20-3520 (L)20-3789 (con)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-v.-

ALLISON MACK, KATHY RUSSELL, LAUREN SALZMAN, NANCY SALZMAN, AKA Prefect,

Defendants,

KEITH RANIERE, AKA Vanguard, CLARE BRONFMAN,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT KEITH RANIERE

JENNIFER BONJEAN
BONJEAN LAW GROUP, PLLC
750 Lexington Avenue, 9th Floor
New York, NY 10022
(718) 875-1850

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF JURISDICTION

After a verdict of guilt, Defendant was sentenced to a term of 120 years' imprisonment on October 27, 2020. (Dkt No. 968) Judgment was entered on October 30, 2020. (A. 104-114) A timely notice of appeal was filed on November 4, 2020. (A. 103)

The United States Court of Appeals for the Second Circuit has jurisdiction over this matter pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the government proved the Defendant guilty by proof beyond a reasonable doubt of the following offenses: all sex trafficking offenses (Counts 5-7 and Act 10A); conspiracy to commit forced labor and forced labor of Nicole (Count 3 and Act 10B); sexual exploitation of a child (Acts 2 & 3); conspiracy to alter records in an official proceeding (Act 6); and conspiracy to commit identify theft of Pam Cafritz. (Act 11).

2. Whether the government proved the Defendant guilty of RICO and conspiracy to commit RICO due to insufficient evidence of: (1) an enterprise; and (2) a pattern of racketeering.

3. Whether Defendant was deprived of his Fifth and Sixth Amendment constitutional guarantees where the government swamped the jury with a mass of minimally probative yet highly prejudicial evidence related to the Defendant's controversial sex life.

4. Whether Defendant was denied his constitutional guarantees under the Fifth and Sixth Amendments where the District Court prematurely terminated defense counsel's cross-examination of the government's key cooperating witness.

5. Whether Defendant was denied his constitutional guarantees under the Fifth and Sixth Amendments where the District Court required the parties and the witnesses to refer to individuals designated by the government as "victims" only by their first names or pseudonyms, signaling to the jury that Defendant should be presumed guilty.

STATEMENT OF THE CASE

On April 19, 2018, Defendant was charged by way of indictment with a number of offenses including sex trafficking, sex trafficking conspiracy, and forced labor conspiracy. (Dkt. No. 14) Two superseding indictments later, Defendant also stood charged with RICO conspiracy,

RICO, wire fraud conspiracy, and attempted sex trafficking. (Dkt. No. 430) A jury returned a verdict of guilt as to all charges, and District Court Judge Nicholas G. Garaufis sentenced Defendant to 120 years' imprisonment. This direct appeal follows.

In 1998, Defendant and Nancy Salzman created a "human potential" school known as Executive Success Programs ("ESP"). (R.1514) ESP was designed to help people achieve their goals and consisted of workshops designed to "actualize human potential." Salzman was the CEO of the company, and Defendant was its philosophical leader. (R.467; 549-550)

In the early 2000s, the legal entity NXIVM was established which served as an umbrella organization for ESP and a myriad of other programs that were developed by the Defendant and Salzman. (R.468-478) NXIVM was headquartered in Latham, New York. (R.467) Over time, a small community of people moved to the area known as Clifton Park to live near other NXIVM devotees who were committed to the teachings of Defendant and NXIVM. (R.567-571; 575) NXIVM also opened centers in other parts of the country and in Canada and Mexico (R.552; 555)

A. A Family from Mexico Joins the NXIVM Community

In roughly 2002, a well-to-do couple from Mexico participated in an ESP course and became enamored with the teachings of the program. (R.2300-2301) One of their daughters, 16-year-old Daniela,[1] also attended an intensive course and was deeply moved by the mission of ESP. (R.2301-2304) Thereafter, Daniela traveled to New York with her parents to attend the annual celebration of Defendant's birthday known as V-week where she met Defendant and other members of the NXIVM community. (R.2314). After that week, Daniela, with the approval of her parents, remained in the Clifton Park to work with NXIVM and study with the Defendant. (R.2322-2327). Eventually her entire family joined her, including her siblings Marianna, Camila and Adrian. (R.2328; 2368)

B. Defendant's Polyamorous Lifestyle

During the existence of NXIVM, Defendant lived with his life-partner, Pamela Cafritz, with whom he had a 30-year relationship before she passed away in 2016. (R.4540) By all accounts, Pam was Defendant's closest confidante and supporter. (R.548; 1519) Defendant's

[1] Defendant uses the names of witnesses as they were referenced at trial.

relationship with Cafritz was a polyamorous one, meaning it was characterized by "the practice or condition of participating simultaneously in more than one serious romantic or sexual relationship with the knowledge and consent of all partners.[2]" (R.2375)

For example, Defendant had simultaneous, ongoing sexual relationships with numerous other women from NXIVM, including Lauren Salzman. Salzman's relationship with Defendant began in 2001 and she frequently participated in consensual sexual activities with Defendant and his other partners, including Pam. (R.1538-1539) Defendant's other partners included Kristin Keefe and Marianna – both of whom lived with Defendant and Pam in a condo located at 3 Flintock Lane. (R.2392). Pam and Marianna were best friends who were inseparable (R.1520)

Defendant also began a relationship with Marianna's sister, Daniela, in and around late 2003. (R.2387) The sisters discussed with one another their respective relationships with the Defendant and their desire to be with him romantically; they agreed it could prove

[2] Polyamorous. (2021). Retrieved from https://www.dictionary.com/browse/polyamorous

problematic but ultimately continued having simultaneous sexual relations with him. (R.2398-2399) Daniela spent a significant amount of time at 3 Flintock, helping the Defendant with a variety of tasks. (R. 2400-2401) By her own admission, Daniela idolized the Defendant and considered him her best friend. (R.2401) According to Daniela "I felt like he could be with women in front of me, I wasn't jealous. I really wasn't." (R.2401)

C. Daniela Enters the U.S. Illegally

Between 2002 and 2004, Daniela traveled to the United States on a tourist visa that had to be renewed from time to time. (R.2408) In late 2004, Daniela and her father traveled from New York to Mexico to renew their visas; however, when they returned to the United States on October 24, 2004, their visas were withdrawn and they were barred from reentering the country. (R.2408) Daniela returned to Mexico and was told she would have to wait a year to reapply for a visa. (R. 2408) Daniela was "crushed," "beside herself," and desperate to return to Clifton Park and her life there. (R.2409) Daniela testified that she was having regular communications with the Defendant who suggested that she might be able to re-enter the county over the Canadian border.

(R.2409) According to Daniela, a plan was hatched whereby she would fly to Canada and meet Kirstin Keefe who would provide her with identification of another person and that they would drive across the Canadian/US border (R.2411) Ultimately, another NXIVM member, Cathy Russell, met Daniela over the border in Canada, providing her with a sheriff's identification of another woman who Daniela resembled. (R.2411) Daniela showed the ID to border patrol agents before successfully crossing into the U.S. (R.2412-2414)

D. Defendant's Relationship with Camila

Less than 60 days before trial was scheduled to commence, the government filed a superseding indictment, charging Defendant with additional racketeering acts, including sexual exploitation of a child arising from the discovery of a number of nude of photos of Camila on a hard drive, allegedly created on November 2, 2005 and November 24, 2005 when Camila was 15 years old. (Dkt. No. 434) The government also charged Defendant with an act of possession of child pornography as a result of maintaining the images on the hard drive. *Id.*

Camila did not testify about the circumstances under which the photographs were obtained nor did she identify who was responsible for

taking the photos that were allegedly recovered from the hard drive. However, the government presented testimony from FBI agent Booth, who told the jury that through forensic examination of a camera card and hard drive recovered from 8 Hale Drive, a location utilized by the Defendant although not exclusively, he concluded that the images were taken on November 2 and November 24, 2005. (R.4873-4880) In addition to admitting the nude photos of Camila, the government admitted, over defense objection, 167 nude photos of Defendant's adult consensual sex partners, the vast majority of which focused on their genitalia. (R.4797-4805; 4842-4843)

The government presented other testimony that supported its theory that the Defendant and Camila had an intimate relationship in late 2005, but the details of the genesis of the relationship were limited. Over defense counsel's objection (R.3487-3490), the government introduced 1500 pages of chat messages between Defendant and Camila, mostly from 2014 when Camila was in her mid-20s. (R.3440-3675) Although approximately 3 pages of those messages intimated that Defendant and Camila began some type of relationship when she was underage, the remaining messages were introduced to show the jury the

nature of Defendant and Camila's relationship when she was an adult. *Id.*

Also over defense counsel's objection, the government was permitted to apprise the jury that Daniela, Camila, Marianna, and Pam had abortions after being impregnated by Defendant. (R.2278) Part of that evidence included Daniela and Camila's medical records from the abortion and ultrasound images of eventually aborted fetuses. (R.3281-3282)

E. NXIVM Comes Under Attack and Fights Back

At some point in 2002, a man named Rick Ross was hired by a New Jersey couple, Morris and Rochelle Sutton, to stage an intervention in an effort to help their son Michael extricate himself from NXIVM. (R.4685-4687) Rick Ross was the director of the Cult Education Institute and the author of the book , "Cults Inside Out: How people get in and can get out." (R.4680) As part of this intervention effort, the Suttons hired two experts to study the curriculum of NXIVM and prepare reports about NXIVM that was later published on Ross's website. (R.4701-4702) NXIVM responded by suing Ross and others.

Shortly thereafter, NXIVM began receiving negative media attention. Forbes published an article entitled "The Cult of Personality" which was critical of NXIVM on October 13, 2003, and which included a quote from Claire Bronfman's father, Edgar Bronfman. (R. 4723) Over defense objection, the court permitted the government to introduce the Forbes article into evidence (R.4725-4727)

In 2012, another series of negative articles was published by the Times Union, entitled "The Secrets of NXIVM" featuring the Defendant on the cover. (R.5001-5002)

NXIVM aggressively responded to the public claims of their detractors, primarily through litigation. In addition to filing a lawsuit, NXIVM hired private investigators to gather financial information about individuals who they perceived had an agenda to destroy NXIVM including for example Rick Ross, Edgar Bronfman, and journalists who had reported negatively on NXIVM.

F. Defendant and Others Create DOS also known as "The Vow."

In late 2015, Defendant with a number of women, including Allison Mack, designed a secret society known as "DOS" or "The Vow." (R.1619) Although a number of DOS members came from the larger

NXIVM community, involvement in NXIVM was not a prerequisite to membership, and DOS and NXIVM were unrelated. (R.211; 1783; 3847) In fact, Defendant expressed a preference for enrolling people into DOS who were not part of the NXIVM community. (R.1620)

DOS was a women's sorority built on a master-slave paradigm with the Defendant positioned at the top of the structure as the "Grandmaster." (R.1594) Immediately below the Defendant was his "slaves" who consisted of a number of women, including but not limited to Allison Mack, Lauren Salzman, and Monica Duran. These women were also considered first-line "masters," because they recruited their own slaves into the group. (R.1601) Defendant had a sexual relationship with most but not all of the first-line masters. (R.1595; 1601)

Salzman recruited a total of six slaves into DOS. (R.1601) She testified that membership in DOS required complete secrecy. (R.1602) There was an enrollment process whereby the prospective slave would be asked to provide collateral, which consisted of highly sensitive information, true or untrue, that was sufficiently valuable to ensure the recruit's commitment to the secrecy of the group. (R.1602; 1621) Once the collateral was provided, the prospective slave would learn that

members made a lifetime vow of obedience as part of DOS; that it was premised on a master-slave dynamic; and that they would eventually be asked to get a brand in connection with their membership in DOS. (R.1603; 1621) If the recruit decided to move forward with membership, she was expected to collateralize all areas of her life by providing her master with rights to material possessions and more damaging information. According to Salzman, the purpose of the collateral was to create fear among the "slaves" that their collateral would be forfeited or released to prevent them from breaking their vow by leaving DOS or from disclosing its existence. (R.1603; 1621) First-line "masters" were prohibited from revealing that Defendant was the "Grandmaster" or that the brand they would be expected to get was the Defendant's initials (R.1602-1603; 1621)

There were a number of practices associated with DOS including checking in with your master in the morning and before you went to bed. (R.1603-1604). There were daily acts of self-denial to build character and other tasks or assignments, including "readiness drills." (R.1604) DOS "slaves" were also expected to do "acts of care" for their respective masters which consisted of such things as running errands,

picking up groceries, or generally helping make the master's life easier. (R.1615) The concept of "acts of care" was familiar to the NXIVM community, because it put great value on the notion of learning to care for somebody just for the sake of caring. (R. 1615)

Allison Mack was a successful working actress from Los Angeles who ran one of NXIVM's programs called "The Source." (R.3815) The Source was billed as an acting course that involved psychology and was tailored to artists. (R. 3813) Mack was also a first-line "master" in DOS who recruited other actresses into DOS, including Nicole and India. India in turn recruited another aspiring actress, Jay, into DOS.

Nicole began a friendship with Mack after participating in a Source class. (R.3819) After completing the course, Nicole moved from LA to New York and kept in touch with Mack. (R.3821) Nicole continued to take a weekly Source class with Mack and attended V-week in August 2015. (R.3822-3823)

In early 2016, Mack recruited Nicole into DOS, explaining that it was a secret women's organization and that in order to ensure the secrecy of the group, Nicole had to provide collateral to learn more. (R. 3846-3847) Nicole agreed to provide collateral and gave Mack an

untruthful letter claiming that her father sexually abused her, a damaging letter about an ex-boyfriend, and a sexually explicitly video. (R.3848-3853) After providing the collateral, Mack told Nicole about DOS, explaining that membership in the group involved a lifetime vow of obedience and that the women would don matching brand. (R. 3844) Mack did not disclose that Defendant was affiliated with DOS. (R. 3862)

Nicole joined DOS and remained a member for roughly 14 months. (R. 3877) After joining, Nicole began taking walks with the Defendant at the urging of Mack. (R. 3907) On May 31, 2016, Nicole went on a walk with the Defendant during which he blind-folded her, brought her to an unknown location, restrained her, and spoke to her as another person performed oral sex on her. (R. 3925-3928, 3933) Although Defendant did not use physical force to coerce Nicole into this sex act, Nicole testified that she complied when the Defendant led her through the sexual encounter, because she feared the release of her collateral if she did not follow his directives. (R. 3936-3938) Thereafter, Nicole engaged in a sexual relationship with Defendant for the better part of year that was unrelated to DOS and conducted in secret. (R. 3970)

Jay was initiated into DOS through India who was Mack's "slave." (R. 4370) Jay testified that she was given an assignment from India to "seduce" Defendant. (R. 4417) Jay was horrified and refused. *Id.* Her collateral was not released as a result of her defiance. She ultimately left DOS with no release of her collateral as a consequence. (R. 4434)

SUMMARY OF ARGUMENT

As this Court has previously acknowledged, the potentially broad reach of RICO poses a danger of abuse when the government attempts to apply it to scenarios for which it was never intended. Such is this case here. In a transparent attempt to plead around the statute of limitations, the government alleged that Defendant and his "inner circle" comprised an enterprise whose purpose was to "promote" the Defendant. Because the members of an enterprise must have more in common than a collective admiration for its purported leader, that is, they must have a common purpose of engaging in a course of conduct and must function as a continuing unit, the government's evidence that Defendant's "inner circle" constituted an enterprise for RICO purposes was insufficient. Separately, the government failed to demonstrate a pattern of racketeering activity where no two racketeering acts were

sufficiently related, but rather amounted to isolated and sporadic offenses unconnected to any enterprise.

The government's proof was insufficient as to a number of other counts, including all sex trafficking offenses where the government failed to show any commercial sex acts (intended or completed) that were caused by threats of harm. Similarly, Defendant's forced labor conviction must be vacated where no DOS members were living in a condition of servitude and whatever small tasks or "acts of care" they completed did not amount to the type of "labor or services" contemplated by the forced labor statute. The government's proof was also insufficient as to Defendant's convictions for sexual exploitation of a child where Camila did not testify and the jury was not permitted to assume that Defendant committed the conduct prohibited by the statute simply because he allegedly possessed the pornographic images.

The government successfully distracted the jury from its deficient proofs in a calculated attempt to breed hatred for the Defendant and indifference to his constitutional guarantees, including the right to be convicted only by proof beyond a reasonable doubt. The District Court sanctioned this strategy when it gave the government carte blanch to

convert Defendant's trial on the charged offenses into a trial on his moral character and treatment of women with whom he had consensual relationships. The jury was inundated with incalculably prejudicial evidence about Defendant's controversial sex life that was of marginal relevance and had the effect of luring the jury into finding the Defendant guilty of the charged offenses based on emotion rather than the evidence.

The District Court's own strong emotions about Defendant's guilt interfered with a number of Defendant's constitutional rights, including the presumption of innocence, when it forced the parties to refer to witnesses who the government designated as "victims" by first names or pseudonyms before the government proved its case. This practice served to signal to the jury that Defendants should be presumed guilty. Defendant further suffered unquantifiable prejudice when the District Court prematurely terminated defense counsel's cross-examination of the government's key cooperating witness in violation of his Fifth and Sixth Amendment guarantees. As set out in detail below, Defendants RICO conspiracy, RICO, sex trafficking and forced labor conspiracy charges must be vacated. Alternatively, a new trial is demanded.

ARGUMENT

I. The Government Failed to Prove Defendant Guilty Beyond a Reasonable Doubt of All Sex Trafficking Offenses (Counts 5-7 and Act 10A), Forced Labor Conspiracy and Forced Labor of Nicole (Count 3 and Act 10B), Sexual Exploitation of a Child (Acts 2 & 3), Conspiracy to Alter Records (Act 6), and Conspiracy to Commit Identity Theft of Pam Cafritz (Act 11).

A jury found Defendant guilty of an assortment of offenses spanning roughly 15 years, including the following charged counts and/or racketeering acts: (1) sex trafficking and forced labor of Nicole; (2) attempted sex trafficking of Jay; (3) sex trafficking conspiracy; (4) sexual exploitation of Camila; (5) conspiracy to alter records in an official proceeding; and (6) conspiracy to commit identity theft of Pam Cafritz. The government obtained a guilty verdict on these counts/acts notwithstanding insufficient evidence as to each and every element of the offenses. Because the jury's verdict of guilt as to counts 3, 5, 6, 7 and acts 2-3, 6, 10-11 were based entirely on speculation, conjecture, and

inflamed emotions, rather than through reasonable inferences derived from the evidence, this Court must vacate those convictions.

This Court reviews *de novo* challenges to the sufficiency of the evidence underlying criminal convictions. *United States v. Purcell,* 967 F. 3d 159, 185 (2d Cir. 2020). In so doing, this Court takes "the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Id.* Where the Government asks the jury to find an element of the crime through inference, "[t]he jury may not be permitted to conjecture . . . or to conclude upon pure speculation or from passion, prejudice or sympathy." *United States v. Vernace,* 811 F. 3d 609, 615 (2d Cir. 2015). Instead, this Court "must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *Id. quoting United States v. Martinez,* 54 F. 3d 1040, 1043 (2d Cir. 1995).

A. The Government's Proof of: (1) a Commercial Sex Act; that (2) Was the Product of Coercion or Fraud Was Insufficient.

Defendants' convictions related to sex trafficking must be vacated where: (1) the government's evidence showed that no commercial sex act was intended, initiated, or completed as to any DOS "slaves," including Nicole, Jay, and Sylvie; and (2) Nicole's year-long intimate relationship with Defendant was not the product of any coercion or fraud. Defendant was charged with sex trafficking of Nicole and attempted sex trafficking of Jay between the dates of February 2016 and June 2017 pursuant to 18 U.S.C. §1591.

Section 1591(a) establishes criminal penalties for "[w]hoever knowingly "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person" or "benefits, financially or by receiving anything of value, from participation in a venture which has engaged in "such an act, while "knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, coercion, . . . or any combination of such means will be used to cause the person to engage in a commercial sex act." 18 U.S.C. §1591(a), (1)(2). "Commercial sex act" is defined in section 1591(e)(3) as

"any sex act on account of which anything of value is given to or received by any person."

To determine whether the government satisfied its burden of proof, this Court should consider the purpose and aim of 18 U.S.C. §1591 enacted under the Trafficking Victims Protection Act ("TVPA"). The TVPA is part of a comprehensive regulatory scheme that criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain. *United States v. Walls,* 784 F. 3d 543, 548 (9th Cir. 2015). *See also United States v. Evans,* 476 F. 3d 1176, 1179 (11th Cir. 2007). In enacting §1591, Congress recognized that human trafficking, particularly of women and children in the sex industry, "is a modern form of slavery, and it is the largest manifestation of slavery today." *Id. citing* 22 U.S.C §7101(a) & (b)(1). Congressional findings from the TVPA reflect that the impetus for the legislation was to address sexual exploitation *for profit*, not merely mistreatment of women and children. *See* 22 U.S.C. §7101(2) Courts have acknowledged that the TVPA was aimed at regulating a class of activities that are economic in nature, and more specifically, sexual exploitation for profit. *See, e.g., Todd v. United States* ("commercial sex

acts are necessarily economic in nature . . . and distinguishable from laws governing gender-motivated crimes of violence and not involving such economic activity"); *United States v. Campbell,* 111 F. Supp. 3d 340, 344-46 (W.D.N.Y. 2015) (TVPA was intended to regulate an "economic 'class of activities' ")

With this legislative history in mind, the government failed to prove that the Defendant intended/completed sex acts that were commercial in nature, or that they were *caused* by a threat of harm.

1. Sex Trafficking of Nicole (Act 10A and Count 6)

Turning first to the completed act of sex trafficking of Nicole, the government offered insufficient evidence that "anything of value" was given or received on account of Nicole's sexual experiences with Defendant that commenced on May 31, 2016 and persisted for over a year. Nicole engaged in a sexually intimate relationship with Defendant that was conducted almost exclusively outside the domain of DOS. Apart from the initial sexual encounter that allegedly occurred on May 31, 2016, Nicole described an extended relationship with Defendant that was unconnected to DOS. (R.3943; 3956) Even Nicole's so-called DOS "master," Allison Mack, was in the dark about the relationship,

because Defendant did not want to arouse Mack's jealousies. (R.3957; 396; 3978; 4258) Given the secrecy in which Defendant and Nicole conducted their relationship, the government's contention that Mack received some type of benefit *because* Defendant was sexually intimate with Nicole is illogical. (R.3871)

Recognizing the flaw in its reasoning, the government took the position that the May 31, 2016 incident, during which Nicole was blind-folded and brought to an undisclosed location where another person performed oral sex on her, constituted the requisite commercial sex act. (R. 5409) The government posited that the May 31, 2016 incident was commercial in nature, because Mack received certain privileges such as "maintaining a spot in the first line [of DOS]" by soliciting women into DOS. (R.5414) (R.5409; 5413)

The government distorts the meaning of "commercial sex" beyond recognition. First, "maintain[ing] a spot in the first line of DOS" cannot qualify as a "thing of value" in the context of commercial sex services. Section 1591 was designed to punish sexual exploitation for economic profit, not sex acts with unsubstantiated connections to vague, unquantifiable benefits. *See United States v. Estrada-Tepal,* 57 F. Supp.

3d 164, 172, n.7 (E.D.N.Y. 2014) (collecting cases under section 1591, all of which involve sexual exploitation for profit).

Second, even if it could be said that Mack received advantages in exchange for her recruitment of women into DOS, it does not follow that Mack received "anything of value" specifically *on account o*f Nicole's sexual encounter with the Defendant on May 31, 2016 – or on any other day. "On account of" means that there needs to be a "causal relationship between the sex act and an exchange of an item of value." *See United States v. Marcus,* 487 F. Supp. 2d 289, 307 (E.D.N.Y. 2007) *vacated on other grounds,* 538 F. 3d 97 (2d Cir. 2008), *reversed,* 560 U.S. 258 (2010). The government conflated the supposed benefits that Mack received as a result of being a first line DOS master with economic benefits that must be shown to have flowed directly from the May 31st sex act.

Mack did not testify, of course, that she received any benefits, economic or otherwise, *on account of* Nicole's sexual encounter with Defendant on May 31, 2016. Rather, the evidence revealed that Mack, like other first-line DOS masters, received certain perks like "acts of care" on account of being in a master-slave relationship with Nicole to

which Nicole consented, not because Nicole had sex with the Defendant. Case in point, Salzman, who received the same benefits as other first line masters, had no knowledge that sex with the Defendant was integral to DOS membership, and her "slaves" were not engaged in sexual activity with Defendant. (R.1790-1794) The government's attempt to create a nexus between the sex acts and the "acts of care" fails. Nothing in the record supports the inference that if Mack did not produce DOS slaves for sex with Defendant, she would lose her status in DOS. Any benefits Mack received as part of DOS were not directly or indirectly related to the May 31, 2016 episode.

In an instructive case, *Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.,* 2013 U.S. Dist. LEXIS 180463 (W.D. Ark. 2013), the court held that to sustain a charge under section 1591, there must be a causal relationship between the sex acts and money received by the defendants. There, the defendants were members of Tony Alamo Christian Ministries ("TACM"), a "communal" organization of churches and businesses, whereby earnings by members were deposited into a joint account and members' living expenses were paid from the joint account. *Id*. at 53. Tony Alamo, the head of the church, forced the

plaintiffs to become his "spiritual wives" and subjected them to sexual and physical abuse as minors. *Id.* The plaintiffs sued church members and other "sister wives" of Alamo who "shared a home with [plaintiffs] during the time they were being abused" and "who encouraged and facilitated the abuse, or at the very least, did nothing to prevent the abuse when they had the duty and the ability to do so." The court dismissed the sex-trafficking count because there was no evidence that the defendants were compensated "on account of" the sex acts, or that plaintiffs' living expenses were paid "as some sort of quid pro quo for the sex acts that occurred with Alamo." *Id.*

Consistent with *Kolbek,* the evidence presented at trial failed to show that Mack received any benefits as a quid pro quo for the sex acts that occurred between the Defendant and Nicole on May 31, 2016 or at any time thereafter. Whatever benefits Mack received as a first line DOS "master" were not connected to specific sexual acts between Defendant and Nicole. Thus, the government failed to establish a commercial sex act which is fatal to count 6 and act 10A.

Separately, the government failed to put forth adequate evidence that Nicole engaged in the May 31, 2016 sex act (or any other sex act

with the Defendant) as a result of coercion or force, including a fear that her collateral would be released if she refused to submit.

Immediately after the May 31st incident, Nicole wrote a journal entry that signaled no regrets about her sexual experience with "Keith," declaring that she was done "fighting the growing process" and was "excited about embracing the vow and working with Keith . . ." (R.3942) Nicole complained to Mack about a litany of things, but her sexual adventure with "Keith" was not among her complaints. When Nicole bemoaned the chaos in her life, suggesting that frequent trips to Albany were burdensome, Mack criticized Nicole but ultimately stated "choose as you wish." (R.3942)

Nicole's email communications with Mack do not depict someone reluctant to express her true feelings. Not once did Nicole suggest that she felt coerced into any sexual acts nor did she convey any concern about the release of her collateral if she declined sexual activity with the Defendant. Even when she unloaded on Mack, Nicole voiced no outrage, surprise, or disgust about the May 31, 2016 incident. Nicole admitted that she felt "fine" after the experience and thought it might be a good thing. (R.3944)

It is unfathomable that a near-30 year old woman would have remained silent in the wake of such a dramatic encounter wherein she was allegedly taken against her will, blind-folded, tied down, and subjected to non-consensual oral sex at the direction of her friend and mentor. Her silence is particularly telling under the circumstances, because she regularly complained to Mack about any number of less-consequential matters. Nicole's subsequent lengthy and private relationship with Defendant belies the government's claim that she feared "serious harm." Importantly, during that time period when Nicole told Defendant that she did not want to be sexually intimate with him, her request was honored. (R.3961)

While it is true that Nicole testified at trial that she feared release of her collateral if she left DOS, she *never* testified that she feared release of her collateral if she did not engage in sexual activity with the Defendant. (R.4259-4262) And of course, Nicole ultimately left DOS, as did other DOS "slaves" without the consequence of having their collateral released. (R.4081) Even taking Nicole at her word that she never would have joined DOS had she known that Defendant was the architect of the group, the government was still required to demonstrate

a nexus between the coercion and the May 31, 2016 sex act; it's evidence is lacking on this element.

2. Sex Trafficking Conspiracy (Count 5) and Attempted Sex Trafficking of Jay (Count 7)

Like count 6 and act 10A of the indictment, the government's evidence in support of count 5 (sex trafficking conspiracy) and count 7 (attempted sex trafficking of Jay) of the indictment was insufficient to establish Defendant's guilt by proof beyond a reasonable doubt where the government offered no evidence that Defendant intended or entered into an agreement to engage in *commercial* sex activities. "It is elementary that conspiracy is a crime, separate and distinct from the substantive offense." *United States v. Coplan,* 703 F. 3d 46, 67 (2d Cir. 2012). "Although the government need not prove commission of the substantive offense" to secure a conspiracy conviction, "it must prove that the intended future conduct [the conspirators] agreed upon which includes all the elements of the substantive crime." *Id.*

Even if the government is correct that the Defendant and Mack entered into an understanding whereby Mack recruited women into DOS so that the Defendant might have sex with those women, the record is devoid of any evidence that there was an agreement to engage

in *commercial* sex acts as defined, *supra*. The record fails to reflect that the moving force behind Mack's (or any other first-line "master") directions to "seduce" Defendant was for economic benefit, including so-called "acts of care" which was a common theme of NXIVM. "Acts of care" received by DOS masters, were a product of the master-slave relationship but were unlinked to specific sex acts with the Defendant. Accordingly, the *commercial* element of the sex-trafficking charges is wholly lacking. To find otherwise would be to omit the commercial aspect of sex trafficking and convert the distinct crime of sex trafficking into a garden-variety sex crime.

B. The Government Did Not Prove that Defendant Agreed To or Did Obtain Labor or Services from Nicole Through Threats of Serious Harm (Count 3 and Act 10B).

The jury found that between February 2016 and June 2017, Defendant knowingly obtained labor and services of Nicole by means of threats of serious harm (Act 10B) and had engaged in forced labor a conspiracy for the same time period charged in a separate count of the indictment (Count 3). No rational juror could conclude based on the evidence adduced at trial that Defendant knowingly obtained, or agreed to obtain, any labor or services from Nicole or any other DOS slave.

A conviction of forced labor under 18 U.S.C. §1589 requires the government to prove beyond a reasonable doubt that: (1) the defendant obtained the labor or services of another person; (2) through, *inter alia,* threats of serious harm; and (3) the defendant acted knowingly. *Marcus,* 487 F. Supp. at 310. Like the sex-trafficking statute, the language "by means of" contained in the forced labor statute, 18 U.S.C. §1589(a), requires the government to establish a causal link between the labor and services provided by the person and the threat of "serious harm." *Id.* Serious harm, for purposes of §1589(a)(2) is defined as:

> [a]ny harm, whether physical or nonphysical, including psychological, financial or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to performing labor or service in order to avoid incurring that harm. *Muchira v. Al-Rawaf,* 850 F. 3d 605, 618 (4th Cir. 2017).

Section 1589 is "intended to address *serious* trafficking, or cases where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." *Id*. The harm or threat of harm, "considered from the vantage point of a reasonable person in the place of the victim, must be 'sufficiently serious' to *compel* that person to

remain" in her condition of servitude when she otherwise would have left. *Id.*

"Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *United States v. Toviave,* 761 F. 3d 623, 628 (6th Cir. 2014) Section 1589, the forced labor statute, was "passed to implement the Thirteenth Amendment's [prohibition] against slavery or involuntary servitude." *United States v. Toviave,* 761 F. 3d 623, 629 (6th Cir. 2014). "Congress intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion" as well as through "physical or legal coercion." *Muchira,* 850 F. 3d at 617.

The forced labor statute was not intended, however, to cover the "acts of care" that were expected from members of DOS and the NXIVM community as a whole. Absent "clear expression of Congressional intent," this Court should resist the urge to transform the forced labor statute to cover the circumstances alleged in act 10B and count 3 of the indictment which bear virtually no resemblance to those paradigmatic forced labor cases and their victims. *See Toviave,* 761 F. 3d at 626.

(describing prostitution, forced sweatshop work, and forced domestic service as "paradigmatic forced labor cases.")

The government urges an unreasonably broad interpretation of "labor or services" to include isolated personal favors and kind gestures that were understood as such in the context of DOS. To conclude that Nicole's occasional "acts of care" for Mack and an isolated incident where she transcribed Cafritz's speeches for her memorial service qualifies as a "condition of servitude" or the type of "labor and services' intended under the statute renders the purpose of the force labor statute meaningless. Under government's expansive interpretation of "labor and services," even Jay's act of sending a poem to India electronically would constitute the types of "labor and services" prohibited by the forced labor statute.

Even if "acts of care" could be construed as "labor or services," the record shows that Nicole knowingly consented to these types of activities as part of her membership in DOS. Nicole did not testify that Mack concealed the fact that she would be expected to do "acts of care" as a member of DOS, and Lauren Salzman testified that when she became a member of DOS herself and when she enrolled others, she

explained that the group involved a master-slave dynamic and that "acts of care" were part of the vow of obedience. (R. 1718; 1757) In fact, "acts of care" was a well-accepted tenet of the entire NXIVM community. (R.1615) The record is devoid of evidence that Nicole, Jay or Sylvie feared "serious harm," physical or otherwise, including the release of any of their collateral, if they refused to participate in "acts of care." Thus, no reasonable juror could conclude that Nicole harbored an objectively reasonable fear that her collateral would be released if she refused to run errands for Mack which was a task expected of all members of DOS. In fact, the record reflects that DOS slaves routinely failed to live up to the expectations of their DOS masters and no threats were made to release collateral, rather they were expected to do "penance."

In sum, the government's application of the forced labor statute to these circumstances strips all meaning from the concept of "forced labor" and "involuntary servitude." Neither Nicole, nor any other DOS "slave" was held in a "condition of servitude" as contemplated by the forced labor statute. Accordingly, this Court should reverse Defendant's conviction for conspiracy to commit forced labor and consider whether

the RICO counts can survive notwithstanding the government's failure to prove racketeering act 10.

C. Where Camila Did Not Testify, the Government Failed to Prove the Child Exploitation Charges, Allegedly Committed on November 2 and 24, 2005.

Defendant was charged with two acts of sexual exploitation of a child and possession of child pornography in connection with a number of nude photos of a 15-year-old Camila that were recovered from a hard drive located in the residence of 8 Hale Drive. (GX518A-U) Because Camila did not testify, the mere presence of photos on a back-up drive recovered from a location to which Defendant and countless others had access was insufficient to establish that Defendant intentionally induced or coerced Camila to take part in sexually explicit conduct 13 years earlier. Although the government allegedly discerned through forensic analysis of a camera card that the photographs recovered from a hard drive were taken on November 2 and 24, 2005,[3] no evidence was

[3] Defendant was charged with the sexual exploitation charges via a superseding indictment less than 60 days prior to the commencement of trial. Defendant's trial counsel objected to the eleventh hour superseding indictment, complaining, *inter alia,* that Defendant was under unreasonable time constraints in which to adequately challenge the forensic evidence that formed the factual basis for the child exploitation and possession of child pornography acts. Defendant intends to challenge the reliability of Agent Booth's testimony via a Rule 33 motion.

presented at trial regarding the circumstances of how the photos came to be in existence or maintained on the hard drive. Instead, the jury was left to complete a narrative based entirely on speculation and conjecture rather than competent evidence or fair inferences therefrom.

Under section 2251(a), the government was required to prove, *inter alia,* that Defendant "employed, used, persuaded, induced, enticed, or coerced" Camila to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. 18 U.S.C. §2256 2(A). Although Defendant does not contest that the photos admitted into evidence as GX518A-U (R.4873) are photos of Camila, the photos alone, even if recovered from a hard drive to which the Defendant may have had access at some point in time, cannot establish by proof beyond a reasonable doubt that Defendant employed, used, persuaded, enticed, coerced Camila to participate in the taking of the photographs on November 2 and 24, 2005 – over 13 years before they were recovered. (R.4305) To hold otherwise would be to conflate the offense of possession of child pornography and sexual exploitation of a child which requires a showing of something more than mere possession of the pornographic material.

Without Camila's testimony, the origins of Defendant and Camila's relationship is simply unknown. However, the government presented some evidence through Daniela's testimony and messages between Camila and Defendant that suggest their relationship began before her 16th birthday. But the mere fact of an inappropriate, even sexual relationship, does not satisfy the government's burden since the record is devoid of any specific evidence regarding what, if anything, occurred on November 2 and 24, 2005.

Courts have often remarked that a Defendant's wrongful intent is normally demonstrated through inferences drawn from the Defendant's conduct. "The state of a person's mind is rarely susceptible to proof by direct evidence, and usually must be inferred from evidence of his or her acts, but is no less a question of fact for that." *United States v. Crowley,* 318 F. 3d 401, 409 (2d Cir. 2003). In the case at bar, the government presented *no* evidence of Defendant's conduct on November 2 and 24, 2005. Thus, the jury was forced to speculate not only about the conduct that occurred but whether the Defendant possessed the requisite state of mind. In short, the mere presence of nude photos of Camilla on a hard drive that untold numbers of people had access to discovered 13

years after the picture was allegedly taken simply cannot prove that Defendant took the photo in the manner and for the purpose prohibited by the statute in November 2005.

Although distinguishable, the United States Supreme Court's decision in *Bailey v. United States,* 516 U.S. 137 (1995) *superseded by statute* offers some guidance here. In *Bailey,* the Defendant was convicted of "using" a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1) after drugs were recovered from his car and a firearm discovered in the trunk of his car. The Court held that the word "use" under § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant and that mere possession of a firearm by a person who commits a drug offense is insufficient to sustain a conviction under § 924(c)(1). The Court observed that had Congress intended possession alone to trigger liability under §924(c)(1), it easily could have so provided. *Id*. at 143. The Supreme Court disapproved of conflating "use" with "possession," condemning the lower's court's analysis which "render[ed] "use" virtually synonymous with "possession" . . ." *Id*. at 150.

Bailey is instructive to the extent that it underscores the government's burden to present evidence of the *conduct* prohibited by the statute and that it may not simply ask a jury to assume such conduct occurred (with the requisite mental state) because the prohibited material was found "in possession" of the Defendant 13 years later. Defendant's alleged possession of the pornographic material is not synonymous with taking the photographs.

As set forth in Argument III, *infra,* the government inundated the jury with hundreds of pages of email communications between the Defendant and Camila numerous years later, a fraction of which were arguably relevant to show that Defendant and Camila engaged in a sexual relationship when she was underage, but which shed no light on the circumstances of the photographs obtained in November 2005. The jury's contempt for the Defendant and their hunch that he was responsible for taking the photo cannot satisfy the government's burden.

D. The Government Failed to Prove Conspiracy to Alter Record for Use in an Official Proceeding (Act 6).

To establish conspiracy to alter records for use in an official proceeding pursuant to §1512(c)(1), the government had to prove that a

Defendant or a co-conspirator altered the video-tapes that were produced in the civil litigation *NXIVUM Corp., et al., v. Ross Institute, et al.,* 06 CV 1051 (D.N.J.) with the intent of impairing the availability of the video footage for use in an official proceeding. There is no question that the government presented evidence that Mark Vicente altered or directed the alteration of certain video tapes at the direction of Defendant. But the evidence does not show that any party did so with the intent to impair the availability of the video footage for use in an official proceeding or with the purpose of impeding the administration of justice.

The record is devoid of evidence showing that Vicente or any other co-conspirator altered the videos with the intent to interfere with any official proceeding, including the one charged in the indictment. When asked if the Defendant told Vicente whether the videos would be produced in a "case," Vicente responded, "[i]t was some case and that the – there was some case that the patent would be at risk because of what was in the tapes." (R.666-667) Vicente did not testify what he meant by "case" nor did claim to know that an official proceeding was underway or imminent as a result of the patent issues. Vicente did not

admit that that he intended to impede the administration of justice. Even when the prosecutor asked leading questions of Vicente, Vicente did not affirm that he intended to interfere with an official proceeding, as defined by §1515(a)(1) (R.670)

After some strong-arming, the prosecution successfully elicited testimony from Vicente that as he sat in court testifying, he understood that the alteration of the videotapes was illegal. (R. 676) But Vicente never conceded that at the time he directed the alteration he knowingly or intentionally did so with the purpose of obstructing an official proceeding. Thus, the government failed to establish the mental state necessary to prove act 6.

Furthermore, although the government presented testimony through an attorney associated with *NXIVUM Corp., et al., v. Ross Institute, et al.,* 06 CV 1051 (D.N.J.) that GX605-A-D were video-tapes that had been produced in connection with that litigation. (R.4502) Vicente was unable to confirm that GX605A-D were the video tapes that were altered at his direction or Defendant's direction. (R.710) Over defense counsel's objection (R.4504-4506), the court permitted the video-tapes to be introduced into evidence despite the government's inability

to prove that Defendant, or Vicente, or any other co-conspirator altered GX605A-D. Because the government failed to prove that any video tapes altered by Vicente's team were, in fact, produced in the *NXIVM* civil case or that *at the time* he directed the alteration of the video, Vicente possessed knowledge that it would be produced in an official proceeding, the government's proof as to act 6 is insufficient.

E. The Government Failed to Prove Act 11 Where No Competent Evidence Was Put Forth to Show that Defendant: (1) Acted Without Authority or (2) That He Did So With the Intent of Evading Tax Liabilities.

It is undisputed that Defendant and Pam Cafritz were long-term partners who had lived together for decades. In fact, according to the government, Cafritz was a co-conspirator, a member of Defendant's so-called inner circle, and his "fixer." Cafritz named Defendant both executor and sole beneficiary of her estate. (R.4542-4547; 4621-4623) Despite this relationship, the government opined that Defendant did not have authority to use her credit card or pay bills from her accounts after she passed and that Defendant used her credit card and paid bills from her bank accounts for the purpose of committing tax evasion.

At the outset, the government offered only conclusory testimony, lacking foundation and based entirely on hearsay statements of

another, that Defendant did not have authority to use Cafritz's American Express card and to access her bank account to pay expenses. (R. Furthermore, the government failed to demonstrate that Defendant's use of Cafritz's American Express and/or monies from her account was related in any way to any agreement between Defendant and another to commit the crime of tax evasion.

In order to prove act 11, the government was required to demonstrate that Defendant, and his conspirators, intended to engage in conduct that constituted the offense of tax evasion. The substantive crime of tax evasion requires proof of: (1) the existence of a substantial tax debt; (2) willfulness of the nonpayment, and (3) an affirmative act by the defendant, performed with intent to evade or defeat the payment of the tax. *United Stated v. Litwok,* 678 F. 3d 208, 215 (2d Cir. 2012).

Although the government bombarded the jury with anecdotal evidence that Defendant and other members of NXIVM questioned the federal government's right to tax income of its citizens (as does anyone who considers himself a Libertarian), and hired accountants to mitigate NXIVM"s tax liability (as most tax payers do), the government did not offer a scintilla of evidence that Defendant ever failed to pay his taxes

or that he had a "substantial tax debt." The government further failed to show that Defendant's motivation in using Cafritz's resources (of which he was the sole beneficiary) to pay bills was an intent to avoid paying taxes rather than a continuation of how bills were paid prior Cafritz's death. As such, the government failed to prove act 11 by proof beyond a reasonable doubt.

As the foregoing shows, the government's proof was insufficient as to a number of counts and acts that went to the jury. Accordingly counts 3, and 5-7 must be vacated, and acts 2-3, 6, 10-11 may not considered as grounds for demonstrating a pattern of racketeering activity.

II. Defendant's RICO Convictions Must Be Reversed Where the Government Failed to Prove an Enterprise and a Pattern of Racketeering Activity.

The Racketeer Influenced and Corrupt Organizations ("RICO") was passed in 1970 as part of the Organized Crime Control Act ("OCCA"). The legislation arose from a growing concern about the widespread influence of La Cosa Nostra, also known as the Mafia. Section 1962(c) prohibits "any person employed by or associated with any enterprise . . . to conduct or participate, directly or in directly, in

the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." Concededly, RICO is a broadly written statute, but its application is not without limits. Whereas here, the government charged an enterprise so far-reaching that it could not possibly satisfy RICO's requirement of showing a group of people associated together for a common purpose of engaging in a course of conduct and functioning as a continuing unit, Defendant's convictions for RICO and conspiracy to commit RICO must be vacated. Likewise, Defendant's RICO convictions cannot be sustained where the government failed to show a pattern of racketeering activity.

This Court reviews *de novo* challenges to the sufficiency of the evidence underlying criminal convictions. *Purcell,* 967 F.3d at185.

A. Insufficient Proof of an Enterprise

A RICO enterprise is defined as " 'a group of persons associated together for a common purpose of engaging in a course of conduct.' *United States v. Turkette,* 452 U.S. 576, 583 (1981). *See also Boyle v. United States,* 556 U.S. 938, 950 (2009)(holding "section 1962(c) demands the creation of an "enterprise" – a group with a common purpose and course of conduct – and the actual commission of a pattern

of predicate offenses."). An enterprise is demonstrated "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *First Capital Asset Mgmt., Inc.. v. Satinwood, Inc.,* 385 F. 3d 159, 173 (2d Cir. 2004). In particular, for an association of individuals to constitute an enterprise, "the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Id.* at 174. The enterprise's purpose must be common to all of its members. *Stein v. World-Wide Plumbing Supply Inc.,* 71 Supp. 3d 320, 325 (E.D.N.Y. 2014). *See also Crab House of Douglaston v. Newsday,* 801 F. Supp. 2d 61, 77 (E.D.N.Y 2011) *citing Satinwood,* 385 F. 3d at 174. The "enterprise" is neither the individual defendant nor the "pattern of racketeering activity;" rather it is "an entity separate and apart from the pattern of activity in which is engaged," and must be alleged and proved separately. However, there must be a nexus between the enterprise and the racketeering activity that is being conducted. *United States v. Indelicato,* 865 F. 2d 1370, 1384 (2d Cir. 1989).

Here, the government did not allege that NXIVM, a formal business entity, was the racketeering enterprise for purposes of the

RICO statute, nor did it allege that DOS, a secret society, was the racketeering enterprise for purposes of satisfying the RICO statute. To maximize the reach and scope of the alleged enterprise, the government charged that the Defendant and his "inner circle" was an informal group that constituted the enterprise for purposes of satisfying the RICO statute. (S.I. at ¶ (R.1564).

According to Lauren Salzman, the Defendant's "inner circle" consisted of herself and a whopping 24 other people, some of whom were mentioned only in passing during Defendant's trial. (R.1564-1570; GX 362) In order for Defendant's "inner circle" to qualify as an enterprise under the RICO statute, the government was required to show that the associates of the "inner circle" had a common purpose to engage in a course of conduct and that they functioned as a continuing unit. The government proved neither. Rather, the government proved only that the Defendant, *himself,* was the enterprise since he is the only member of the group that connects the racketeering acts allegedly committed under NXIVM and DOS.

First, the government failed to show that the "inner circle" shared a common purpose to engage in a fraudulent course of conduct and

worked *together* to achieve that purpose. The best the government could show in terms of a "common purpose" was "a commitment" to the Defendant. (R. 1571) A shared loyalty to the Defendant simply does not qualify as common purpose *to engage in a course of conduct*. Conduct refers to behavior, and the government offered no evidence that the "inner circle" *together* engaged in a course of conduct for some identifiable common purpose.

Notably, none of the three members of the so-called "inner circle" who testified at Defendant's trial (Salzman, Vicente, Daniela) articulated a course of conduct in which all members engaged to carry out a common purpose of the enterprise. For example, Vicente adamantly denied having any knowledge of or participating in any conduct that related to nearly all of the racketeering acts charged in the indictment. Daniela, also an alleged member of the inner circle, was allegedly ostracized from the "inner circle" in 2008 and was purportedly a victim of the enterprise, not a member of it. For her part, Lauren Salzman could not articulate the common purpose of the "inner circle" except to say that the "inner circle" had a commitment to the Defendant. Other than a shared purpose to support the Defendant, the

government did not identify any *course of conduct* in which the "inner circle" engaged for a common purpose.

Second, the government did not prove that the members of the "inner circle" functioned as a "continuing unit." Quite the opposite. Some members of the "inner circle" were associated entirely with the legitimate business activities of NXIVM or ESP with no factual basis to believe that that they were involved in or condoned a "fraudulent course of conduct." Some members were part of the NXIVM's leadership, like Nancy Salzman and Clare Bronfman, who allegedly were involved in certain criminal conduct related to NXIVM but not DOS. And some members had virtually no clout within NXIVM but were members of DOS, a secret society, separate and discrete from NXIVM. Indeed, the Defendant's "inner circle" – the so-called enterprise – was nothing more than a hodgepodge of people from a wider community who did not share an agenda to engage in a course of conduct but were connected only by their reverence or desire for the Defendant. Simply put, the "inner circle's" shared devotion to the Defendant without a common purpose to engage in a *course of conduct* is not sufficient to demonstrate an enterprise.

In *United States v. Bledsoe,* 674 F. 2d 647 (8th Cir. 1982), an instructive case, 22 defendants were indicted for violation of RICO; the RICO count alleged that each of the defendants were associated with an enterprise, described as a group of individuals associated in fact to offer and sell securities of corporations organized as agricultural co-operatives ("co-ops") by fraudulent means from residents of the states of Missouri, Oklahoma, and Arkansas. *Id.* at 659. The court observed that inclusion of the RICO count allowed the government to join 22 defendants in the same indictment even though not all of the defendants were involved in the formation and sale of the securities of all the various cooperatives. *Id.* Furthermore, without the broad RICO allegation, the government could not have introduced evidence of all 209 alleged predicate acts of racketeering. *Id.* The government conceded that had it alleged an enterprise of a single cooperative rather than an enterprise consisting of multi-states associations, only evidence of mail and securities fraud related to that single cooperative would have been admissible. *Id.* at 660. In light of the theory under which the government tried the case, the court observed that the RICO conviction could only be sustained if sufficient evidence of a *single* enterprise

composed of the various individual defendants associated in fact and distinct from the co-ops existed. *Id.* The court held that the government's evidence fell short. The court emphasized that a RICO enterprise cannot simply be the undertaking of the acts of racketeering and that enterprise must function as a single unit:

> Proof of the existence of an associated-in-fact enterprise requires proof of a "common purpose" animating its associates, and this may be done by evidence of an "ongoing organization, formal or informal," of those associations in which they function as a "continuing unit." The ties between the individual associates that are implied by these concepts of continuity, unity, shared purpose and identifiable structure operate precisely to guard against the danger that guilt will be adjudged solely by virtue of associations not so related. They define the line between "concerned action" through "group association for criminal purpose" for which "combination in crime" may constitutionally be proscribed, and less clearly related conduct that may not be so proscribed or prosecuted. *Id.* at 664.

Similar to *Bledsoe,* the government here did not charge that either NXIVM or DOS were the enterprises associated with pattern of racketeering activities. Intent on casting their net as wide as possible, the government instead alleged that the *enterprise* was a rather large assortment of individuals associated with the Defendant so as to create relatedness between otherwise disconnected acts. Given the government's theory of the case, Defendant's RICO conviction can only

be sustained if the government established sufficient evidence of a single enterprise. As in *Bledsoe,* because the government proved only a loose and discontinuous pattern of associations among the "inner circle" with no common purpose to engage in a course of conduct and further failed to show that the group functioned as a continuing unit, the government's evidence of an enterprise is insufficient.

B. Insufficient Evidence of a Pattern of Racketeering Activity

The government must also demonstrate a pattern of racketeering activity by proving, at a minimum, two predicate racketeering acts that occurred within ten years of one another. *See* 18 U.S.C. §1961(1), (5). Proof of two predicate acts is not sufficient to satisfy its burden of proof, the government must also show that the racketeering acts are related to each other and to the enterprise, and together pose a threat of continuing criminal activity. *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 239 (1989). *See also, Reich v. Lopez,* 858 F. 3d 55, 59 (2d Cir. 2017).[4] Predicate acts must bear a relationship to each other that "manifest[s] the continuity required to prove a pattern." *United States v. Pizzonia,*

[4] This Court observed in *Reich* that the Supreme Court has instructed courts to interpret the pattern element the same way in civil and criminal cases. *Reich,* 858 F. 3d at 61, n.4

577 F. 3d 455, 465 (2d Cir. 2009). RICO is inapplicable to perpetrators of "isolated" or "sporadic" criminal acts; "criminal conduct only 'forms a patterns if it embraces criminal acts'" that are related. *Indelicato,* 865 F. 2d at 1383.

Focusing on the relatedness requirement, the "[p]redicate crimes must be related both to each other (termed 'horizontal relatedness') and to the enterprise as a whole (termed 'vertical relatedness'). *Reich,* 858 F. 3d at 60-61. *See also United States v. Daidone,* 471 F. 3d 371, 376 (2d Cir. 2005). Horizontal relatedness can be shown through predicate acts that "have the same or similar purpose, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.,* 492 U.S. at 240. *See also, Indelicato,* 865 F. 2d at 1382 (relatedness shown by "temporal proximity, or common goals, or similarity of methods, or repetitions"). Where the enterprise in question is not primarily in the "business of racketeering activity" predicate acts must be related to each other in kind for a RICO case to proceed." *Reich,* 858 F.3d at 60-61

Vertical relatedness requires only "that the defendant was enabled to commit the offense solely because of his position in the

enterprise of his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise." *United States v. Burden,* 600 F. 3d 204, 216 (2d Cir. 2010).

With regard to the continuity requirement, the government must present evidence regarding the timing and temporal scope of the alleged racketeering acts to demonstrate either close-or open-ended continuity. *Reich,* 858 F. 3d at 60. Criminal activity that occurred over a long period of time in the past has close-ended continuity, regardless of whether it may extend not the future. Close-ended continuity is "primarily a temporal concept," that requires that the predicate crimes extend "over a substantial period of time." *Id.*

In contrast, criminal activity "that by its nature projects into the future with a threat of repetition" possesses open-ended continuity, and that can be established in several ways. Some crimes may be by their very nature a future threat. *Id.* When the business of an enterprise is primarily unlawful, the continuity of the enterprise itself projects criminal activity into the future. Similarly, criminal activity is continuous when "the predicate acts were the regular way of operating that business," even if the business itself is a primarily lawful. *Id.*

The racketeering acts charged by the government can be grouped into three distinct categories, DOS-related acts (Acts 9 & 10), Non-DOS acts (Acts 1, 5-8, 11), and child exploitation acts related to Camila (Acts 2-4). For the reasons set forth, *infra,* the government failed to demonstrate a pattern of racketeering by proof beyond a reasonable doubt where the charged acts lacked sufficient relatedness and continuity. Indeed, the predicate acts consist of a medley of sporadic offenses with no connection to the alleged enterprise or each other.

1. DOS-Act (Acts 9 & 10)

As argued, *supra,* the government failed to prove act 10 beyond a reasonable doubt, but insufficiency of the evidence aside, the government failed to prove that the DOS acts were related to any other charged racketeering acts or the enterprise. Guided by *H.J., Inc.,* act 9 (state law extortion) and act 10 (sex trafficking and forced labor of Nicole) do not share the same or similar purpose as any other Non-DOS racketeering acts or the child exploitation acts (acts 2-4). The DOS acts identify Nicole and other lower-ranking DOS "slaves" as the victims of these crimes during the time period of September 2015 through June 2017. No other charged racketeering acts identify DOS slaves as victims

and the DOS acts occurred long after the other charged racketeering acts. The methods of commission, that is, generally coercing Nicole and other DOS "slaves" to provide collateral to engage in sex acts with the Defendant out of fear that earlier collateral would be released, bears no similarity to any of the other charged racketeering acts, all of which occurred long before DOS was in existence. Furthermore, the purpose of these acts which was allegedly to sexually gratify the Defendant and provide status and labor to first-line "master" Allison Mack is vastly different than the purpose of the Non-DOS acts and the child exploitation acts which occurred 13 years earlier. Indeed, it is clear that the DOS acts stand alone, related to each other but no other acts.

The DOS acts also do not relate to the enterprise. If the government had alleged that DOS was the enterprise, the government would surely have proven vertical relatedness. But the government instead claimed that the enterprise consisted of Defendant's "inner circle" and that the purpose of the enterprise was to "promote the defendant," presumably in an effort to satisfy the vertical relatedness requirement for the mélange of charged racketeering acts. As discussed above, the government did not prove a single enterprise of Defendant

and his "inner circle." Thus, it cannot show that the DOS acts are vertically related to the enterprise.

If courts were to recognize that the mere "promotion" of the alleged leader of a group constitutes a common purpose to engage in a course of conduct, the vertical relatedness requirement would mean nothing. After all, any charged act against the Defendant could arguably be related to an enterprise whose purpose is to promote the Defendant. Because the DOS-acts are not sufficiently related to any other racketeering acts, nor can there by vertical relatedness when the enterprise's alleged common purpose is so broad as to be meaningless, the DOS-acts do not show a pattern of racketeering activity.

2. Sexual Exploitation and Possession of Child Pornography Acts (Acts 2-4)

The sexual sexploitation of Camila acts and possession of child pornography (acts 2-4) relate to each other but no other charged racketeering acts. Camila is identified as the victim in these charges whereas is she is not identified as a victim in any other racketeering act, and the other racketeering acts involve no other child victims. The child exploitation acts occurred in 2005 long before the bulk of any other racketeering acts. The method of commission of these acts, although

unknown since Camila did not testify, is generally that Defendant induced her to pose for lascivious photos that he saved but never looked at again. No distinguishing characteristics exist between the exploitation acts and the other racketeering acts.

The child exploitation charges do not relate to the alleged enterprise, primarily because as argued, *supra,* the government failed to prove an enterprise. The acts do not relate to the activities of the enterprise, because the government has not shown that the enterprise engaged in any activities other than admiration for the Defendant.

The government also failed to prove continuity of the child exploitation and possession of pornography acts. These acts, to the extent they were proven, were isolated events.

3. **Non-DOS Acts**

The government charged a number of miscellaneous Non-DOS acts that bore no relationship to the DOS acts or child exploitation charges and were largely unrelated to one another.

a. *Act 1: Conspiracy to Commit Identity Theft and Unlawfully Possess identification Document*

Act 1 relates to Defendant's alleged efforts to help Daniela enter the country unlawfully after her visa was revoked. This offense was

clearly an isolated event, unique to the circumstances of the moment. It shared no distinguishing features with the child exploitation acts, and it occurred over a decade before the DOS acts.

As for other non-DOS acts, act 1 bore no commonalities with charges related to identity theft of Loperfido, Bronfman, and Marianna or any efforts to alter video-tapes to obstruct an official proceeding (act 5-7). According to the government, Defendant sought to "hack" the email accounts of Loperfido and Bronfman primarily to find damaging information with which to discredit them and directed the alteration of videotapes to obstruct a civil litigation. In contrast, he intended to access Marianna's account to determine whether she was communicating with another man. The purpose of these crimes had no connection or relationship to helping Daniela enter the country unlawfully.

It is true that Daniela participated in the charged identity theft acts, but the record is devoid of evidence that Defendant, or any co-conspirator, helped her unlawfully enter the country so she could carry out these identity theft crimes. Defendant's interest in gaining access to these email accounts did not arise until well after 2004. Furthermore,

Daniela was an unschooled 18-year-old with no expertise in the field of computer science, belying any suggestion that Defendant's motivation in assisting her return to the United States was connected in any manner to the identity theft acts that occurred four years later.

Lastly, act 1 is not related to the forced labor charges set forth in act 8, notwithstanding that Daniela was the alleged victim of act 8. Act 8 charged Defendant with forced labor and involuntary servitude of Daniela under threat of being sent back to Mexico without her birth certificate. According to Daniela she was confined to a bedroom in her home where she was forced to write letters to Defendant and complete book reports to earn her release. Defendant did not assist Daniela's return to the U.S. to lock her in a room. The events were unrelated and unconnected both factually and by temporal proximity.

Act 1 also has no relatedness to the enterprise, not only because no enterprise with a common purpose was proven but because act 1 was carried out for the benefit Daniela and only Daniela. Daniela admitted that she was desperate to return to the United States. While it may have been unlawful to assist her in returning, the crime was clearly an

isolated event with no risk of repetition and no connection to any common purpose of the enterprise.

b. Acts 5 & 6: Identity Theft of Loperfido and Bronfman and Conspiracy to Alter Records in Official Proceeding.

As argued, *supra,* Defendant contends that the government failed to prove act 6, but sufficiency of the evidence challenges aside, these acts do not relate to the enterprise. For the reasons argued in subsection A of this argument, the government did not establish an enterprise that extended beyond the Defendant himself. Rather, the enterprise consisted of an ad hoc group of individuals who shared a loyalty to the defendant and not much more. Thus, even if acts 5 and 6 could be connected to each other, the government failed to show their relatedness to the enterprise.

c. Acts 7 & 8: Identify Theft of Marianna and Forced Labor of Daniela.

Act 7 is an isolated or sporadic offense related to Defendant's interest in learning whether Marianna was communicating with other men; it has no distinguishing characteristics with any other racketeering activity nor is it related to any enterprise. Even if the

government had pled that the enterprise was either NXIVM or DOS, this act relates to neither.

Similarly, the forced labor counts related to Daniella's confinement to her bedroom cannot be linked to any other racketeering act. The mere fact that Daniela features into other acts as a co-conspirator is not sufficient to demonstrate horizontal relatedness and like the other racketeering acts, a nexus between the so-called enterprise and this act is wholly lacking.

d. Act 11: Conspiracy to Commit Identify Theft of Pam Cafritz.

Act 11 which charges Defendant with using Pam Cafritz's credit card and paying bills from her account without authority and for the purpose of tax evasion is yet another isolated charge, committed in a manner dissimilar to any of the other charged identity theft acts, involving entirely different players, and having a purpose unrelated to any other racketeering acts. Although Defendant maintains that the government failed to prove this act beyond a reasonable doubt, even if its proof was sufficient, it cannot show relatedness (vertical or horizontal) or continuity. Rather, it is simply one of many random

charged acts cobbled together in an attempt to create a non-existent pattern of racketeering activity.

In sum, the government's evidence of a violation of RICO falls short at every turn. No single enterprise was pled or proven, dooming Defendant's convictions for counts 1 and 2. Moreover, no pattern of racketeering was proven where no two acts, completed with 10 years, relate to each other and also relate to a single enterprise with a common purpose.

III. Where Defendant's Jury was Swamped with a Mass of Minimally Probative Yet Highly Prejudicial Evidence Related to Defendant's Controversial Sex Life, Defendant Was Deprived of a Fair Trial and Fair Opportunity to Defend Himself Against the Charged Offenses.

Defendant's trial was overwhelmed by excessive evidence related to his personal relationships outside the context of DOS. It was no secret that Defendant led a polyamorous lifestyle long before DOS came into existence. While some small percentage of the government's evidence regarding Defendant's consensual sex life, as unconventional as it was, was arguably relevant to charges related to DOS and

racketeering acts 2 &3 (the sexual exploitation charges), the vast majority of this evidence served no legitimate purpose and was designed solely to breed contempt and disgust for the Defendant.

This Court reviews evidentiary rulings for abuse of discretion. *United States v. Mercado,* 573 F.3d 138, 141 (2d Cir. 2009)

The district court abused its discretion when it allowed the government to introduce: (1) thousands of chat communications between Defendant and Camila when Camila was in her mid-20s, including graphic sexual exchanges; (2) evidence that Camila, Daniela, Mariana (all sisters), and other intimate partners of Defendant had abortions after becoming pregnant with his child; (3) medical records and testimony about Daniela and Camila's abortions, including ultrasound photos of the fetuses; and (4) nearly a hundred photos of women's genitalia that were taken during consensual sexual activities. Because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice and evidentiary alternatives existed for presenting the evidence to the extent it was minimally probative of some fact in issue, the district court should have

excluded the vast majority of this evidence pursuant to Fed. R. Evid. 401 & 403.

Rule 401 defines relevant evidence as that which "has any tendency to make a fact more or less probable than it would be without the evidence," so long as "the fact is of consequence in determining the action." Fed. R. Evid. 401. *See also Old Chief v. United States,* 519 U.S. 172, 178 (1997). Rule 403 authorizes the exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Old Chief* holds that "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offenses charged. *Old Chief v. United States,* 519 U.S. 172, 180 (1997). The Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. R. Evid. 403. As *Old Chief* observed:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much crime with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that is disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. *Michelson v. United States,* 335 U.S. 469, 475-76 (1948).

Probative value is also informed by the availability of alternative means to present similar evidence. Specifically, the Supreme Court has advised that the "Rule 403 'probative value' of an item of evidence . . . may be calculated by comparing evidentiary alternatives." *Old Chief,* 519 U.S. at 184.

The district court is afforded wide discretion to exclude evidence that is, on balance, unduly prejudicial. *Taveras,* 424 F. Supp. 446 (E.D.N.Y. 2006). "So long as the district court has conscientiously

balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational. *Id*.

As set out below, the district court did not conscientiously balance the probative value of certain proffered government evidence that carried an extraordinary risk of prejudice.

A. Camila Communications

Over defense objection (R.3426-3439), the government admitted into evidence thousands of chat messages between Defendant and Camila that were largely irrelevant to any issue in dispute but incalculably prejudicial to the Defendant. (R.3442-3443; 3446) Via the testimony of Agent Rees, the government admitted 1500 pages of WhatsApp[5] messages between Defendant and Camilla primarily between the years 2014 and 2016 when Camila was in her mid-20s. (R. 3457) The government devoted an entire day – and then some – to having Agent Rees read cherry-picked messages between Camilla and Defendant that painted a disturbing picture of Defendant and Camila's highly dysfunctional relationship.

[5] WhatsApp is a popular text and voice messaging application.

For example, the government presented hundreds of communications that revealed a secret intimate relationship between Defendant and Camila in 2014 and 2015 when she was of legal, consenting age. The government purposefully highlighted certain communications culled from thousands of pages of communications that portrayed Defendant as manipulative, controlling and emotionally abusive. (R. 3453-3454; 3456-3457; 3458-3459; 3470; 3471-72; 3480-81; 3481-3482; 3493-3492; 3493; 3501-3502; 3512-3514; 3555-3556; 3576; 3593) For example, some communications reflect Camila asking Defendant if she can shave her pubic region or color her hair. (R. 3494; 3536-3537; 3619) The communications revealed that Defendant was simultaneously in a relationship with Camila's sister, Marianna or "Monkey," which was a source of great pain for Camila (R. 3459-3461; 3502-3504) (*e.g.* "[w]ere you serious about having children with my sister or were you using that to scare me? . . .I always felt that you chose her over me. If you have children with her, you'd be making the ultimate statement that that was true." (R. 3503))

The government focused on numerous communications between Camila and Defendant that portray Defendant as controlling and

consumed by jealously as a result of Camila's relationship with other men, including Robbie or "R" and Jim. (R.3465-3468; 3491-3492; 3515-3516; 3524-3530; 3549-3550; 3556-) Just by way of example,

> KR: Why are you still protecting what you did with R? Why won't you face this in yourself so things can get better?
> C: I don't have the answers you are looking for . . . I'm sorry.
> KR: Please find them now . . . Ask yourself those questions . . . Visualize what you did, how you made those decision and see the future evaporate . . . Also see yourself being the type of person you don't want to be . . . It should deeply disturb and disgust you . . . I hate to be crude, but it will build your conscience to strongly see our little child saying, Please mommy don't, as you spread your legs and picture that child withering as you do and get that's what you did . . .
> C: Whoa.
> KR: You seem not to acknowledge the crudeness of the raw destruction . . . It should be deeply disturbing and disgusting. It's you doing that in reality. (R.3468)
>
> ***
>
> KR: Why haven't you insisted on swallowing me since you did so with R? . . .
> C: I haven't wanted it . . .
> KR: That's the worst news of all. His sperm and DNA should be disgusting and invasive. You should have wanted[ed] to do anything to love mine, to try to save what is left of a connection. Do you like his fluid more than mine? (R.3556)

The communications revealed that Camila suffered from an eating disorder known as bulimia and that Defendant still repeatedly

pressured her to lose weight. (R.3472-3474; 3475-3480; 3619) Just by way of example:

> KR: By the way . . . how's your weight? Et cetera?
> C: I don't know. Why? Do I look fat?
> KR: I'm sad then because it's important to me . . . To not know is not to care enough.
> C: I disagree but I will weigh myself for you. (R.3473)

Some of the communications show Camila in a state of emotional turmoil, mentally broken, and suicidal. (R.3495; 3501-3502; 3504-3500; 3521-3522; 3530-3534; R.3537-35420; 3570-3571; 3600-3605; 3606-3610; 3613-3614; 3618; 3640-3641) In fact, the court even permitted the government to introduce evidence that Camila had attempted suicide in and around April 2015 by cutting her wrists. (R.3560-3562; 3600-3605)

The government was permitted to introduce communications between Defendant and Camila revealing that *before* the existence of DOS, they embraced a master-slave dynamic in their relationship and that Defendant demanded a lifetime vow of obedience from Camila. (R.3496-3500; 3516-3518; 3542; 3546-3549; 3551-3553; 3620-362; 3622; 3625-3626) Particularly prejudicial were conversations between Defendant and Camila about the prospect of bringing a "virgin" into their relationship as some type of "successor" because Camila had

engaged in sexual relations with Robbie and had lost her "purity." (R.3510-3511; 3516-3518; 3520; 3542-3543; 3588-3591; 3594-3599; 3605; 3611-3612; 3614)

The court also permitted the government to introduce gratuitous sexually-graphic conversations that served little purpose other than to inflame the passions of the jury. (R.3522-3523; 3549-3551; 3556-3561) In one exchange, Defendant asks Camila to compare his semen with Robbie's semen in terms of "taste, consistency, quantity, and intensity" and to compare their penises - which she does. (R.3556-3560) In another exchange, Agent Rees describes a BDSM photo sent from the Defendant to Camila, stating "[t]his is an image of a BDSM act in which a woman is bound by her hands and legs as well as a hook. It appears to be a ceiling in giving - - performing oral sex to a male." (R.3636)

The vast majority of the WhatsApp communications between Camila and Defendant were not relevant to any disputed issue. While certain communications were arguably relevant to support the government's claim that Defendant began a sexual relationship with Camila when she was 15 years old (R.3462-3464) and that Defendant was the architect of DOS, those communications could have been

presented without a days-worth of salacious testimony about Defendant and Camila's emotionally-destructive relationship. The government had more than enough evidence tying Defendant to DOS and could have presented Defendant's statements suggesting the length of their relationship without overwhelming the jury with an entire day's worth of troubling and intimate communications that served no purpose other than to arouse the passions of the jury.

B. Abortion Evidence

Over objection, the district court permitted cumulative evidence in the form of testimony and medical records about the many pregnancies and abortions of Defendant's sex partners, including the three sisters Camilla, Daniela, Mariana. Over defense counsel's objections (Doc. No. 561; R.1562) the government elicited testimony from Lauren Salzman that Defendant had told her that Mariana had had "abortions" (R.1559). Daniela testified that in 2006 she became pregnant with Defendant's child and had an abortion. (R.2628-2631) Daniela testified at length about her experience terminating her pregnancy and her state of mind at the time. (R.2628-2636) Daniela further testified that Defendant told her that Pam had previously terminated a pregnancy and that Mariana

had undergone multiple abortions. (R.2631; 2636-2636) Daniela testified at length that her younger sister Camila had also experienced an abortion after becoming pregnant with Defendant in 2008. (R.2640) Again, Daniela described the experience of supporting her sister through the abortion (R.2641-2648) And finally, Agent Rees testified that he reviewed images in Camila's email communications that reflected a positive pregnancy test and ultrasound from 2016 (R.3656) The government admitted those photos into evidence as GX1162 & 1164 (R.3442-3443) All told, the government presented evidence to the jury that Defendant's partners had undergone abortions no fewer than a half-dozen times.

The government was permitted to highlight the abortion evidence with the testimony of retired nurse practitioner Elizabeth Butler (R.3283- 3328) who testified at length about types of medical abortions and the process one experiences when getting an abortion. (R.3288-3295) If that was not enough, the government was also permitted the government to introduce Daniela and Camila's medical records (GX539 & 540) detailing their abortions and including ultrasound images of their fetuses. (R.3300-3302; 3305)

The cumulative abortion evidence was exceedingly prejudicial and had minimal probative value. Even if a tiny section of the records were relevant to support the government's theory that Defendant initiated a sexual relationship with Camila when she was 15 years old, the issue of whether she underwent an abortion was probative of absolutely nothing. The government justified the admission of this evidence to show that Pam Cafritz was a co-conspirator in the enterprise and that her actions of bringing Daniela and Camila to a women's clinic for the purpose of getting abortions was part of the "means and methods of the charged enterprise." (R.3281) But where Daniela testified unequivocally that she wanted an abortion, was not pressured into an abortion, and could not ever imagine having a child with the Defendant, the government's contention that Pam's role in facilitating exactly what Daniela wanted was not particularly probative of the "means an methods of the charged enterprise." Furthermore, because Camila and Marianna did not testify, there is no evidence that Pam, at the direction of Defendant, pressured the women into abortions. Even if he had, this evidence had no connection to the activities of the enterprise – to the extent there was an enterprise.

In short, the government elicited this testimony for no other purpose than to inspire hatred for the Defendant and distract the jury from its duty to determine Defendant's guilt on the *charged* offenses. Where abortion is among the most divisive, if not *the* most divisive, issue in this country, and 12 of the 18 jurors (and alternates) who sat of Defendant's jury indicated that faith was either "extremely important; I make life decisions based on faith" or "important but I consider other issues," there can no doubt that the introduction of excessive evidence regarding abortions carried a high risk of prejudice, particularly where three of Defendant's partners who had those abortions were sisters. Even the district court judge could not help but voice his disapproval of the fact that Defendant had engaged in relationships with three sisters before the parties rested. , remarking at a sidebar "[] this is a choice that, apparently Mr. Raniere made to engage in this behavior with three sisters. That is a creation of your client, it is not a creation of the Government, so I am not going to have Camila's last name, even though she is a co-conspirator, or alleged to be a co-conspirator . . . Just that's life, you know. That was Mr. Raniere's choice, that wasn't the court's choice." (R. 3437-3438)

In sum, the abortion evidence depicted Defendant as contemptible and reflected poorly on his morality, at least by conventional norms, but it was of little probative value in determining whether he committed the charged offenses.

C. Binders of Vulva Photos

Over objection (R. 4798-4802; 4804), the government also admitted into evidence roughly 167 images of women's genitalia with whom Defendant had consensual sexual relations in and around 2005. (R.4804-4805) (GX 508A-F; 509A-O; 510A-L; 511A-l; 512A-I; 513A-P; 514A-P ; 515A-KK; 516A-H; 517A-O; 519A-HH) Each juror was provided with a binder of images of the vulvas that were wholly unrelated to any of the charged offenses.[6] (R.4834-4835) The parties stipulated to the identity of each of the woman and their vulvas – none of the women alleged that the photos were taken under duress or without consent. (R.4842-4843)

The government argued that the evidence was relevant to prove the child exploitation charges because the child pornography images

[6] Although the images at issue were often referred to as depicting women's vaginas, the anatomically correct name of the women's genitalia depicted in the images is "vulva." https://grammarist.com/usage/vagina-vulva/

were contained in a folder in the same area as the folders that contained images of other women and for timeframe. (R.4799-4800) The government also opined that the "type" of photographs (*i.e.,* images of women's vulvas) were the same kind the Defendant received in DOS a decade later. (R.4800).

Arguably, the timeframe in which the vulva photos was taken shed some light on the question of whether Defendant was responsible for taking the Camila photos, but it was entirely unnecessary to provide the jury with binders of 167 images of nude women and their vulvas to establish a timeline. Indeed, the government had ample evidence via the testimony of Lauren Salzman and Daniela that in conjunction with the meta-data associated with the images would have accomplished the same goal. Salzman and Daniela both testified that Defendant took intimate photos of them with a camera in and around 2005. (R.1534-1536) They certainly could have identified a handful of photos of themselves for the purpose of establishing the "time line." Similarly, the record contained more than ample evidence via testimony from Sylvie, Lauren Salzman, Daniela, and Nicole about what "types" of intimate images the Defendant preferred. The probative value of 167 images of

women's nude bodies and genitalia from 2005 during consensual sexual encounters was minimal while the prejudicial effect was extraordinary.

Cumulatively, the admission of minimally probative evidence of thousands of troubling text messages between Defendant and Camila, excessive evidence about Defendant's sexual partners obtaining abortions, including images of fetuses eventually aborted, and 167 photos of vulvas of numerous women was substantially outweighed by the prejudicial effect. Defendant was denied a fair trial and fair opportunity to defend the charged offenses as a result of the district court's admissions of this explosive evidence.

V. Defendant Was Denied his Fifth and Sixth Amendment Rights When the Trial Court Prematurely Terminated Defense Counsel's Cross-Examination of the Government's Key Cooperating Witness Lauren Salzman.

Lauren Salzman, a cooperating co-defendant, pled guilty to racketeering and conspiracy to commit racketeering before testifying against Defendant pursuant to a cooperation agreement with the government. (R.2005-2007) Salzman told the jury that she faced up to 20 years in prison for her role in the charged offenses and that in

exchange for her truthful testimony against Defendant, the government would inform the sentencing judge that she provided truthful testimony and assisted the prosecution of Defendant but that it would not recommend a specific sentence. (R.2008)

During Salzman's cross-examination, defense counsel began a line of questioning designed to show that Salzman pled guilty and was testifying against Defendants for reasons unrelated to her or Defendant's guilt.

> Q. Did you think it was extortion when you took the stuff? Were you doing it to scare them?
> Ms. Hajjar: Objection
> The Court: You may answer.
> A. I had concerns that it was problematic and I chose to go with what Keith said. If I didn't think it was problematic, I wouldn't have raised it.
> Q. Did you intend to hurt anyone, did you intend to scare anyone?
> Ms. Hajjar: Objection
> The Court: Sustained
>
> ***
>
> Q. When you were in DOS, before anybody was arrested, were you doing things intentionally to break the law?
> Ms. Hajjar: Objection
> The Court: That requires a legal conclusion.
> Q. What was your intention when you were in DOS?
> The Court: You may answer.
> A. My intention was to prove to Keith that I was not so far below the ethical standard that he holds that I was – I

> don't even how far below I am. I was trying to prove my self-worth, and salvage this string of hope of what I thought my relationship might some day be, and I put it above other people, helping them in their best interest. That's what I did when I was in DOS.
>
> The Court: Okay, that it. We are done. (R. 2264-2265)

After the witness was excused, defense counsel immediately addressed the court, "I don't know why Your Honor cut off my cross-examination. The court responded:

> If you want to know, you went way over the line as far as I'm concerned with regard to this witness. You could have asked your questions and moved on to the next question, but you kept coming back, and I am not going to have someone have a nervous breakdown on the witness stand in front of -- excuse me, this is not DOS. This is not the allegations. This is a broken person, as far as I can tell, And whether she's telling the truth, whether the jury believes her. I think it's absolutely necessary that there be a certain level of consideration for someone's condition And that's really what this was. You had plenty of – if you have other things to say, you could have gone on and said them. But what I had here was, I had a crisis here. And not in my courtroom.
> I have to sentence this defendant and what you did was, basically, ask her to make legal judgments about whether what she did in pleading guilty was farcical that she took somebody else's advice, some lawyer, so she could get out from under a trial. I thought that really went pretty far beyond the pale, frankly.
>
> Mr. Agnifilo: Your Honor, I –
>
> The Court: I took her guilty plea, sir. All right?
>
> Mr. Agnifilo: I am not trying to argue with you. I am not trying to argue with you.
>
> The Court: Then don't argue with me.

> Mr. Agnifilo: No –
>
> The Court: You can take your appeal if you should not be successfully. I don't want to talk about it anymore. I thought it was extremely excruciating. When I tried to cut off the line of questioning, you just went right back to the line of questioning. You could have gone on to something else. You could have.
>
> I may not get everything right up here, but I will tell you, as a human being, it was the right decision. Alright? And before I'm a judge, I'm a human being. And that goes for everybody in this room, and it includes you and the Government. And I am not going to allow someone to be placed in this circumstance and that let it continue. I am the one who is disappointed. I'm done. (R. 2267-2270)

The district court's abrupt termination of defense counsel's cross-examination of Salzman before the jury interfered with Defendant's right to a fair trial and his right to confront the government witness, including on the subject matter of whether Salzman pled guilty because she was actually guilty.

Defense counsel promptly moved for a mistrial on account of the district court cutting off his cross-examination, identifying a number of areas of cross that Defendant was unable to confront the witness with including: (1) the impact of her potential jail term on her decision to cooperate; (2) certain other facts she learned in discovery that caused her in hindsight to view Defendant and DOS differently that she did at the relevant time; (3) certain specific portions of the tape recordings she

heard of meetings between Defendant and other DOS members, and (4) other aspects of her plea agreement and her cooperation. (Doc. No. 668 & 730)

The Sixth Amendment guarantees that a criminal defendant "shall enjoy the right . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. That right of confrontation is a "bedrock procedural guarantee;" *Crawford v. Washington,* 541 U.S. 36 (2004); and includes the "fundamental right" to cross-examine government witnesses. *Pointer v. Texas,* 380 U.S. 400, 404-045 (1965); *see also Chambers v. Mississippi,* 410 U.S. 284, 294-95 (1973). The Confrontation clause guarantees not merely the formal opportunity to cross-examine but the opportunity to engage in effective cross-examination. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986) (the Confrontation Clause is violated where "[a] reasonable jury might have received a significantly different impression of [the witness's credibility had [] counsel been permitted to pursue his proposed line of cross-examination"

The district court's termination of defense counsel's cross-examination of Salzman not only implicated Defendant's Sixth

Amendment guarantees, but infringed on his Fifth Amendment Due Process rights. *Goldberg v. Kelly,* 397 U.S. 254 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Cross-examination "is essential to a fair trial" and should be given the "largest possible scope" with cooperating witnesses. *United States v. Hall,* 653 F. 2d 1002, 1008 (5th Cir. 1981). *See also, United States v. Pedroza,* 750 F. 2d 187, l95 (2d Cir. 1984) ("[w]ide latitude should be allowed . . . when a government witness in a criminal case is being cross-examined by the defendant.") "A defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against him either favored the prosecution or was hostile to the defendant." *United States v. Haggett,* 438 F. 2d 96, 399 (2d Cir. 1971). The Supreme Court has held that the "denial or significant diminution of the right to cross-examine calls into question the "integrity of the fact-finding process." *Chambers,* 410 U.S. at 295. After all, in the words of John Henry Wignore, "cross examination is beyond a doubt the greatest legal engine

ever invented for the discovery of truth." 3 J.Wigmore, Evidence § 1367, p. 27 (2d ed. 1923).

No sound justification exists for the district court's premature and abrupt termination of counsel's cross examination of the government's key cooperating witness. Defense counsel's line of questioning was appropriate and proper. Indeed, the court directed the witness to answer the question posed by defense counsel over the government's objection prior to ending the examination. The district court judge later suggested that defense counsel had done something inappropriate by asking the witness questions probing whether she truly intended harm in connection with the charges to which she pled guilty. The court appeared overly concerned that the witness might answer defense counsel's questions in a manner that contradicted her guilty plea and suggested that defense counsel should have shared that concern.

Quite to the contrary. Defense counsel had every right, indeed an obligation, to test the veracity of Salzman's testimony, including through bias and motive. The district court did not enjoy the discretion to curtail cross-examination so as to prevent the jury from hearing facts bearing on the witness's credibility. *Gordon v. United States,* 344 U.S.

414, 423 (1953) (trial judge's discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness crucial testimony") The district court impermissibly intervened in the fact-finding process during a central line of cross-examination. The prejudice suffered by the Defendant was exacerbated where the jury was left with the false impression that defense counsel had done something so improper as to justify the draconian punishment of forfeiting his cross examination along with a tongue-lashing by the court. In reality, defense counsel was doing his job, cross-examining a cooperating witness in an attempt to discredit her.

VI. Defendant Was Denied his Constitutional Guarantees under the Fifth and Sixth Amendments Where the Trial Court Required the Parties and Witnesses to Refer to Individuals Designated by the Government as "Victims" Only by Their First Names or Pseudonyms, Signaling to the Jury that the Defendant Should Be Presumed Guilty.

Prior to trial, the government moved *in limine* for an order,

requiring defense counsel and all witnesses to refer to individuals it deemed "victims" by their first name. Defendant and any individual the government considered a co-conspirator, charged or uncharged, would be referenced by first and last name. Over defense objection, the court granted the motion without addressing Defendant's objections. (A.158)

This practice impinged on a number of Defendant's constitutional rights, including his Sixth Amendment right to confront the government's witnesses and his right to be presumed innocent. It is axiomatic that a jury is entitled to know 'who the witness is, where he lives, and what his business is." *Alford v. United States,* 283 U.S.687, 688-689 (1931). As the Supreme Court observed:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test without which the jury cannot fairly appraise them . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessary have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . *Id* at 692.

Apart from Sixth Amendment implications, the trial court's ruling ran afoul of the presumption of innocence. The jury was conditioned

from the start of trial that certain individuals were victims and certain individuals were co-conspirators, based entirely on the government's say so before the government even proved a conspiracy. The trial court bolstered these assumptions, even forced the Defense to essentially concede the government's theory of the case. By allowing the government to identify victims and co-conspirators before proving its case, the district court implicitly told the jury that it should assume a crime occurred, and because identity was not issue in this case, this message resulted in a directive to assume the Defendant's guilt. This practice resulted in a violation of Defendant's Fifth and Sixth Amendment guarantees and demands a new trial.

CONCLUSION

For the foregoing reasons, count 1-3 & 5-7 and 2-3 must be reversed and a new trial ordered as to the remaining counts. Even if this Court affirms counts 1 and 2, it must vacate the jury's verdict as to the child exploitation acts, sex trafficking and forced labor of Nicole, conspiracy to alter records, and conspiracy to commit identity theft of Pam Cafritz and remand for resentencing.

CERTIFICATE OF COMPLIANCE

I certify pursuant to FRAP 32 and Local Rule 32.1 (a)(4)(A) that the foregoing brief was prepared on a computer using Microsoft Word. The proportionally spaced typeface, font size and spacing used was the following:

Name of Typeface: Century Schoolbook
Point Size: 14
Line Spacing: Double

The total number of words in the brief, based upon Microsoft word count, exclusive of the cover, table of contents, table of authorities and signature is 17,466 words.

Dated: May 7, 2021

/s/ Jennifer Bonjean

Bonjean Law Group PLLC
750 Lexington Avenue, 9th Floor
New York, NY 10022