procedural violation condemned by binding authority of this Court.

The prejudice from the belated guideline change extended to the erroneous imposition of a role-in-the-offense enhancement. The government's assertion that, as a general proposition, a role enhancement is not excluded where the money laundering guideline is applied does not pertain to the specific circumstances here in which Pavlenko had no role in the money laundering activity. The government fails to address this Court's ruling in *United States v. Salgado*, 745 F.3d 1135, 1138 (11th

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[5] Contrary to the government, *United States v. Lucena-Rivera*, 750 F.3d 43, 48 (1st Cir. 2014), a decision affirming application of the money laundering guideline to multiple ***proceeds*** laundering convictions, supports Pavlenko's contention that the money laundering guideline cross-reference does not, and cannot rationally, apply to a non-proceeds money laundering offense. Such an enhancement would be not only conflict with limitations of the guideline's express terms, but would create disparate and disproportional punishment untethered to the purpose of the guideline.

Cir. 2014), providing that where a defendant is sentenced under § 2S1.1(a)(1), it is the defendant's role in the *money laundering*, rather than the underlying offense, that governs applicability of U.S.S.G. § 3B1.1. Given that Pavlenko had no aggravating role in any money laundering, imposition of a role enhancement was improper.

C. Erroneous role-in-the-offense enhancement under U.S.S.G. § 3B1.1

The government does not dispute authority precluding a role enhancement where, as in the present case, a defendant who is sentenced under the money laundering guideline is not shown to have had a role in the money laundering. *See Salgado*, 745 F.3d at 1138. The government is incorrect that this matter should be reviewed for plain error, where—even after being sandbagged by the government's blatant violation of fundamental procedural rules applicable to sentencing proceedings—the defendant made clear his opposition on substantive as well as procedural grounds to application of the money laundering guidelines. DE:1219:6. Even if reviewed for plain error, that standard is met, where the government did not claim at sentencing, or assert any facts to show—nor does it now—that Pavlenko played any aggravating role in money laundering.

Any anecdotal recollection that Pavlenko indicated that credit card charges for an individual card should not exceed $1,000, DE:1122:16, or that in the course of a discussion, Pavlenko indicated that the bar should not accept AmEx credit cards,

DE:1131:200, related to Pavlenko's role in managing assets, an inadequate basis to support a role enhancement. *See United States v. Glover*, 179 F.3d 1300, 1302-03 (11th Cir. 1999); *United States v. Martinez*, 584 F.3d 1022, 1028 (11th Cir. 2009). That he was a self-described managing member of Rose Entertainment, a company he formed, does not show he played a managing role as to Simchuk's longtime employees who came to work at Caviar Bar, where Pavlenko's company's purpose was to assist in managing assets and where Pavlenko simply did not recruit or supervise Simchuk's associates, including the bar manager selected by Simchuk.

Caselaw supporting a role enhancement for assisting operational plans is inapposite, where the evidence indicates: that any help afforded by Pavlenko as to the B-girls—who operated under Simchuk's direction—was tangential at most; that Pavlenko was rarely, if ever, present at Caviar Bar after it opened; and that his activities and function focused on the financial services aspect of the bar.

D. Erroneous Obstruction of Justice Enhancement under U.S.S.G. § 3C1.1

The district court erred in ruling *sua sponte* that Pavlenko's testimony concerning an ambiguous email to AmEx referencing a photograph of a woman with Caviar Bar customer Bolaris was perjurious, where neither the government nor the PSI specified such testimony as being untruthful and the court did not identify the particular statement it deemed untrue or make findings that such statement was

materially and willfully false. *See United States v. Dunnigan*, 507 U.S. 87, 95, 113 S.Ct. 1111, 1117 (1992). Where the court had already determined that Pavlenko's email was "***not*** a perjured statement," DE:1219:25 (emphasis added), its conclusion that Pavlenko's testimony about the email was perjurious—in failing to disclose that he did not want to convey to AmEx that the woman in the photograph was a bar employee—was improper.

The record—which is devoid of requisite findings of fact, compelling that the sentence enhancement be vacated on that basis alone—fails to substantiate that Pavlenko's testimony was perjurious, materially or willfully false, or false at all, where his email was *not* a submission of information in support of the credit card charge, but rather a statement that he did *not* have any photos of Bolaris other than the one he sent, DE:1147:202; Pavlenko merely responded *negatively* to the AmEx representative's request—made after AmEx made its decision on the chargeback—for *additional* pictures of Bolaris at Caviar Bar on either of the *two days* that he bought drinks at the bar. Testimony by Pavlenko that he did not discuss in the AmEx email Turcina's employee status because it was not directly relevant to AmEx's inquiry is not materially or willfully false–nor did the district court make such a finding—where AmEx documents already indicated that the photo showed Bolaris with an employee of the bar and that AmEx had already resolved the matter in favor of the bar. AmEx's inquiries were limited to knowing whether Bolaris was at the bar on the dates

indicated and signed the credit card receipts. Pavlenko believed, accurately, that the answer to those questions was "yes." Where the court did not identify the particular testimony it found perjurious and made no specific findings that any portion of the defendant's testimony was materially and willfully untrue, enhancement for perjury under U.S.S.G. § 3C1.1 was invalid. *See, e.g., United States v. Alpert,* 28 F.3d 1104, 1107-08 (11th Cir. 1994) (*en banc*) (meaningful appellate review of obstruction of justice enhancement for perjury requires specific findings of fact).

E. Unsupported Restitution Order

The government's reliance on *United States v. Rodriguez*, 751 F.3d 1244, 1261 (11th Cir. 2014) (restitution order removed "any amounts that were not sufficiently verified"), is misplaced. The government claims that one customer's trial testimony did not reveal any reimbursement for an as-of-then undisputed charge. The government never sought to determine—much less show—whether the customer ultimately suffered a loss, where customer reimbursement by the merchant bank was the consistent practice for disputed credit card charges and Caviar Bar maintained more than sufficient funds for reimbursement.

CONCLUSION

The Court should reverse the defendant's convictions and sentence.

Respectfully submitted,

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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 6,870 words.

s/ Richard Docobo
Richard Docobo, P.A.

CERTIFICATE OF SERVICE

I CERTIFY that on this 3rd day of August, 2015, a copy of the foregoing was electronically filed with the Clerk of the Court and served by mail upon John C. Shipley, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132-2111.

s/ Richard Docobo
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