UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:19-CR-20693-SEITZ

UNITED STATES OF AMERICA

v.

PETER SOTIS and
EMILIE VOISSEM,

Defendants.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR A NEW TRIAL

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files its Response in opposition to the joint motion of Defendants Peter Sotis and Emilie Voissem for a new trial pursuant to Federal Rule of Criminal Procedure 33 ("Defendants' Joint Motion"). *See* ECF No. 115. For the reasons stated below, the Court should deny Defendants' Joint Motion.

PROCEDURAL BACKGROUND

On October 24, 2019, a federal grand jury returned an indictment charging Defendants with violating 18 U.S.C. § 371 by conspiring to export items in violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-08; violating 50 U.S.C. §§ 1705(a) and (c) by exporting and attempting to export goods in violation of IEEPA; and violating 18 U.S.C. § 554(a) by engaging in smuggling, that is fraudulently and knowingly exporting or sending from the United States certain items in violation of U.S. law. *See* Indictment, ECF No. 3 at 5-9. These charges stem from Defendants' efforts to export to Libya four rebreathers. Rebreathers are diving

equipment that enable divers to operate undetected for extended periods of time by producing little or no bubbles and efficiently re-circulating a diver's own breath after replacing its carbon dioxide with oxygen. Because they have both a civilian and military function, rebreathers are considered "dual use" items and are included on the Commerce Control List maintained by the Department of Commerce. With this designation, it is a criminal offense to willfully export or cause the export of rebreathers from the United States to a country with national security concerns, including Libya. Defendants nevertheless attempted to export four rebreathers to Libya, despite being instructed by an agent with the Department of Commerce that the items were detained while a license determination was pending. In addition to these charges, Defendant Voissem was charged with making material false statements in violation of 18 U.S.C. § 1001 for statements she made during a March 2019 de-brief with an agent with the Department of Commerce who was investigating this matter.

Defendants' jury trial began on October 13, 2021. On October 21, 2021, the jury returned a verdict of guilty as to both defendants on three counts: conspiracy, attempt to violate IEEPA, and smuggling. *See* ECF Nos. 102, 103. The jury returned a not guilty verdict as to the false statements charge against Defendant Voissem. *See* ECF No. 103. On November 2, 2021, Defendants filed a Joint Motion for a New Trial. *See* ECF No. 115.

LEGAL STANDARDS

Federal Rule of Criminal Procedure 33 provides that the Court "on motion of a defendant may grant a new trial to that defendant if required in the interests of justice." Fed. R. Crim. P. 33. Where motions demanding a new trial in the interests of justice allege that the verdict is contrary to the evidence, as Defendants contend, the Eleventh Circuit has instructed that:

> The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really "exceptional cases."

United States v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985) (citations omitted).

The Eleventh Circuit has described the standard announced in *Martinez* as a restrictive one, leading to lesser deference for appellate review of a decision contradicting the jury's verdict and granting a new trial based on the weight of the evidence. *United States v. Cox*, 995 F.2d 1041, 1043-44 (11th Cir. 1993). Specifically, it has reasoned that:

> The grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds.
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> We limit . . . the district court's ability to reweigh the evidence, because when the jury verdict is set aside usual deference to the trial judge conflicts with deference to the jury on questions of fact thereby undermining trial by jury. For these and other reasons, while we do not conduct pure *de novo* review in these circumstances, the review that we do conduct is not much different because we want to assure that the judge does not simply substitute his judgment for that of the jury.

Butcher v. United States, 368 F.3d 1290, 1297 (11th Cir. 2004) (citations omitted).

ARGUMENT

I. The evidence adduced at trial supports the guilty verdicts, which were not contrary to the weight of evidence

Defendants' request for a new trial is premised on their assertion that there was insufficient evidence at trial to support the guilty verdicts as to the charges of conspiracy, attempt to violate export laws, and smuggling. *See* Defs.' Joint Mot. at 1. Notably, Defendants provide no further explanation or grounds for why they contend the evidence to be inadequate. Regardless, the

evidence adduced at trial more than supports Defendants' convictions on all three counts, so Defendants' request for a new trial should be denied.

A. Sufficient evidence exists to support the guilty convictions for conspiracy to violate IEEPA, and attempting to violate and violating IEEPA

To prove that Defendants engaged in conspiracy to violate IEEPA, the Government must show that there was an agreement to make an illegal export, that Defendants knew of the unlawful plan and willfully joined in it, and that they each committed at least one overt act to carry out the agreement. All of these elements were satisfied by the evidence at trial. To prove that Defendants attempted to violate and violated IEEPA, the Government must show that (1) the Defendants exported, caused the export, transferred for export, or aided and abetted the attempted export of, an item from the United States; (2) that the item the Defendants exported, caused the export, transferred for export, or aided and abetted the attempted export of, was controlled for export on the Commerce Control List; (3) that the Defendant failed to obtain a license or other authorization from the U.S. Department of Commerce prior to the attempted exportation of the items; and (4) that Defendants did so willfully. The evidence at trial likewise satisfied all of these elements.

Beginning in the spring of 2016, Sotis and Voissem coordinated a shipment of over $100,000 worth of diving gear, including four rebreathers, from Add Helium to an entity called the Codi Group located in Misrata, Libya. The Codi Group's purchase was facilitated by a dual citizen of Libya and the United States named Osama Bensadik, who resided in Virginia and who requested that the shipment be arranged using a Virginia-based exporting company called Ramas, LLC, which in turn was owned by Mohammad and Diana Zaghab. At trial, the jury heard evidence from Michael Tu, an engineer who works on licensing determinations for the Department

of Commerce's Bureau of Industry and Security ("BIS") that a license was required to export the rebreathers to Libya, and the jury further heard testimony that no such license was obtained. Defendants have not disputed this evidence. Instead, they argue that their actions were not willful.

The evidence at trial, however, showed that both Sotis and Voissem knew from multiple sources that a license determination from the Department of Commerce was necessary before the rebreathers could be shipped to Libya. Mitch Zollman, a salesman with Global Forwarding, the freight forwarding company that Add Helium enlisted to assist with the shipment, testified that in late July 2016 that he provided Voissem with information from Global Forwarding's compliance department about Libya being on "a restricted list" and "a special license" potentially being necessary from the Department of Commerce or State Department. In addition, the jury heard testimony from Mohammad and Diana Zaghab about their communications with Voissem in late July and early August 2016 about potential restrictions on exporting to Libya and inquiring as to whether the rebreathers are classified as "dual use" or "dangerous goods," and requesting that Voissem contact officials at the Department of Commerce to ascertain what export restrictions applied to the rebreathers. Shawn Robotka, a former co-owner of Add Helium along with Sotis, testified that in late July 2016 he informed Voissem of a 2016 Executive Order that banned certain exports to Libya, that rebreathers have "a distinctive military application," and that there were concerns about terrorism in the region. Collectively, the evidence at trial showed that before their attempted export on August 9, 2016, both Voissem and Sotis understood that they would likely need to obtain the permission of the U.S. Government before exporting the rebreathers to Libya: Documents admitted into evidence show that on July 28, 2016, Voissem emailed Sotis that, based on her communication with Mitch Zollman, she understood that it was "our responsibility to clear

the items with the Department of Commerce," that there was a "concern for terrorism" with the shipment, and there was a "potential hold with the Department of Commerce." On July 29, 2016, Voissem emailed Sotis and Robotka to report that an official with the Commerce Department had informed her "that shipping to Libya was probably not going to happen because of how volatile" the situation in Libya was at the time. The evidence at trial further showed that, in response on July 30, 2016, Sotis emailed Robotka and Voissem, stating the following:

> [I]f the president has banned all shipments to Libya, they are going to have to find another route or handle it from here. We do not need trouble from the government for making an illegal shipment. I think its [sic] time Osama and Mohammad manage this problem and let us know how they intend to receive their goods as we can't ship to Libya.

Defendants received still further notice of potential restrictions on exporting rebreathers to Libya on August 4, 2016, when Brent Wagner, a special agent with BIS, met with Voissem, Robotka, and another Add Helium employee named Deb Wesler to discuss the shipment. As Special Agent Wagner testified, he informed Voissem and Robotka that he would need to submit a license determination for the rebreathers to determine what restrictions applied to the devices, and that, in the meantime, the rebreathers could not be shipped. Robotka testified that he understood Special Agent Wagner's instruction to be an order and that the shipment was to remain at Add Helium during the pendency of the license determination. Although Sotis did not attend the August 4, 2016 meeting with Special Agent Wagner, Robotka testified that he spoke with Sotis that day after the meeting and conveyed to Sotis what Special Agent Wagner had said. Voissem confirmed during her testimony that Robotka spoke with Sotis on August 4 regarding the meeting with Commerce.

On August 9, 2016, Sotis and Voissem caused the shipment of rebreathers to Libya, despite having received warnings about potentially needing a license from Global Forwarding, Ramas LLC, and Robotka, and despite having been ordered five days previously by Special Agent Wagner not to ship the devices until the license determination was completed. Their conduct following the shipment further demonstrates their awareness that the shipment was illegal. For example, the jury heard testimony from Special Agent Wagner and BIS Special Agent Michael Bollinger that documents produced by Add Helium in response to an administrative subpoena lacked any internal email discussions with Sotis, despite the fact that Sotis was on multiple email communications about the shipment up through July 30, 2016. Robotka similarly testified that Sotis told Robokta that he thought he could evade detection of his wrongdoing because his name was not on documents. In addition, search warrant returns for email accounts belonging to Sotis and Voissem showed no emails between the two from August 4, 2016 (the date of Agent Wagner's visit to Add Helium) and August 9, 2016 (the date the devices were picked up from Add Helium to be shipped), despite the fact that Sotis and Voissem emailed frequently before and after that time period.

Sotis and Voissem attempted to conceal their conduct in other ways. As Special Agent Wagner and Robotka testified, during an August 17, 2016, telephone call with Special Agent Wagner, neither Defendant informed Special Agent Wagner that the shipment had been picked up on August 9. Robotka testified that the Defendants similarly did not apprise him of the shipment. Indeed, Special Agent Wagner and Robotka both testified that it was not until an August 24, 2016 visit by Special Agent Wagner to Add Helium that they learned the shipment had been picked up

on August 9. As discussed further below, both Sotis and Voissem concealed material evidence from Ramas LLC in order to finalize the shipment.

Moreover, Voissem's own testimony trying to falsely minimize her involvement and the import of what Special Agent Wagner had told her regarding the rebreather shipment having to remain at Add Helium while the license determination as pending, provided substantive evidence against the Defendants. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) ("[W]hen a defendant chooses to testify, he runs the risk that if disbelieved 'the jury might conclude the opposite of his testimony is true.'")

Evidence adduced at trial revealed a likely motivation for why Sotis and Voissem pressed forward with the shipment, despite these warnings: money. Email evidence, for example, showed that Voissem remarked "Wow" when she first learned about the order from Codi Group, and Voissem acknowledged during her testimony that this was a large shipment for Add Helium. Additionally, email evidence shows that Sotis told Voissem, Robotka, and another Add Helium employee named Ken Wesler that "[t]here is nothing casual about completing this order" and that "[i]f we do a good job, I believe this is just the beginning of what he will order." Other emails showed that, during this same time, Add Helium had "an immediate need for funding" and was experiencing financial duress. In an August 5, 2016 email to Robotka—sent one day after being told of the order from Agent Wagner not to ship the devices—Sotis summarized Add Helium's struggles as follows: "If we do not pay what we owe, have some funds available so I can do the work, we will come to a halt and we will not be able to continue. We cannot set this issue aside. We either find some money or hang things up."

In sum, there was sufficient evidence at trial to support the guilty verdicts for Defendants on the conspiracy and substantive IEEPA charges. With respect to conspiracy, the evidence shows that Defendants had a plan to export the rebreathers to Codi Group in Libya, pressed forward with this plan—unbeknownst to Robotka and Special Agent Wagner—even after learning that a license determination was necessary, and each took multiple steps (engaging in email communications about the shipment, completing shipping paperwork, concealing the plan from others) to see it to fruition. The evidence similarly shows that Defendants violated IEEPA by causing the attempted shipment to Libya. A license was required for the shipment, Defendants never obtained a license, and they caused the attempted shipment by concealing material information about Special Agent Wagner's visit and the need for a license determination from Ramas LLC. The evidence, moreover, shows that Defendants undertook these actions willfully because they had ample notice from Global Forwarding, Ramas LLC, Robotka, and Special Agent Wagner that a license was likely required for this shipment and that they should not have proceeded with it until the license determination was completed.

B. Sufficient evidence of smuggling

To prove that Defendants engaged in smuggling in violation of 18 U.S.C. § 554(a), the Government must prove that they fraudulently and knowingly exported or sent from the United States, or attempted to export or send from the United States, or aided or abetted any such export of, any merchandise, article, or object contrary to U.S. law. As with the first two counts, the evidence at trial more than suffices to sustain the guilty verdict as to smuggling.

The jury heard evidence that the Defendants caused the attempted export of four rebreather devices to Libya in violation of U.S. law and that they did so knowingly, as discussed above.

Evidence at trial, furthermore, thoroughly supported the conclusion that the Defendants' actions in this regard was fraudulent. Most notably, there was ample evidence that the Defendants hid from Ramas LLC and the Zaghabs information about the rebreathers that they learned from Special Agent Wagner. Email evidence shows that on August 4, 2016—hours after Agent Wagner visited Add Helium and conveyed to Voissem and Robotka that the devices could not ship pending a license determination—Voissem emailed Diana and Mohammad Zaghab and stated that she was not aware of anything in the order that could be considered "a dangerous good", but she did not say one word in the email about Special Agent Wagner's meeting at Add Helium that day Nor did Voissem ever disclose to the Zaghabs the information she learned from Robotka about the devices having a military application. Mohammad Zaghab also testified that he spoke with Sotis by telephone on August 9, 2016 prior to the shipment being picked up, and that when asked if Commerce had said anything about the shipment being restricted, Sotis falsely told Mohammad Zaghab that a Commerce agent "didn't say anything" about any prohibitions, that no one from Add Helium spoke with the Commerce agent during the inspection of merchandise, and that the Commerce agent's visit did not specifically concern the shipment to Libya. Voissem moreover, testified that Sotis instructed her not to tell the Zaghabs about Special Agent Wagner's order not to ship during the August 4, 2016 meeting. Both Zaghabs further testified that they were determined to do their due diligence for this order, and that they never would have arranged the shipment had Sotis and Voissem informed provided them with complete and accurate information.

In addition, as noted above, Sotis and Voissem took steps to try to conceal and hide their conduct shortly before and after the shipment went out, including omitting documents from Add Helium's response to an administrative subpoena (Sotis), refraining from communicating

internally in writing (both Defendants), and withholding material information from Special Agent Wagner during the August 17, 2016 phone call and August 24, 2016 visit (both Defendants). Collectively, this evidence more than demonstrates that Defendants each took fraudulent actions to attempt to ship the rebreathers to Libya in violation of U.S. law.

II. The Court correctly ruled on evidentiary issues concerning the credibility of Shawn Robotka

In addition to their claim generally that there was insufficient at trial to establish Defendants' guilt as to any charge, Defendants argue that the Court erred with respect to the testimony of Shawn Robotka in three ways: (1) admitting Robtoka's Google calendars as prior consistent statements; (2) admitting evidence that Sotis threatened Robotka and instructing the jury that this evidence could prove Sotis's consciousness of guilt; and (3) denying Defendants the opportunity to cross-examine Robotka concerning law enforcement reporting and civil litigation against his former business partners. Defendants claim that these purported errors collectively warrant a new trial. For the reasons discussed below, each of Defendants' three contentions about error is incorrect, so no new trial is necessary.

A. The Court properly admitting Robotka's Google calendars as prior consistent statements under Federal Rule of Evidence 801(d)(1)(B)

During Defendants' cross-examination of Robotka, defense counsel challenged Robotka's memory due to a traumatic brain injury that he suffered while serving in the military in a combat zone. Defense counsel further accused Robotka of fabricating statements against Sotis to support Robtoka's claims in a civil lawsuit between the two. The Government on re-direct sought to admit seven documents which depict entries that Robotka made on his personal Google calendar in July, August, November, and December of 2016. Over Defendants' objections, the Court

permitted these electronic calendar entries to be admitted into evidence as prior consistent statements pursuant to Federal Rule of Evidence 801(d)(1)(B)(ii). Defendants now contend that the Court's ruling was erroneous because Defendants never sought to impeach Robotka with prior inconsistent statements and because the calendar entries were not accompanied by metadata reflecting when the entries were created and last modified. *See* Defs.' Joint Mot. at 5. Neither argument has merit.

As an initial matter, Defendants' claim that prior consistent statements are admissible only where a witness has been impeached with a prior inconsistent statement is contrary to both the plain language of Rule 801(d)(1)(B) as well as case law interpreting that rule. Specifically, the rule permits prior consistent statements to be admitted into evidence under two scenarios: (i) "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying," or (ii) "to rehabilitate the declarant's credibility as a witness when attacked *on another ground*." Fed. R. Evid. 801(d)(1)(B)(ii) (emphasis added). Defendants' Joint Motion focuses only on subsection (i), but the Government sought, and the Court granted, admission of the calendar entries pursuant to subsection (ii), as well as (i).[1]

Multiple circuit courts, moreover, have held that prior consistent statements may be admitted where, as here, a witness's memory is challenged. *See United States v. Flores*, 945 F.3d 687, 705–06 (2d Cir. 2019) (affirming admission into evidence under FRE 801(d)(1)(B)(ii) prior

[1] As the Advisory Committee notes make clear, Rule 801(d)(1)(B) was amended in 2014 for, among other reasons, to allow prior consistent statements to be admitted into evidence under precisely these circumstances. Fed. R. Evid. 801, advisory committee's notes (2014 amendment) (noting that amendment was to make substantively admissible prior consistent statements that are used to rehabilitate a witness's credibility in the face of alleged inconsistencies in the witness's testimony or "*to rebut a charge of faulty memory*" (emphasis added)).

consistent statements where defendants' opening arguments suggested that testifying agent's memory would be faulty and couldn't be trusted); *United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017) (affirming admission into evidence under FRE 801(d)(1)(B)(ii) testifying agent's statements about what child victim had told him during investigation where defense "attacked" the child witness "on the basis of a faulty memory"). The Government identified these legal authorities for the Court when it sought admission of the calendar entries. Although the Eleventh Circuit has not yet had the occasion to address this issue, it is not true, as Defendants claim, that "there is no authority for such type of witness rehabilitation in the caselaw of the Eleventh Circuit." Defs.' Joint Mot. at 5. To the contrary, multiple district courts within the Eleventh Circuit have recognized this same point of law. *See United States Sec. & Exch. Comm'n v. Spartan Sec. Grp., Ltd*, No. 8:19-CV-448-VMC-CPT, 2021 WL 2144841, at *5 (M.D. Fla. May 26, 2021) ("[A] prior consistent statement may be allowed to rebut a charge that the declarant fabricated the statement, or to rehabilitate credibility when a witness's credibility is attacked on other grounds" and "could conceivably come in[to evidence] under this rule . . . ."); *United States v. Lepore*, No. 1:15-CR-367-WSD-JKL, 2016 WL 4473125, at *4 (N.D. Ga. Aug. 25, 2016) ("If, at trial, Defendants attack Clark's credibility on grounds other than a claimed recent fabrication or improper influence or motive, Rule 801(d)(1)(B)(ii) permits the Government to introduce Clark's handwritten notes to rehabilitate his credibility."). Defendants' claim thus finds no support in either the text of Rule 801 or case law interpreting it.

Equally without merit is Defendants' suggestion that the calendar entries should not have been admitted into evidence for lack of metadata.[2] After the Court admitted the calendar entries,

[2] As Defendants note, they have filed a separate motion pursuant for a Rule 17(c) subpoena for

defense counsel had ample opportunity to cross-examine Robotka about his creation of the entries, including when they were created, whether the entries were available on his work computer, the frequency with which Robotka made entries, and why certain entries purportedly were not included in the calendar. Defense counsel were thus able to mount an effective impeachment as to the accuracy of the calendar entries, so Defendants suffered no prejudice from not having access to metadata about the calendars.

B. The Court properly admitted evidence of Sotis's threats against Robotka

Nor did the Court err by admitting evidence of Sotis's prior threatening of Robotka as evidence of Sotis's consciousness of guilt, the second claim as to Robotka's credibility as a witness that Defendants raise in their Joint Motion. The Eleventh Circuit has expressly held that a court "may consider evidence of threats to witnesses as relevant in showing consciousness of guilt." *United States v. Gonzales*, 703 F.2d 1222, 1223 (11th Cir. 1983); *United States v. Smith*, 352 F. App'x 387, 390 (11th Cir. 2009) (affirming district court's admitting, over defendant's Rule 403 objection, statement by defendant "about cooking a steak" where that phrase was understood to mean killing a government witness and where evidence was introduced to show consciousness of guilt). The probative value of Sotis's threats was significant and was not outweighed by any risk of prejudice. *See* Fed. R. Evid. 403 (authorizing a court to exclude relevant evidence only if "its probative value is substantially outweighed by a danger of . . . unfair prejudice"). Namely, Sotis threatened Robotka with bodily harm and even death in an attempt to scare Robotka into not cooperating with the Department of Commerce investigation and to alter or hide documents from

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production of Mr. Robtoka's personal computer to conduct a forensic analysis. *See* ECF No. 116. The Government will respond to that motion in a separate filing.

investigators. Given that an innocent person would be unlikely to strong arm a business partner into not cooperating with a federal investigation, Sotis's conduct had direct bearing on his consciousness of guilt.

The Court, moreover, gave proper limiting instructions to the jury as to how this evidence could be used. Specifically, the Court informed the jury that the evidence of threats could be considered only "for the limited purpose of whether it shows consciousness of guilt or lack of mistake in allegedly committing the crimes charged against Defendant Peter Sotis." Jury Instructions, ECF No. 101, at 8. The Court further counseled that "[i]ntentional threats against a witness of a person during or immediately after a crime has been committed, or after he is accused of a crime, is not, of course, sufficient in itself to establish the guilty of that person." *Id*. And the Court made clear that it was "exclusively" the province of the jury to decide "[w]hether or not [] Sotis's conduct constituted an intentional threat" as well as "the significance to be attached to it." *Id*. These instructions sufficiently protected against the evidence of threats having a prejudicial effect. *See Smith*, 352 F. App'x at 390 (holding that risk of undue prejudice in admitting evidence of prior threats was minimized by, among other things, a limiting instruction that the jury "could consider the evidence only on whether it indicated consciousness of guilt and admonish[ing] the jury that it was their responsibility to decide whether to believe the testimony and what weight, if any, to give it" (citation and internal brackets and quotation marks omitted)).

Although Defendants complain about a "negative spillover effect" that this evidence had against Voissem, *see* Defs.' Joint Mot. at 6, the Court's specific instruction that the evidence could be considered with respect to Sotis's consciousness of guilt only likewise provided sufficient safeguards against that possibility, *see United States v. Baker*, 432 F.3d 1189, 1221 (11th Cir.

2005) (reversing admission of evidence of threats where jury instructions failed to state that it should be considered as to certain co-defendants only) *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813 (2006); *Smith*, 352 F. App'x at 390 (rejecting argument about spillover effect where the district court "explicitly instructed the jury that it was to consider the evidence only about [one defendant]'s consciousness of guilt and that it was not to consider" the evidence as to the other defendant). Defendants' concerns about a spillover effect as to Voissem are unfounded.

C. The Court properly limited defense counsel's cross-examination of Robotka and excluded information about a past civil lawsuit and cooperation with law enforcement

Defendants' contention that the Court erred by not permitting defense counsel to cross-examine Robotka about certain information is equally without merit. In their motion, Defendants object to the Court's refusal to permit them to cross-examine Robotka about information that he provided to law enforcement officers about his former business partners at a company called Ocean Divers having engaged in identity theft against him as well as an alleged rape incident involving two Ocean Divers employees. According to Defendants, because Robotka was previously engaged in civil litigation against his Ocean Divers business partners, the fact that he engaged in this law enforcement reporting evinces "a pattern of using the criminal justice system to advance his lawsuits against past business partners," including Sotis. Defs.' Joint Mot. at 7. Defendants therefore argue that it constitutes similar conduct and motive that was relevant to Robotka's credibility. *Id*.

This argument is unavailing. Although Rule 404(b) permits the use of other acts to be admitted to prove motive, *see* Fed. R. Evid. 404(b)(2), "the word 'motive' as used in the rule does not refer to a motive to testify falsely," *United States v. Farmer*, 923 F.2d 1557, 1567 (11th Cir.

1991) (further explaining that "motive" refers to "motive for the commission of the crime charged" (citation omitted)); *see also United States v. Taylor*, 417 F.3d 1176, 1180 (11th Cir. 2005) (rejecting attempt to introduce under Rule 404(b) past instances of a police officer's "racial harassment, brutality and evidence planting" to show that officer had a racial bias and motivation to frame the defendant at trial); *United States v. Hairston*, 627 F. App'x 857, 858–59 (11th Cir. 2015) (rejecting argument that evidence of past convictions was admissible under Rule 404(b) to demonstrate witness's motivation to testify falsely against defendant). Defendants were thus not permitted to introduce evidence about Robotka's past law enforcement reporting to undermine his credibility at trial.

Equally incorrect is Defendants' assertion that such evidence was relevant to establish that Robotka had a "pattern" of contacting law enforcement to advance his interests in civil litigation. Rule 404(b) is clear that evidence of past actions "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1); *Hairston*, 627 F. App'x at 859 ("[T]he party advancing the evidence [under Rule 404(b)] must demonstrate that it is not offered to prove the character of a person in order to show action in conformity therewith." (citation omitted)). Accordingly, the Court properly excluded this evidence about Robotka's past reporting to law enforcement.

Defendants' proposed questioning about Robotka's past conduct, moreover, had little (if any) probative value. And any probative value it did have would have been significantly outweighed by a risk of confusing the jury with a collateral, unrelated issue. *See* Fed. R. Evid. 403. The fact that Robotka contacted law enforcement officials previously about events concerning Ocean Divers has no bearing on whether he has any bias against either of the

Defendants in this case or even that he was biased against his former Ocean Divers business partners. Indeed, one of the incidents about which Defendants sought to inquire—Robotka's reporting about a rape involving two Ocean Divers employees—did not directly concern his former Ocean Divers business partners or necessarily imply any wrongdoing on their part. Nor is there any evidence to suggest that Robotka was being untruthful in any of his contact with law enforcement officials or in his civil litigation against either Ocean Divers or Add Helium. To the contrary, in denying Sotis's motion for a temporary injunction against Robotka, the Broward Circuit Court judge presiding over the case concluded that Robotka's testimony "was credible" and that Sotis's "was not credible" after they both testified about the illegal attempted shipment to Libya. *See* June 30, 2017 Order on Def.'s Mot. for Temp. Inj. In short, Defendants' proposed questioning would have done nothing to establish either a pattern or undermine Robotka's credibility: Robotka's past contacting of law enforcement concerned unrelated incidents factually distinct from Defendants' violation of export laws and do nothing to call into question Robotka's truthfulness in either contacting law enforcement officials or his involvement in civil litigation with his former business partners.

CONCLUSION

For all the reasons states above, the Court should deny Defendants' Joint Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF on November 17, 2021.

s/ Michael Thakur
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