UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20189-CR-SCOLA

UNITED STATES OF AMERICA

vs.

NIDAL WAKED HATUM,

Defendant.
_____/

GOVERNMENT'S NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B)

The United States of America hereby files this Notice of Intent to Introduce Evidence Pursuant to Federal Rule of Evidence 404(b), and states as follows:

I. BACKGROUND

On March 24, 2015, the grand jury returned an indictment charging defendant Nidal Waked Hatum with two money laundering conspiracy counts, in violation of 18 U.S.C. § 1956(h). The first conspiracy count charged that the underlying specified unlawful activities were fraud on a foreign bank and distribution of controlled substances. It listed Tamas Zafir and two corporations controlled by the defendant, Star Textile Manufacturing and Vida Panama, Z.L., S.A., as co-conspirator defendants. The second conspiracy count named Vida Panama as a co-conspirator defendant and noted that the underlying specified unlawful activity was drug trafficking.

The first conspiracy count noted that the scheme involved the defendant's knowing "engage[ment] in monetary transactions . . . through and to a financial institution" and his "transport[ation], transmi[ssion] and transfer [of] a monetary instrument[.]" (DE 3 at 2). The second conspiracy count further noted that the financial transactions underlying that charge were

"designed in whole and in part to conceal and disguise the nature, source, ownership, and control of the [unlawful] proceeds" and that the "transportation, transmission or transfer [of the unlawful proceeds] was designed in whole or in part to conceal and disguise the nature, source, ownership, and control of th[ose] proceeds[.]" (DE 3 at 3-4).

As part of the discovery and in ongoing discussions with defense counsel, the government explained that the alleged schemes involved the use of fake invoices – that is, invoices that were produced and provided to financial institutions, representing payments for sales of goods for export, when no such sales ever took place (and indeed, the purported seller did not even carry goods of that type), and the payments did not occur as represented, all as part of a plan to disguise or cover the illegitimate movement of funds.

The government further informed the defendant that he had been intercepted over certain Panamanian wiretaps and provided him with copies of all recordings from those wiretaps that were in the possession or control of the government.

II. ADMISSIBILITY OF EVIDENCE AT TRIAL

A. Proposed Evidence

Two telephone calls from the Panamanian wiretaps, recorded on October 20 and 22, 2014, record the defendant engaged in a conversation with an associate, "Ramon," and discussing money laundering, specifically the covert movement of money, similar to the transactions that underlie conduct charged in the Indictment.

In the first call, the defendant discusses filling out documents in a deceptive way, claiming a certain amount of money will be transferred, but then instructing that his associate should have a telephone call with the receiving party in Venezuela to explain that the transfer of money will

occur in a different way than what is claimed on the documents.[1] The defendant also discusses various options to transfer a certain amount of money, including opening up new companies and bank accounts, so that transfers of money could be split among different companies and accounts. The defendant noted the challenges of the various options, the number of companies and accounts that would need to be opened, policies that hinder transfers of large sums by newly created companies, and the benefits of creating invoices. During the call, "Ramon" related to the defendant a telephone conversation "Ramon" had with the intended receiving party about the money transfer and states, in sum and substance, that the receiving party directed "Ramon" that they should discuss this in person rather than over the telephone.

In the second call, the defendant continued the discussion of the money transfer to Venezuela. After noting an exchange rate listed on a related document, the defendant stated, in sum and substance, that he instructed one of his associates to alter the amounts written on the transfer documents.

The government intends to play the two intercepted calls to the jury, accompanied by a translation of the conversations.

B. Admissibility Under Fed. R. Evid. 404(b).

Evidence of the acts and intercepted calls described above are admissible pursuant to Fed. R. Evid. 404(b) for the purpose of establishing the defendant's knowledge, intent, plan and absence of mistake or accident with regard to the conspiracies charged in the Indictment.

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1 The substance of the conversations described herein are based on draft summaries and not on complete translations of the conversations, which are in Arabic. The government reserves the right to amend the descriptions once final translations are received; however, in the interest of providing notice to the defendant, the conversations are summarized here as accurately as permitted by the information currently available to the government.

"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*[.]" Fed. R. Evid. 404(b) (emphases added). "Rule 404(b) is a rule of inclusion, and accordingly 404(b) evidence, like other relevant evidence, should not be lightly excluded when it is central to the prosecution's case." United States v. Kapordelis, 569 F.3d 1291, 1313 (11th Cir. 2009) (quotations and internal alterations omitted). Evidence of a defendant's "other crimes, wrongs, or acts" is admissible so long as there is "sufficient proof to support a jury's finding that the defendant committed the similar act and the other act is probative of a material issue other than the defendant's character." Id.; accord United States v. Breitweiser, 357 F.3d 1249, 1254 (11th Cir. 2004); United States v. Miller, 959 F.2d 1535, 1538 (11th Cir.1992) (en banc). This standard is satisfied here, as shown below.

1. Relevance

Because the evidence tends to prove the defendant's knowledge, intent, plan and absence of mistake or accident – all expressly permissible Rule 404(b) purposes—it is admissible at trial. See, e.g., United States v. Rodriguez, 589 F. Appx 513, 514 (11th Cir. 2015) (summarily affirming defendant's sex-trafficking convictions over objection that trial court erred in permitting introduction of evidence under Rule 404(b) that defendant had previously been convicted of indecent liberties with a minor); United States v. Beeman, 386 F. App'x 827, 832 (11th Cir. 2010) (upholding the admissibility of prior drug trafficking activity to prove intent, motive, knowledge, and absence of accident); United States v. Jennings, 280 F. App'x 836, 841-42 (11th Cir. 2008) (affirming, in trial of defendant accused of sex trafficking of minors, admission pursuant to Fed.

R. Evid. 404(b) of testimony that defendant and codefendant had attempted to recruit a person other than the victim of the charged conduct as a prostitute); United States v. Foster, 889 F.2d 1049, 1053 (11th Cir. 1989) (upholding the admissibility of prior drug trafficking activity to prove opportunity, intent, preparation, planning, and knowledge); see also United States v. Campbell, 764 F.3d 880, 889-90 (8th Cir. 2014) (affirming district court's decision to permit testimony at trial, under Rule 404(b), of very similar conduct extrinsic to the charged offense in a sex trafficking trial). With regard to intent, as the Eleventh Circuit has repeatedly explained, a defendant "who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995); see also United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997). The defendant's not-guilty plea will require the government to prove his intent to engage in deceptive financial transactions for the purpose of money laundering to the exclusion of each and every reasonable doubt or other innocent explanation the defendant may claim, and the defendant's statements in the recorded calls, which indicate intent and knowledge of how to covertly move money across international borders, including the use of multiple companies, bank accounts, fake documents and invoices to achieve the transactions (as well as to hide their unlawful nature), are relevant to prove that he intended to engage in the money laundering schemes charged in the Indictment. Cardenas, 895 F.2d at 1344 ("Evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy") (quotation omitted); United States v. Edouard, 485 F.3d 1324, 1345 (11th Cir. 2007) (upholding the admissibility of prior drug-smuggling activity to prove the defendant acted with the requisite

intent in perpetuating the charged drug-trafficking conspiracy); United States v. Miller, 959 F.2d 1535, 1539 (11th Cir. 1992) (prior drug transaction in which defendant was the supplier relevant to prove that the defendant was the supplier as to the charged transaction).

2. Proof of defendant's Involvement

The second prong of the Rule 404(b) test requires that there be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act in question. See United States v. Chavez, 204 F.3d 1305, 1317 (11th Cir. 2000). In this case, the government intends to prove the defendant's statements and knowledge through recordings of the defendant himself, with his voice to be identified by someone familiar with it. Such evidence is more than sufficient proof under Rule 404(b) – indeed even weaker proof, for example testimony by one witness as opposed to a recording of the defendant's statements, would pass muster under this factor. See, e.g., United States v. Calderon, 127 F.3d 1314, 1325 (11th Cir. 1997) ("It is well established that credibility determinations are the exclusive province of the jury") (internal quotations omitted). Thus, this factor is sufficiently supported for the admission of the proposed evidence.

3. Probative Value and the Risk of Undue Prejudice

In determining whether the risk of unfair prejudice substantially outweighs the probative value of an article of evidence, the Court should consider "all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness." United States v. Jernigan, 341 F.3d 1273, 1282 (11th Cir. 2003) (internal quotations omitted). Each of these considerations strongly support inclusion.

There is a substantial need to introduce the defendant's recorded telephone calls. In pleading not guilty, the defendant is putting at issue whether he knowingly engaged in money laundering transactions. The defendant may well argue that that there is an innocent explanation for the transactions and fake invoices in question. He may also argue that, to the extent he collaborated with co-conspirators who are witnesses at trial, he did know that it was for the purpose of laundering money. And, he is expected to attack the credibility of any government witnesses.

The defendant's statements in the recorded calls help to prove each of these material facts, as they illustrate his knowledge of covert financial transactions and fake documents. See, e.g., United States v. Cardenas, 895 F.2d 1338, 1344 (11th Cir.1990) ("Evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy.") (quotation omitted). Indeed, not only do the conversations tend to prove several material facts through permissible, non-propensity purposes, but they do so substantially because they discuss methods that are similar to the charged drug offenses. See, e.g., United States v. Jernigan, supra, (holding that conduct occurring even 2 and 3 years prior to the charged "is well within the temporal bounds of relevance"); United States v. Jones, 225 F. App'x 848, 851 (11th Cir. 2007) (upholding admissibility of prior drug transaction that was neither too remote in time nor so different from the charged offense).

The principle limitation on admission of relevant evidence under Rule 404(b) falls under Rule 403, precluding evidence that is unfairly prejudicial. "*Unfairly* prejudicial" is not the same as "prejudicial". As explained in United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979), "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially

outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." The Eleventh Circuit has maintained this approach, United States v. Finestone, 816 F.2d 583, 585 (11th Cir. 1987). "Unfair prejudice" can be characterized as evidence that relies on irrational bases, such as emotion, to induce a jury to return a conviction. United States v. Astling, 733 F.2d 1446, 1457 (11th Cir. 1984), United States v. Hughes, 310 F.3d 557, 565 (7th Cir. 2002). The nature of the government's evidence described above does not fit the definition of "unfairly prejudicial" in any way that would support its exclusion. It is, however, clearly relevant, and so should be admitted.

WHEREFORE, the Government files this Notice of Intent to Introduce Evidence Pursuant to Fed. R. Evid. 404(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, on April 10, 2017.

/s/ Walter M. Norkin
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