

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW WHEELER,

LOWER CASE NO. 17-15003-HH

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX- VOLUME II

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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BENCH RULING REGARDING DENIAL OF
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THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
FLORIDA (JUNE 15, 2017)

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI
CASE NO. 16-CR-20715-MGC

4 UNITED STATES OF AMERICA,
Plaintiff

5 vs.

June 15, 2017

6 CHARLES KENNETH TOPPING, ANITA
7 SGARRO, CHARLES DAVID SMIGROD,
MATTHEW WILLIAM WHEELER, JAMES
8 WAYNE LONG,

Defendants.

9
10 JURY TRIAL DAY 27

11 BEFORE THE HONORABLE MARCIA G. COOKE,
12 UNITED STATES DISTRICT COURT JUDGE

13 A P P E A R A N C E S

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15 UNITED STATES OF
16 AMERICA

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15 Also present:

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1 shows that they participated in a scheme to defraud each and
2 every one of them, Mr. Smigrod in particular. He lied to
3 Mr. Gunter about Mr. Marchant and said that he was paid in
4 stock. He was never paid in stock.

05:42 5 The evidence Mr. Houlihan testified to. Ms. Lynch
6 testified. Nobody in the room was ever paid in stock.
7 Mr. Smigrod made other material misrepresentations to people.
8 You heard him on the video saying, "Fun Cool Free, we're the
9 company with Apple." They were not with Apple.

05:42 10 You heard testimony from Mr. Perez who worked in
11 the room, Mr. Rubens worked there for a day, this company was
12 never with Apple. So to say that Mr. Smigrod was an
13 unknowing pawn in this scheme is just simply incorrect.

14 **MR. FLEISHER:** Judge, in response at what happened
05:42 15 in that room, Mr. Mesa, despite the fact that he was -- what
16 he did to these people, he told Rubens, page 33 of that taped
17 transcript, be aggressive, but tell the truth. Be truthful.
18 Be truthful. This is what he told the FBI informant.

19 **THE COURT:** Mr. White.

05:43 20 **MR. WHITE:** Yes, I would renew all previous motions
21 for severance, motions for mistrial. And incorporate and
22 adopt all the arguments of my co-counsel.

23 Your Honor, I think as to Counts 1 and Counts 11,
24 is Count 1 being Sanomedics, and 11 Fun Cool Free, I move for
05:43 25 judgment of acquittal. Looking at the Government's response

1 to the jury instruction issue that was filed this morning,
2 really says it all, that they're accused of selling,
3 knowingly selling worthless stock.

4 In order for the Government to meet its burden,
05:44 5 they have to prove that these defendants, including Matthew
6 Wheeler, knew that the stock was worthless.

7 Now, what did they know? What did Mr. Wheeler
8 know? Now Mr. Wheeler, based upon the payment records that
9 were admitted by the Government, worked for -- in the Mesa
05:44 10 room from early of 2009 to early 2012 and then he left. And
11 he was -- he came back in early 2015 to the same room to sell
12 Fun Cool Free until the raid in August of 2015. So -- and he
13 was in the room when Rubens Stewart -- Stewart Rubens was
14 there as an informant.

05:44 15 The key is during the time that Mr. Wheeler was
16 working with Count 1 first, Sanomedics did have a list price,
17 we just learned today for the first time from Mr. Houlihan
18 that that price was being manipulated by Mr. Sizer. None of
19 this information was made known to the salesmen in the room.

05:45 20 Juan Perez Ortega, the Government's inside the room
21 witness; Shawna Lynch, Isis Machado, who testified about Fun
22 Cool Free. These witnesses all said that what they thought
23 was going on in that room was that Sanomedics and Fun Cool
24 Free were raising capital. They were raising capital.

05:45 25 It turns out -- it turns out that the stock was

1 worthless because all they were doing was putting money in
2 Sizer's pocket. That's why the stock was worthless.

3 But at the moment -- at that time, this was an
4 elaborate scheme to make it look like this was a functioning
05:46 5 company. The purpose of Mr. Houlihan's press releases was to
6 show a company that was making profits, was to show a company
7 that was becoming eligible to being listed on the NASDAQ or
8 the AMEX. These were all part of the deception and these
9 defendants, Mr. Wheeler was deceived as well.

05:46 10 Now, there was some testimony from Shawna Lynch and
11 there was some testimony from Mr. Perez Ortega that, in fact,
12 at some point, and they both testified that point really
13 arrived when the stock price began to plummet and that did
14 not take place until approximately 2014 to 2015, when it went
05:46 15 down to almost zero, and there is evidence that there were --
16 that their investors who were getting called, they were
17 starting to make complaints and all of that took place after
18 Mr. Wheeler had already left.

19 So Mr. Wheeler was never told -- I'll give you an
05:47 20 example. Shawna Lynch said when she would be picking up
21 Mr. Wheeler and taking him to work and sometimes driving him
22 home because he didn't have a car, she would say, "Oh, I
23 suspected at the time that there was something wrong," and I
24 said, "Well, did you tell Mr. Wheeler while you were driving
05:47 25 him to and from work," and she said that it wasn't her job.

1 So, you know, she didn't say, "Hey, you know,
2 you're selling stock that's not worth anything or this is a
3 bogus thing." No. He wasn't told that at all. He was
4 communicating in good faith information that he was being
05:47 5 provided about a company that had a business and appeared to
6 be making business deals, signing letters of intent, making
7 agreements to distribute large amounts of thermometers that
8 was making deals with the Dog Whisperer and all of these
9 things which the Government has very ably shown were
05:48 10 fabrications that were perpetrated at the highest levels of
11 this company, and they want to infer that these defendants
12 were aware of that, so what are they left with?

13 And the whole Sculley thing, you know, ten percent.
14 Well, there is a press release about how there was a private
05:48 15 equity company that he co-founded and the press releases that
16 were introduced -- either one of them was introduced by the
17 Government as being part of the package that was taken in the
18 room has all about how these the South Ocean Equity is going
19 to be become involved in the management of Sanomedics. It's
05:49 20 going to be involved in its day-to-day operations. It's
21 going to -- they were inferring that -- and providing the
22 evidence that, in fact, John Sculley was actively involved in
23 this, and to the extent that John Sculley didn't want to be
24 involved or Cesar Millan didn't get involved, these were the
05:49 25 representations that were made to the salespeople.

1 And we know, we know, that that's how the stock was
2 sold. We had two people that testified as to Mr. Wheeler.
3 They had Mark Bradshaw testify about Sanomedics.

4 Just to clarify the record, I had forgotten that
05:49 5 Count 4, which was the substantive count involving somebody
6 else, was dismissed by the Government and I had made an
7 argument about Count 4. There was no substantive count
8 against Mr. Wheeler that was in the indictment. He's only
9 charged with the conspiracy in Count 1. They had one witness
05:50 10 that came in, Mark Bradshaw --

11 MR. TANSEY: That's incorrect, he's charged with a
12 substantive count with Fun Cool Free.

13 MR. WHITE: Counsel, I said for Sanomedics. He's
14 only charged in the conspiracy count as to Sanomedics.
05:50 15 That's what I'm talking about right now is Sanomedics. Thank
16 you for that correction.

17 Now, Mark Bradshaw was the only investor who
18 testified. Mark Bradshaw was very clear. He said -- he
19 answered all of my questions. He answered all of my
05:50 20 questions. He sent me the e-mails, he sent me the press
21 releases, he answered all my questions, "I wanted to buy the
22 stock."

23 I didn't ask him any questions about -- I didn't
24 ask him about commissions. I didn't ask him about anything.
05:50 25 He did say he claimed that he asked about how that commission

1 -- he doesn't remember the answer. So whatever the answer
2 was, we don't know.

3 I think an argument can be made. I understand that
4 it might not be appropriate at a Rule 29 argument, but the
05:51 5 pitch that says there's no commission and fees, you have to
6 understand the way that the deal was.

7 The deal was that you would go onto the internet
8 and you would see the stock price was \$2 a share and so the
9 salesmen in the room were saying, "We're going to offer you,
05:51 10 for a dollar a share, stock that's worth already \$2 a share
11 and we're not going to charge you commissions and fees for
12 it. So you're going to -- and the money that you put in is
13 going to go directly to the company."

14 Now they honestly believed that and they can say
05:51 15 that honest belief to the investors, and that's why they
16 bought the stock and that's why Mr. Bradshaw bought the stock
17 and he admitted that.

18 Now, after the fact we even have a situation where
19 so much has been done about the name, the false name, the
05:51 20 false name, the badge of fraud.

21 Well, two witnesses, Isis Machado and Shawna Lynch
22 and also, if I remember correctly, Juan Perez Ortega, said
23 that Mr. Wheeler used his real name when he was selling
24 Sanomedics stock. And Mark Bradshaw substantiated that.

05:52 25 So it was Mr. Wheeler selling the stock that he

1 believed was a value. It had value. It was a good deal.
2 And whatever misrepresentation, whatever things he held back
3 in terms of commissions were not even material to why these
4 people bought the stock.

05:52 5 And it goes -- and it goes further because now we
6 go to the Takhalov issue. If you are saying something like,
7 you know, this is going to be a really good stock, it's
8 really going to go up in value, we're going to be listed on
9 the NASDAQ, and you have all kinds of indications that
05:52 10 they're receiving that this is actually true, and this is
11 something that it would be one thing if Mr. Perez Ortega had
12 testified here and he said that when we would go into the
13 conferences with Mr. Mesa, and he said, "Here's some more
14 crap that we can tell these people on the phone to sell this
05:53 15 worthless stock," and everybody says, "Yeah, we're all on
16 it."

17 But no, everything was presented to the defendants
18 and to Mr. Wheeler, especially, that this was a legitimate
19 company and that this was something that they were actually
05:53 20 helping the company raise money.

21 There's an exhibit that was introduced by the
22 Government that was Mr. Wheeler's LinkedIn account.
23 Apparently, he had -- and you really should look at it. He
24 talks about how he wants to go to raise capital for small
05:53 25 companies. And he talks about that as his mission in life.

1 This is what he was doing, or he thought he was doing for
2 Sanomedics. And it's what he thought he was doing for Fun
3 Cool Free.

4 And, really, what made this worthless stock was a
05:54 5 scheme that was kept away from them. And that's the whole
6 point of Takhalov. Even to the extent that the investors
7 come back after the fact and say, "Oh, if I knew he was
8 making a 20 percent commission, I never would have bought
9 that stock."

05:54 10 Well, you know, maybe, but if that was a legitimate
11 company, as Mr. Wheeler thought and he conveyed and not
12 worthless, that wouldn't have been a reason to have him go
13 away for fraud.

14 But what was happening was -- and what made it
05:54 15 worthless was the fact that it was really in the Sizer shares
16 the money -- none of the money was really going into the
17 company at all, because it was all being stolen by Sizer and
18 when Houlihan found out about it and he found out what was
19 going on, he didn't do anything to stop it.

05:55 20 **THE COURT:** Let me hear from Mr. Tansey.

21 **MR. WHITE:** Just one more thing, Your Honor.

22 Count 13 is the substantive count for Mr. Wheeler.
23 That was Bruce Molnia. This was a classic situation. Bruce
24 Molnia was an accredited investor. He was contacted by Tony
05:55 25 Williams. Tony Williams sent him the package on the e-mail

1 with the information. He consulted with his running buddy
2 and decided to buy the stock.

3 Mr. Wheeler called him up, gave him more
4 information and he bought the stock. He already made his
05:55 5 decision before he even spoke to Mr. Wheeler that he was
6 going to buy the stock. He read everything. He understood
7 what a preIPO was. He understood every word of the contract.
8 He understood all of it. And yet, he bought the stock and
9 then he says, "Oh, well, if I knew that Mr. -- somebody was
05:56 10 going to make a commission, I wouldn't have -- I wouldn't
11 have bought the stock."

12 Classic. Goes to the heart of the Takhalov
13 argument here. And I think that really the Government, you
14 know, they talk about the boiler room and we talk about the
05:56 15 stigma to the boiler room. There's no evidence to suggest
16 that these defendants and, particularly, Mr. Wheeler thought
17 they were working selling and peddling worthless stocks, and
18 there's no evidence, in fact, the evidence that would have
19 told them that they were was purposely withheld and purposely
05:56 20 kept from them.

21 MR. TANSEY: Your Honor, I'll give you some
22 evidence that Mr. Wheeler knew what they were doing was wrong
23 and he had criminal intent.

24 When he was selling Sanomedics, when he was first
05:56 25 starting he used his real name Matt Wheeler. When he moved

1 on to sell Fun Cool Free two years later, or whatever
2 Mr. White said, he started using a fake name, Matt Williams.
3 That was criminal intent. He knew he was doing something
4 wrong and he changed his name because he didn't want to get
05:57 5 caught.

6 **THE COURT:** Counsel, much has been made in this
7 case about the names and that the names may be indicative of
8 misrepresentation based upon the law. But I have to really
9 think about that case law in light of Takhalov, that you have
05:57 10 -- you can deceive and not defraud. And I think that the
11 Government consistently -- no, Mr. Cruz, I get one person at
12 a time.

13 The Government has consistently said that that is
14 enough to show fraud. I think you still are going to have to
05:58 15 prove at some point in this trial, and I'm not saying that
16 you have not because we're going to talk about credibility in
17 a second, that the people on that side of the V not only used
18 false names, not only said that Sculley was the president and
19 he wasn't, not only said X, Y and Z, but they somehow knew
05:58 20 that the money that they were bringing in from these
21 investors never was going to go to a legitimate company, that
22 it never was going to have any investment value, that never,
23 ever, ever was it going to be used to build capital for a
24 real company. That's the fraud.

05:58 25 **MR. TANSEY:** That's exactly right, Your Honor, and

1 we would never argue that using false names alone was a
2 misrepresentation that, standing along, could be fraud. We
3 have never argued that. It was not in the indictment as a
4 separate misrepresentation. It's evidence of their criminal
05:59 5 intent. It's evidence that they consciously knew they were
6 doing something wrong by making these other
7 misrepresentations and lies to investors, material ones about
8 John Sculley being at the helm and on the board of directors,
9 that saying that --

05:59 10 **THE COURT:** If John Sculley, if they said -- this
11 is a theory -- if they said John Sculley was on the board of
12 directors, that all this other stuff was true, and every
13 single one of these investors got a return on their
14 investment, would there still be a fraud?

05:59 15 **MR. TANSEY:** Yes, absolutely, because they're
16 misrepresenting.

17 **THE COURT:** Every single person got back the money
18 they put in, would that still be a fraud?

19 **MR. TANSEY:** Yes, because they're still lying to
05:59 20 people to get them to invest and then taking 20 to 25 percent
21 of their money.

22 **THE COURT:** If they got all of their investment
23 back, that's my question. If they got all of their
24 investment back, would there be a fraud? Because if I
06:00 25 followed your analysis to its illogical conclusion, that's

1 your argument to me.

2 MR. TANSEY: No, Your Honor, because if the
3 defendants hadn't lied to them and taken 20 to 25 percent out
4 of that investment, they would have gotten more back. So
06:00 5 that's the argument is that the lies that they told to the
6 investors, pumping up this company to be something that it
7 wasn't, that's the fraud and, I mean, the lies here, that's
8 what they did. They misrepresented that this company was run
9 by these successful, by well-established, businessmen.

06:00 10 THE COURT: If they got what they put in, which is
11 what Takhalov said, if you get back -- if what you get is
12 what you gave, that is not a fraud. If I am in a bar on
13 South Beach and I buy a drink from someone who is really a
14 promoter for a club but what I get is a drink, there is no
06:01 15 fraud.

16 MR. TANSEY: Your Honor --

17 THE COURT: If I, however, tell -- this person
18 says, listen, I'm going to give you a diamond if you buy this
19 drink, that's a fraud. If I get a drink, there's no fraud.
06:01 20 There's only deceit.

21 MR. TANSEY: Your Honor, but these customers didn't
22 get a drink. They got worthless stock because of what these
23 defendants --

24 THE COURT: But I'm saying that may be your
06:01 25 argument and you can -- I don't think that alone. You have

1 to show -- and this is what I'm saying, at some point in time
2 you're going to have to say, your bricks in this wall was
3 these people knew, they knew there was no company, they knew
4 that it was never going to exist, and they never were going
06:01 5 to get a return on their investment.

6 That's what you have to prove, not that they came
7 up and said, my name is Nina Simone. Not that they said John
8 Sculley was on the board of directors. But that they were
9 never going to have a company. I am taking your money. I'm
06:02 10 going to Tahiti. I'm going to Neiman-Marcus. That I never
11 intended for this to be an investment. That's the fraud.
12 And that's what Takhalov keeps telling you. Don't fall for
13 the track judge, me, of the deceit alone being a fraud.

14 **MR. TANSEY:** Your Honor, so Takhalov does not say
06:02 15 that they only -- the only way that they can defraud these
16 people is by knowing that this company was a complete sham.
17 That's not what it says. It says they have to misrepresent
18 the nature of the bargain. That's the language in Takhalov.

19 **THE COURT:** But the nature of the body here -- this
06:02 20 is the defense argument is, you give me money, and according
21 to what they're saying they knew, I'm giving money to other
22 people who are going to place it in capital in another
23 company and they're going to invest it.

24 Now, if Sizer, Houlihan, Mesa took the money and
06:03 25 they played poker with it, they bought expensive cars, they

1 were hanging out with the B girls from Judge Scola's case,
2 that's not these people's problem.

3 MR. TANSEY: They took the money, too, Your Honor.

4 THE COURT: But they get a check. They got what
06:03 5 they were negotiating for. "Hi, I'm coming to work for your
6 company, you are going to pay me."

7 Is it deceitful to tell these people, "I'm not
8 getting paid a commission"? Yes. Is it a crime in and of
9 itself? No. Because if I call -- listen, think about it
06:03 10 this way.

11 I call Capital One and somebody in India answers
12 the phone and says, "Hi, I'm John." His name isn't John.
13 He's anglicized it for my purposes because I probably can't
14 pronounce the name that his mother and father gave him.
06:04 15 That, in and of itself, isn't a fraud.

16 Now, on the other hand, if he tells me, "My name is
17 John," but I'm going to receive an interest rate that doesn't
18 exist and he knows it doesn't exist, and I'm going to pay him
19 something on investment that doesn't exist, that's different.
06:04 20 But merely saying his name is John, his name is some name
21 that I can't pronounce --

22 MR. CRUZ: Judge, I was going to argue the Takhalov
23 part of it.

24 THE COURT: I think it all goes together and I
06:04 25 think the Government is being very flippant about this whole

1 misrepresentation not being coupled with a fraud.

2 Listen, I'm kind of jumping the gun here.

3 Mr. Solomon still hasn't argued.

06:05 4 Do I think the Government has placed in play enough
5 credible evidence to go to the jury for them to determine,
6 listen, these people not only used their wrong names, they
7 not only misrepresented about commissions, they not only did
8 this, but they knew that these guys in the back were taking
9 the money and there was no Sanomedics. That's what the
06:05 10 Government has to prove. There's no Sanomedics. There was
11 never going to be an investment.

12 MR. CRUZ: There was never going to be an
13 investment, yes, but there was no Sanomedics. I think you're
14 creating a burden that is insurmountable.

06:05 15 THE COURT: I think I misspoke. You can create a
16 shell company. You can make videos and make it look like
17 there was a company, but you still would have to show that
18 whatever it was was going to be invested in something and I
19 think the Government's theory is there was nothing to be
06:05 20 invested in.

21 MR. CRUZ: That's true.

22 THE COURT: And that's what you have to prove.

23 MR. CRUZ: We will.

24 THE COURT: Not just that these people used false
06:06 25 names, not just that they took commissions, not just that

1 they puffed up and said it was Sculley who was the president,
2 not -- those are just lies. Let's just call it what they
3 are. It's lies.

4 MR. CRUZ: Yeah, and that's --

06:06 5 THE COURT: It's not fraud.

6 MR. CRUZ: Judge, lies and fraud are --

7 THE COURT: No, it's not.

8 MR. TANSEY: The pattern --

9 MR. CRUZ: One at a time.

06:06 10 THE COURT: I mean, do you think you get to have
11 the instructions, that you have to say, listen, there's
12 enough here, there's enough bricks in this wall to indicate
13 that this is fraud, that they should know certain things are
14 happening based upon the evidence? Yes, you get to argue it.
06:06 15 But if your argument only is that they lied --

16 MR. CRUZ: They lied about the essence of the
17 bargain, Judge. They lied about the essence of the bargain.

18 THE COURT: You have to prove that there was no
19 investment. That there was no -- nothing to put their money
06:07 20 into.

21 MR. CRUZ: Right, because it was a straight rip,
22 I've been saying that since --

23 THE COURT: That's what you have to --

24 MR. CRUZ: I'll rest my argument on that if that's
06:07 25 what you believe.

1 **THE COURT:** If all they wanted to do was get all
2 this money, and this is what the salesmen argue. They're
3 saying, "Listen, we did exactly what our bosses said, say
4 this, get money and you get a paycheck."

06:07 5 There's been no evidence the people on this side of
6 the V got any more than a paycheck.

7 **MR. CRUZ:** They got commission checks and they lied
8 about the commissions.

9 **THE COURT:** They lied to the people they got the
06:07 10 money from.

11 **MR. CRUZ:** Yes.

12 **THE COURT:** But it's not like they got commission
13 checks and then on the side somebody is giving them Ferraris
14 or Rolls Royces. They go in to do a job. I'm hired to do a
06:07 15 job. I'm hired to do a job. I get a paycheck for that job
16 and, unbeknownst to me, my boss is taking the money that he
17 says he's going to invest in a company and do all other kinds
18 of wrong things with it, that's not on me.

19 **MR. CRUZ:** There's case law that clearly says that
06:08 20 absorbing a commission --

21 **THE COURT:** Case law post Takhalov that says the
22 Government has to prove deceit and fraud, and that's what
23 Takhalov says. Nobody in the 11th Circuit has ever outlined
24 what a scheme, an artifice to defraud is.

06:08 25 **MR. CRUZ:** In the Takhalov case, when Judge Scola

1 retried it, did not touch any of the language in the Takhalov
2 case in the insertion of the jury instructions.

3 THE COURT: I didn't say that. It doesn't say the
4 jury instruction, in and of itself, is false. It says that
06:08 5 in addition to the jury instructions, the defense gets a
6 theory of defense.

7 MR. CRUZ: It was three --

8 THE COURT: That's how it starts.

9 MR. CRUZ: Three lines in the new trial and that's
06:09 10 was the 11th Circuit order, and it had to do with the
11 secretive agreement between the B girls and the owners, and
12 the owners aren't even here in this trial, and that's, again,
13 very fact- intensive, and there's no district court that in
14 any way, shape, or form included some type of Takhalov theory
06:09 15 of defense because, again, everybody knows that was a one-off
16 case.

17 THE COURT: It is defendants' theory of defense
18 that they did not knowingly and intentionally participate in
19 the fraud. You have got to prove that, that they knowingly
06:09 20 and intentionally participated in the fraud.

21 MR. CRUZ: That's in the jury instructions, it's my
22 burden.

23 THE COURT: That the fraud actually occurred when,
24 unbeknownst to the defendants, the owners and officers of the
06:09 25 corporation stole millions of dollars in investment funds.

1 Although they may have been aggressive salesmen, they did not
2 intend to defraud the investors. And that they were
3 unwilling pawns in a scheme orchestrated by the owners and
4 Mesa.

06:09 5 MR. CRUZ: Takhalov had nothing similar to that in
6 any way, shape or form.

7 THE COURT: A defendant schemed to defraud, only if
8 he or she schemes to defraud someone of something of value by
9 trick, deceit, chicane or overreaching. That's almost the
06:10 10 exact language.

11 MR. CRUZ: But no one instructed a jury with
12 Takhalov language. That's my point.

13 THE COURT: Okay. There's got to be a first time
14 for everything, and here it is.

06:10 15 MR. CRUZ: The jury instructions are pattern.

16 THE COURT: You get the pattern jury instructions
17 and they get a theory of defense.

18 MR. CRUZ: That puts it within the province of the
19 jury would be unreasonable for Your Honor to instruct them on
06:10 20 their -- on how they should look at what the defense said.
21 The defense should be able to argue it.

22 THE COURT: They can argue it and you can argue,
23 but this is their theory.

24 MR. CRUZ: Oh, so then I get a theory of
06:10 25 prosecution inserted in the jury instructions?

1 **THE COURT:** I don't think the law says the
2 prosecution gets a theory. You have the burden of proof.

3 **MR. CRUZ:** I don't believe the law requires you to
4 give them a theory of defense.

06:11 5 **THE COURT:** The law is very clear, not just in
6 Takhalov, but as long as the defense presents a reasonable
7 argument they get a theory of defense.

8 **MR. CRUZ:** Instruction.

9 **THE COURT:** Yes. As long as -- I mean, it would be
06:11 10 very different if they were asking me to say the theory of
11 defense in this case is that the president of Russia came and
12 told them to do this. There is no evidence of that.

13 But if they present a modicum of evidence to allow
14 them to present it, they get to do it.

06:11 15 **MR. CRUZ:** They didn't present any evidence. They
16 presented two witnesses, one was Houlihan and the other one
17 was an in-credible witness.

18 **THE COURT:** You don't have to present evidence in
19 order to attack evidence, and they've attacked the
06:11 20 Government's evidence by showing through your own witnesses
21 what they think these people knew on or didn't know.

22 Some of the investors claim they didn't actually
23 talk to these people. There are some times when the
24 investors come back for a second draw at the action, it's not
06:12 25 from the salesmen, it's from Mesa or Houlihan or something

1 else.

2 You get to argue that, but they get to argue
3 theirs.

4 MR. CRUZ: Right, we get to argue. That's my
06:12 5 point.

6 THE COURT: And you get to say, ladies and
7 gentlemen, you know their theory of defense, it doesn't match
8 up with the evidence, and I'm going to tell you why, and
9 that's why you have two hours to talk to those stellar people
06:12 10 sitting in the box.

11 MR. CRUZ: Takhalov does not instruct, Your Honor,
12 again, with respect to do anything that these defendants are
13 asking you to do, Judge. That's my position. That's what
14 Judge Scola's instructions make clear in the case that he was
06:12 15 overturned on. He didn't put anything even close to what
16 they're asking you to do, Judge, please.

17 THE COURT: That's a different case. It is a
18 different case.

19 MR. CRUZ: It's what caused the case law in the
06:12 20 first place.

21 THE COURT: Well, that isn't my problem. You have
22 to talk to those people in Atlanta, that's what they do and I
23 follow their directions.

24 MR. CRUZ: They didn't ask you --

06:13 25 THE COURT: They are very specific. They tell

1 judges, "You've got to look at this. You've got to look
2 beyond the mere deceit to see the fraud."

3 MR. CRUZ: They didn't instruct you, Judge, to
4 alter the jury instructions or to --

06:13 5 THE COURT: I'm not altering the jury instructions.
6 You still get your fraud jury instructions.

7 MR. CRUZ: They didn't instruct you to insert a
8 theory of defense case just because of the existence of the
9 11th Circuit case.

06:13 10 THE COURT: Let me say this: If Judge Scola had
11 given the jury -- given the theory of defense case, I don't
12 even know if there would have ever been an opinion.

13 MR. CRUZ: You're right. You're right. But,
14 again, the opinion is a special situation with a very unique
06:13 15 situation.

16 THE COURT: I think there's an equally unique
17 situation here. And that is the defense has continually
18 argued, continually attacked the Government's witnesses about
19 specifically -- they presented an attack of credibility, the
06:14 20 Government's witnesses about what they knew about their
21 clients and the Government, you have on your side to show
22 that they're stuff that they ought to have known. There
23 should have been a time when something said there was
24 something rotten in Denmark.

06:14 25 MR. CRUZ: If you will allow me just 30 seconds to

1 try to convince you. The silk robe analogy that you came up
2 with, the diamond one that's in Takhalov, okay --

3 THE COURT: I don't know whether it's a diamond but
4 it's something.

06:14 5 MR. CRUZ: You said silk robe from Argentina the
6 other day on Rule 29, Judge. In this situation, Your Honor,
7 think about what that they were doing, essentially. They
8 were getting the money, telling the investors that they were
9 going to use it and that their investment was a silk robe and
06:14 10 that it's so valuable, this stock is valuable, I'm getting
11 paid in silk robes, pumping up the value, lying about the
12 value, the essence of the bargain, that's what Takhalov says,
13 and in reality.

14 Judge, we all know that they didn't even get paid
06:15 15 in stock.

16 THE COURT: But if someone told them that, "Hey,
17 this is what you need to say to get this job, you need to say
18 that, don't tell them about that you're getting paid a
19 commission," but if there really was a company, if there
06:15 20 really was something to be invested in, if at some point in
21 time someone was going to take this money and not spend it on
22 whatever they spent it on because we don't know, you didn't
23 call those witnesses, that somehow the money came in and went
24 to something other than making a company, that's the fraud.

06:15 25 MR. CRUZ: Houlihan testified about what they used

1 the money for. He said it. They used it all for fees and
2 commissions, Your Honor. That's what everything was used for
3 and they knew that at least a quarter from their own pockets
4 was being taken off the top.

06:15 5 They embezzled it right off the top and Mesa got
6 the other quarter and Sizer got the other one and Sizer used
7 some of it for Sanomedics. That's the essence of the
8 bargain.

9 THE COURT: That's your argument that these guys
06:16 10 should have known that.

11 MR. CRUZ: They did.

12 THE COURT: That they should have known, and you
13 can make that -- but they get to say, listen, I'm a slug, no
14 offense, I'm a slug and all I did was come to work and all I
06:16 15 did was do what they told me to do, and I didn't know the
16 bosses really weren't just paying me commission, but never
17 doing anything real with this company.

18 MR. CRUZ: But you'll agree --

19 THE COURT: That everything was turned for
06:16 20 commission, that nothing went to anything.

21 MR. CRUZ: They can say all that, they can argue
22 all that until they get blue, and if they create a reasonable
23 doubt, they win, God bless them, but when it comes from Your
24 Honor's mouth instructing the jury on that theory, that's
06:16 25 where I take issue. I believe it's unnecessary.

1 **THE COURT:** And you will have to continue taking
2 issue with me.

3 Let me ask the defendants this question, and
4 Mr. Solomon, I know you still have to make your record and
06:17 5 I'm not going to cut you off.

6 Does this theory of defense, the one that I'm
7 showing as proposed Jury Instruction Number 4, apply to all
8 of the defendants?

9 **MR. WHITE:** Yes, Your Honor.

06:17 10 **MR. FLEISHER:** Yes, Judge. And we had an agreement
11 that after the charge conference we would add in the other
12 defendants' names to Mr. Wheeler's.

13 **THE COURT:** Mr. Solomon, would you make your
14 record, please?

06:17 15 **MR. SOLOMON:** On the jury instruction or --

16 **THE COURT:** No, on the Rule 29.

17 **MR. CRUZ:** Are you going to accept it as-is or are
18 we going to --

19 **THE COURT:** I haven't gotten there yet. One thing
06:17 20 at a time, I divulge, not you guys for once.

21 **MR. CRUZ:** Sorry, Judge, I didn't hear that.

22 **MR. SOLOMON:** Judge, with regard to my Rule 29(b)
23 motion, first I would like to start by renewing all my
24 motions and objections heretofore made throughout the trial
06:17 25 of this case. I would like to adopt all the arguments of

1 co-counsel with regard to the Rule 29 issues that pertain to
2 the law in this case. And although, I have to say I've never
3 done this before, the Court has indicated that it has framed
4 this issue exactly what I would have said in terms of the
06:18 5 impact of Takhalov on the facts of this case and what we have
6 been arguing throughout the course of this trial. And I
7 would ask that my motion be considered fully preserved based
8 on the fact that the Court understands exactly what I would
9 have argued in this case. Takhalov is not, as the government
06:18 10 said -- although I have to read it on my phone which is --

11 **THE COURT:** I took my copy in the back --

12 **MR. SOLOMON:** It's getting increasingly harder to
13 do, Judge, as the years go by. But it is not a confusing
14 case. It's a crystal-clear case. And there is a difference
06:18 15 between deceit and defraud. Now, my client is not charged in
16 Sanomedics. All this Sanomedics stuff has nothing to do with
17 my client. My client has to do with Fun Cool Free. There's
18 zero evidence in this case that my client was told anything
19 about what Michael Mesa was doing and what Craig Sizer was
06:19 20 doing. And, in fact, Judge, for both Sanomedics and for Fun
21 Cool Free, Mr. Houlihan's testimony is very instructive in
22 this case because Mr. Mesa was the firewall. Whatever
23 happened above Mr. Mesa was never imparted to these people.

24 Now, remember, the Government is trying to stake
06:19 25 its claim in this case on the fact that these people got --

1 whatever it was. There's been numbers bantered around -- 12
2 percent or 15 percent or 20 percent commissions. But that
3 leaves 80 percent of money.

4 Of the 80 percent, Mr. Houlihan said just today
06:19 5 that maybe one percent went into research and development.
6 That means that the people above our clients who our clients
7 never knew what they were doing were stealing 80 percent of
8 this money. And that's where the fraud occurred and that's
9 why these ventures failed.

06:20 10 Our guys were duped. Our guys were put up to this.
11 And the law is clear on this; they had no intent to defraud.
12 This business about the size of the commissions -- and the
13 Government has staked everything on this because that's all
14 they really have here. But the fact of the matter is that if
06:20 15 this company would have made money, that 15 or 20 percent
16 would not have caused these companies their future.

17 What caused these companies their future was the
18 fact that Sizer, Mesa, and Mr. Houlihan made sure that there
19 would never be a success in these companies. They're the
06:20 20 ones who committed this fraud, and they put our clients out
21 there as dupes to carry it out, and unknowing dupes in order
22 to carry out what was a really terrible fraud.

23 And we're the ones sitting here holding the bag,
24 but the fact is that maybe our clients were deceitful,
06:21 25 Takhalov, but they did not intend to defraud as a matter of

1 law. It's clear. This commission thing is overstated, and
2 I'm glad that the Court has picked up on it.

3 As far as my client is concerned about the name, he
4 didn't even use a fake name. Obviously, I've made an issue
06:21 5 over that. And the Government would rather, I guess, that he
6 did, but he didn't.

7 And Fun Cool Free actually had an app. The only
8 thing that he could see -- because he doesn't know what
9 happened above Mesa -- was that if you go in the Apple store
06:21 10 and you look on Fun Cool Free apps, you get a Fun Cool Free
11 app.

12 And, in fact, Mr. Liva, who was Count 11 -- my
13 client's only charged -- I'm sorry. My client's charged with
14 11, which is the Fun Cool Free conspiracy, and Count 12,
06:21 15 which was Rob Liva.

16 Mr. Liva said, yeah, he downloaded the apps. He
17 downloaded the games, and he gave them to his daughter and
18 her friend, and they played them, and they said they're
19 better for younger kids.

06:22 20 So how is my client, who shows up in February, late
21 January, when this thing started the year before in 2014, he
22 shows up, how is he supposed to know that Mr. Sizer and
23 Mr. Mesa have doomed this company to fail? How is he
24 supposed to know that because they paid him a 15 percent
06:22 25 commission or whatever it is?

1 And so the bottom line is that this case, as to
2 Mr. Long fits squarely into Takhalov. He may have been
3 deceitful. Maybe he was. But that deceit did not amount to
4 an intent to defraud.

06:22 5 And the line of Takhalov -- and I know you beat it
6 up pretty good -- is on page 1313, which says a schemer who
7 tricks someone to enter into a transaction --

8 **THE COURT:** Slow down, Mr. Solomon.

9 **MR. SOLOMON:** Sorry, Gigi. I'm tired. A schemer
06:23 10 who tricks someone to enter into a transaction is not a
11 scheme to defraud as long as he does not intend to harm the
12 person he intends to trick.

13 And this is so, even if the transaction would not
14 have occurred before the trick, for if there's no intent to
06:23 15 harm, there can only be a scheme to deceive, but not one to
16 defraud. And that is Mr. Long.

17 And, in fact, the Government elicited testimony of
18 a pre-arrest statement where they asked him -- this was Agent
19 Alimon (ph.) -- who asks him in June of 2016 about his
06:23 20 commissions and didn't he think they were high. And he said,
21 yeah, he said, in fact, you know what; I did think that they
22 were a little high, but I heard everybody was going to make
23 so much money that those commissions wouldn't have mattered.

24 And you know what? They wouldn't have mattered if
06:24 25 the people above Mr. Long, unbeknownst to him, weren't

1 stealing it all.

2 And that's all I have to say. So I move for
3 judgment of acquittal pursuant to 29(b) on the grounds of
4 Takhalov, and on the grounds that as a matter of law, they
06:24 5 have not proved a case of guilt against Mr. Long, both Counts
6 11 and Count 12.

7 THE COURT: I think I play -- although I'll get to
8 that in a moment. I think I played my hand in this matter in
9 my discussions with Mr. Tansey and Mr. Cruz previously. I
06:24 10 have to take the evidence in the light most favorable to the
11 United States. They have a right to argue, through
12 circumstantial evidence and inference, that the defendants in
13 this case knew that their involvement was beyond the mere
14 misrepresentations, the involvement of certain people in the
06:24 15 company and how they were going to get paid.

16 They have to show -- and I think they presented
17 enough credible evidence at least to make the argument
18 through inference, that these defendants knew that the people
19 in control were stealing; that they were taking the money and
06:25 20 using it for whatever purpose, but the purpose wasn't for
21 investing in a company, to either -- as Mr. Solomon just said
22 -- for apps or for a thermometer that requires that I don't
23 have to touch you. Those are the investments in this case.

24 And it may be that if the upper management had done
06:25 25 what they were supposed to do, we wouldn't be here. We don't

1 know. But what we do know is that there is sufficient
2 evidence the Government has presented to go to a jury, that
3 these defendants knew at a reasonable point in time,
4 consistent with the indictment, that the funds in this case
06:25 5 weren't going back for any sort of investment; that they were
6 -- as Mr. Solomon just said -- being stolen.

7 So for the record, the defendants' motion for
8 judgment of acquittal pursuant to Rule 29 is denied.
9 However, Mr. Solomon, I am taking your motion under continued
06:26 10 advisement.

11 MR. SOLOMON: Thank you, Your Honor.

12 MR. CRUZ: Are you treating his different than the
13 rest?

14 THE COURT: Yeah, I am. I think the evidence is
06:26 15 different as to his client.

16 MR. CRUZ: I might add that he is a former
17 convicted felon from another boiler room, and that's 404(b).

18 THE COURT: And?

19 MR. CRUZ: And that's 404(b) that we're able to use
06:26 20 in consideration for his motive in this case and again --

21 THE COURT: I've ruled, Mr. Cruz.

22 MR. CRUZ: Yes, Judge.

23 THE COURT: All right. All right.

24 MR. CRUZ: Did you want to start with the theory of
06:27 25 defense?