

**General Docket
Court of Appeals, 2nd Circuit**

Court of Appeals Docket #: 16-132		Docketed: 01/13/2016	
Nature of Suit: 1690 FORFEITURE-Other United States of America v. Prevezon Holdings Ltd. Appeal From: SDNY (NEW YORK CITY) Fee Status: Paid			
Case Type Information: 1) Civil 2) United States 3) -			
Originating Court Information: District: 0208-1 : 13-cv-6326 Trial Judge: Thomas P. Griesa, U.S. District Judge Date Filed: 09/10/2013 Date Order/Judgment: 01/08/2016 Date Order/Judgment EOD: 01/08/2016 Date NOA Filed: 01/13/2016 Date Rec'd COA: 01/13/2016			
Prior Cases: <u>14-4407</u> Date Filed: 11/26/2014 Date Disposed: 07/08/2015 Disposition: Dismissed/frivolous			
Current Cases: None			
Panel Assignment: Not available			

United States of America Plaintiff - Appellee	Margaret M. Garnett, Esq., - Direct: 212-637-2520 [NTC -] United States Attorney's Office for the Southern District of New York 1 St. Andrew's Plaza New York, NY 10007 Paul Michael Monteleoni, Assistant United States Attorney Direct: 212-637-2219 [COR NTC US Attorney] United States Attorney's Office for the Southern District of New York 1 St. Andrew's Plaza New York, NY 10007
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Prevezon Alexander, LLC
Defendant - Appellee

Prevezon Soho USA, LLC
Defendant - Appellee

Prevezon Seven USA, LLC
Defendant - Appellee

Prevezon Pine USA, LLC
Defendant - Appellee

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Prevezon 1711 USA, LLC
Defendant - Appellee

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Defendant - Appellee

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Defendant - Appellee

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Defendant - Appellee

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Ferencoi Investments, Ltd.
Defendant

Kolevins, Ltd.
Defendant

Any and All Assets of Prevezon Holdings, Ltd.
Defendant

Any and All Assets of Prevezon Alexander, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as Alexander Condominium, 250 East 49th Street, NY NY 10017, Unit Comm3, and and all funds on deposit in Bank of America Acct #483044568293, held
Defendant

Any and all assets of Prevezon Seven USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as 127 Seventh Ave. aka 166 West 18th Street retail unit #2, NY NY and any and all funds on deposit in Bank of America acct#483041746021 held in the name of Prevezon Seven USA L.L.C., the Prevezon Seven account
Defendant

Any and All Assets of Prevezon Pine USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street, NY NY 10005, Unit 2308 (20 Pine Street, Unit 2308)
Defendant

Any and all assets of Prevezon 1711 USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine Street
Defendant

Any and All Assets of Prevezon 1810, LLC
Defendant

Any and all assets of Prevezon 2009 USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street, NY NY 10005, Unit 1816
Defendant

Any and All Assets of Ferencoi Investments, Ltd.
Defendant

Any and All assets of Kolevins, Ltd., and all property traceable thereto.
Defendant

All right, title, and interest in the real property and appurtenances known as the 20 Pine Street condominium, 20 Pine Street, New York, New York 10005, Unit 1816
Defendant

Any and all funds on deposit in Bank of America account number 8293 held in the name of Prevezon Alexander, LLC
Defendant

Any and all funds on deposit in Bank of America account number 8084 held in the name of Prevezon Soho USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 6021 held in the name of Prevezon Seven USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 8349 held in the name of Prevezon 1711 USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 9102 held in the name of Prevezon 2009 USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 8242 held in the name of Prevezon Pine USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 5882 held in the name of Prevezon 2011 USA, LLC
Defendant

Any and all funds on deposit in Bank of America account number 9128 held in the name of Prevezon 1810 USA, LLC
Defendant

Approximately \$1,379,518.90 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine Street
Defendant

Approximately \$4,429,019.44 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as Alexander Condominium, 250 East 49th Street
Defendant

Approximately \$1,046,530.04 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine Street
Defendant

Approximately \$894,026.21 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine Street
Defendant

A debt of 3,068,946 Euros owed by AFI Europe N.V. to Prevezon Holdings restrained by the Government of the Netherlands on or about January 22, 2014, and all property traceable thereto
Defendant

United States of America,

Plaintiff - Appellee,

v.

Prevezon Holdings Ltd., Prevezon Alexander, LLC, Prevezon Soho USA, LLC, Prevezon Seven USA, LLC, Prevezon Pine USA, LLC, Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC,

Defendants - Appellees,

Ferencoi Investments, Ltd., Kolevins, Ltd., Any and All Assets of Prevezon Holdings, Ltd., Any and All Assets of Prevezon Alexander, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as Alexander Condominium, 250 East 49th Street, NY NY 10017, Unit Comm3, and all funds on deposit in Bank of America Acct #483044568293, held, Any and all assets of Prevezon Seven USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as 127 Seventh Ave. aka 166 West 18th Street retail unit #2, NY NY and any and all funds on deposit in Bank of America acct#483041746021 held in the name of Prevezon Seven USA L.L.C., the Prevezon Seven account, Any and All Assets of Prevezon Pine USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street, NY NY 10005, Unit 2308 (20 Pine Street, Unit 2308), Any and all assets of Prevezon 1711 USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine Street, Any and All Assets of Prevezon 1810, LLC, Any and all assets of Prevezon 2009 USA, LLC, including but not limited to all right, title and interest in the real property and appurtenances known as the 20 Pine Street, NY NY 10005, Unit 1816, Any and All Assets of Ferencoi Investments, Ltd., Any and All assets of Kolevins, Ltd., and all property traceable thereto., All right, title, and interest in the real property and appurtenances known as the 20 Pine Street condominium, 20 Pine Street, New York, New York 10005, Unit 1816, Any and all funds on deposit in Bank of America account number 8293 held in the name of Prevezon Alexander, LLC, Any and all funds on deposit in Bank of America account number 8084 held in the name of Prevezon Soho USA, LLC, Any and all funds on deposit in Bank of America account number 6021 held in the name of Prevezon Seven USA, LLC, Any and all funds on deposit in Bank of America account number 8349 held in the name of Prevezon 1711 USA, LLC, Any and all funds on deposit in Bank of America account number 9102 held in the name of Prevezon 2009 USA, LLC, Any and all funds on deposit in Bank of America account number 8242 held in the name of Prevezon Pine USA, LLC, Any and all funds on deposit in Bank of America account number 5882 held in the name of Prevezon 2011 USA, LLC, Any and all funds on deposit in Bank of America account number 9128 held in the name of Prevezon 1810 USA, LLC, Approximately \$1,379,518.90 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine, Approximately \$4,429,019.44 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as Alexander Condominium, 250 East 49th Street, Approximately \$1,046,530.04 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine, Approximately \$894,026.21 held by the United States as a substitute res for all right, title and interest in the real property and appurtenances known as the 20 Pine Street Condominium, 20 Pine S, A debt of 3,068,946 Euros owed by AFI Europe N.V. to Prevezon Holdings restrained by the Government of the Netherlands on or about January 22, 2014, and all property traceable thereto,

Defendants,

v.

Hermitage Capital Management Ltd.,

Movant - Appellant.

01/13/2016	<u>1</u> 83 pg, 398.75 KB	NOTICE OF INTERLOCUTORY CIVIL APPEAL, with district court docket, on behalf of Appellant Hermitage Capital Management Ltd., FILED. [1683687] [16-132]--[Edited 01/25/2016 by HT] [Entered: 01/13/2016 04:41 PM]
01/13/2016	<u>2</u>	PAYMENT OF DOCKETING FEE, on behalf of Appellant Hermitage Capital Management Ltd., district court receipt # 0208-11833289, FILED.[1683693] [16-132]--[Edited 01/25/2016 by HT] [Entered: 01/13/2016 04:42 PM]
01/13/2016	<u>3</u> 13 pg, 188.25 KB	DISTRICT COURT OPINION, dated 01/08/2016, RECEIVED.[1683695] [16-132] [Entered: 01/13/2016 04:43 PM]
01/13/2016	<u>4</u> 81 pg, 331.12 KB	ELECTRONIC INDEX, in lieu of record, FILED.[1683697] [16-132] [Entered: 01/13/2016 04:43 PM]
01/13/2016	<u>6</u> 1 pg, 56.79 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/13/2016 by CM/ECF. [1683781] [16-132] [Entered: 01/13/2016 06:09 PM]
01/13/2016	<u>7</u> 1 pg, 56.93 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/13/2016 by CM/ECF. [1683791] [16-132] [Entered: 01/13/2016 07:17 PM]
01/13/2016	<u>8</u> 1 pg, 203.03 KB	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/13/2016 by CM/ECF.[1683800] [16-132]--[Edited 01/25/2016 by HT] [Entered: 01/13/2016 09:15 PM]
01/13/2016	<u>9</u> 1 pg, 42.53 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/13/2016 by CM/ECF. [1683801] [16-132]--[Edited 01/25/2016 by HT] [Entered: 01/13/2016 09:22 PM]
01/13/2016	<u>10</u> 702 pg, 12.42 MB	MOTION, to stay, to file oversized brief, to seal document, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/13/2016 by email, CM/ECF. [1683802] [16-132]--[Edited 01/25/2016 by HT] [Entered: 01/13/2016 09:26 PM]
01/14/2016	<u>12</u>	ATTORNEY, Michael A. Levy for United States of America, in case 16-132, ADDED.[1684142] [16-132] [Entered: 01/14/2016 11:41 AM]
01/14/2016	<u>13</u> 1 pg, 9.38 KB	CAPTION, Adding Michael A. Levy for Plaintiff-Appellee United States of America, AMENDED.[1684145] [16-132] [Entered: 01/14/2016 11:43 AM]
01/14/2016	<u>15</u> 2 pg, 55.4 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee United States of America, FILED. Service date 01/14/2016 by CM/ECF. [1684160] [16-132] [Entered: 01/14/2016 11:51 AM]
01/14/2016	<u>17</u>	ATTORNEY, Paul Michael Monteleoni for United States of America, in case 16-132 , [15], ADDED. [1684206] [16-132] [Entered: 01/14/2016 12:18 PM]
01/14/2016	<u>18</u> 20 pg, 87.82 KB	NON-OPPOSITION TO MOTION, to stay [10], to file oversized brief [10], to seal document [10], on behalf of Appellee United States of America, FILED. Service date 01/14/2016 by CM/ECF. [1684267] [16-132]--[Edited 01/14/2016 by DGB] [Entered: 01/14/2016 12:43 PM]
01/14/2016	<u>22</u> 1 pg, 36.99 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/14/2016 by CM/ECF. [1684651] [16-132] [Entered: 01/14/2016 04:09 PM]
01/15/2016	<u>23</u>	ATTORNEY, Andrew M. Grossman for Appellee Prevezon 2009 USA, LLC, Prevezon 1810 LLC, Prevezon Pine USA, LLC, Prevezon Seven USA, LLC, Prevezon Holdings Ltd., Prevezon 1711 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, & Prevezon Soho USA, LLC, in case 16-132, [6], ADDED.[1684827] [16-132] [Entered: 01/15/2016 08:31 AM]
01/15/2016	<u>24</u>	ATTORNEY, David B. Rivkin, [Z], in place of attorney JohnW. Moscow, SUBSTITUTED.[1684828] [16-132] [Entered: 01/15/2016 08:33 AM]
01/15/2016	<u>25</u>	ATTORNEY, Cory S. Buland for Appellant Hermitage Global Partners LP, in case 16-132, [9], ADDED. [1684829] [16-132] [Entered: 01/15/2016 08:35 AM]
01/15/2016	<u>26</u>	ATTORNEY, Mark A. Cymrot for Appellee Prevezon 2009 USA, LLC, Prevezon 1810 LLC, Prevezon Pine USA, LLC, Prevezon Seven USA, LLC, Prevezon Holdings Ltd., Prevezon 1711 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC & Prevezon Soho USA, LLC, in case 16-132, [22], ADDED.[1684832] [16-132] [Entered: 01/15/2016 08:38 AM]
01/15/2016	<u>31</u> 1 pg, 36.29 KB	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/15/2016 by CM/ECF.[1685155] [16-132] [Entered: 01/15/2016 11:46 AM]

01/15/2016 35 CAPTION, to rectify order of partes, AMENDED.[1685467] [16-132] [Entered: 01/15/2016 02:44 PM]
1 pg, 9.39 KB

01/15/2016 38 ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[1685476] [16-132] [Entered: 01/15/2016 02:48 PM]
1 pg, 9.52 KB

01/19/2016 39 MOTION, file oversized opposition, to seal document, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/19/2016 by CM/ECF. [1685856] [16-132]-[Edited 01/19/2016 by TT] [Entered: 01/19/2016 08:07 AM]
1 pg, 83.49 KB

01/19/2016 40 OPPOSITION TO MOTION, to stay [10], to file oversized brief [10], to seal document [10], on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/19/2016 by CM/ECF. [1685858] [16-132] [Entered: 01/19/2016 08:16 AM]
1103 pg, 57.69 MB

01/19/2016 49 SUPPLEMENTARY PAPERS TO MOTION [39], [39], on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/19/2016 by CM/ECF.[1686648][49] [16-132] [Entered: 01/19/2016 03:38 PM]
4 pg, 78.94 KB

01/19/2016 53 LETTER, on behalf of Appellee United States of America, RECEIVED. Service date 01/19/2016 by CM/ECF.[1686956] [16-132] [Entered: 01/19/2016 07:35 PM]
1 pg, 31.77 KB

01/20/2016 62 MOTION ORDER, granting motion for leave to file oversized opposition and to file under seal, [39] filed by Appellee Prevezon Holdings Ltd., Prevezon Alexander, LLC, Prevezon Soho USA, LLC, Prevezon Seven USA, LLC, Prevezon Pine USA, LLC, Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC and Prevezon 2011 USA, LLC; [39] , FILED. [1687685][62] [16-132] [Entered: 01/20/2016 02:22 PM]
1 pg, 36.55 KB

01/20/2016 63 REPLY BRIEF, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/20/2016 by email, CM/ECF. [1688072] [16-132]-[Edited 01/25/2016 by HT] [Entered: 01/20/2016 08:08 PM]

01/21/2016 64 DEFECTIVE DOCUMENT, REPLY BRIEF, [63], on behalf of Appellant Hermitage Capital Management Ltd., FILED.[1688185] [16-132]-[Edited 01/25/2016 by HT] [Entered: 01/21/2016 09:21 AM]
2 pg, 17.38 KB

01/21/2016 65 REPLY TO OPPOSITION [40], on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/21/2016 by email, CM/ECF.[1688255][65] [16-132]-[Edited 01/25/2016 by HT] [Entered: 01/21/2016 09:55 AM]
20 pg, 1.25 MB

01/21/2016 66 CURED DEFECTIVE REPLY BRIEF, [64], [65], on behalf of Appellant Hermitage Capital Management Ltd., FILED.[1688553] [16-132]-[Edited 01/25/2016 by HT] [Entered: 01/21/2016 11:42 AM]

01/22/2016 72 REQUEST FOR ARGUMENT CD, with fee, RECEIVED from Baker Hostetler.[1690088] [16-132] [Entered: 01/22/2016 03:34 PM]
2 pg, 43.56 KB

01/25/2016 73 MOTION ORDER, granting motion to stay [10] filed by Appellant Hermitage Capital Management Ltd.; granting motion to file oversized brief [10] filed by Appellant Hermitage Capital Management Ltd.; granting motion to seal document [10] filed by Appellant Hermitage Capital Management Ltd., by RKW, RR, CFD, FILED. [1690713][73] [16-132]-[Edited 01/25/2016 by HT] [Entered: 01/25/2016 11:57 AM]
1 pg, 18.45 KB

01/25/2016 74 CERTIFIED ORDER, dated 01/25/2016, to Southern District of New York (SDNY), ISSUED.[1690738] [16-132] [Entered: 01/25/2016 12:13 PM]
1 pg, 518.58 KB

01/25/2016 75 CAPTION, to identify the Appellant as Hermitage Capital Management Ltd., AMENDED.[1690826] [16-132] [Entered: 01/25/2016 02:07 PM]
1 pg, 9.38 KB

01/25/2016 77 CORRECTED ORDER, dated 01/25/2016, granting motion to stay [10] filed by Appellant Hermitage Capital Management Ltd.; granting motion to file oversized brief [10] filed by Appellant Hermitage Capital Management Ltd.; granting motion to seal document [10] filed by Appellant Hermitage Capital Management Ltd., by RKW, RR, CFD., FILED.[1690959] [16-132] [Entered: 01/25/2016 03:27 PM]
1 pg, 18.61 KB

01/25/2016 78 CERTIFIED CORRECTED ORDER, dated 01/25/2016, to Southern District of New York (SDNY), ISSUED.[1690963] [16-132] [Entered: 01/25/2016 03:29 PM]
1 pg, 518.81 KB

01/26/2016 79 MOTION, to expedite appeal, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 01/26/2016 by CM/ECF. [1691202] [16-132] [Entered: 01/26/2016 07:57 AM]
7 pg, 200.73 KB

01/26/2016 81 REQUEST FOR ARGUMENT CD, from U.S. Dept. of Justice SDNY with fee, RECEIVED.[1691300] [16-132] [Entered: 01/26/2016 09:51 AM]
1 pg, 54.82 KB

01/26/2016 82 ARGUMENT CD, ready for pick up for U.S. Dept. of Justice SDNY TRANSMITTED.[1691363] [16-132] [Entered: 01/26/2016 10:35 AM]

01/26/2016 84 REQUEST FOR ARGUMENT CD from SUSMAN GODFREY, with fee, RECEIVED.[1691911] [16-132] [Entered: 01/26/2016 03:55 PM]
1 pg, 25.66 KB

01/27/2016 86 MOTION ORDER, granting motion to expedite appeal [79] filed by Appellee Prevezon Holdings Ltd.,

1 pg, 45.92 KB Prevezon Alexander, LLC, Prevezon Soho USA, LLC, Prevezon Seven USA, LLC, Prevezon Pine USA, LLC, Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC and Prevezon 2011 USA, LLC, by RR, FILED. [1692349][86] [16-132] [Entered: 01/27/2016 10:31 AM]

01/27/2016 87 FORM C, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/27/2016 by CM/ECF.[1692994] [16-132] [Entered: 01/27/2016 05:01 PM]
117 pg, 2.04 MB

01/27/2016 88 FORM D, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 01/27/2016 by CM/ECF.[1692996] [16-132] [Entered: 01/27/2016 05:02 PM]
1 pg, 74.7 KB

02/01/2016 96 NEW CASE MANAGER, Ahrona Crossman, ASSIGNED.[1695035] [16-132] [Entered: 02/01/2016 07:14 AM]
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02/04/2016 97 MOTION, to seal document, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 02/04/2016 by CM/ECF. [1698611] [16-132] [Entered: 02/04/2016 12:05 PM]

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02/04/2016 132 ARGUMENT CD, picked up by Christina Belanger, TRANSMITTED.[1707806] [16-132] [Entered: 02/18/2016 03:50 PM]

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02/05/2016 99 NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 02/05/2016 by CM/ECF. [1699351] [16-132] [Entered: 02/05/2016 10:09 AM]
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02/05/2016 101 ATTORNEY, Michael B. Mukasey, [99], in place of attorney David B. Rivkin, SUBSTITUTED.[1699435] [16-132] [Entered: 02/05/2016 10:54 AM]

02/08/2016 102 MOTION, to seal document, on behalf of Appellant Hermitage Capital Management Ltd., FILED. Service date 02/08/2016 by CM/ECF. [1700631] [16-132] [Entered: 02/08/2016 12:34 PM]
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02/16/2016 116 ATTORNEY, Margaret M. Gamett for United States of America, in case 16-132, [108], ADDED. [1704487] [16-132] [Entered: 02/16/2016 08:32 AM]

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02/26/2016	<u>139</u> 1 pg, 123.22 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Prevezon 1711 USA, LLC, Prevezon 1810 LLC, Prevezon 2009 USA, LLC, Prevezon 2011 USA, LLC, Prevezon Alexander, LLC, Prevezon Holdings Ltd., Prevezon Pine USA, LLC, Prevezon Seven USA, LLC and Prevezon Soho USA, LLC, FILED. Service date 02/26/2016 by CM/ECF. [1714094] [16-132] [Entered: 02/26/2016 03:13 PM]
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

PREVEZON HOLDINGS LTD., *et al.*,

Defendants,

ALL RIGHT, TITLE AND INTEREST IN THE
REAL PROPERTY AND APPURTENANCES
KNOWN AS THE 20 PINE STREET
CONDOMINIUM, 20 PINE STREET, NEW
YORK, NEW YORK 10005, UNIT 1816, *et al.*,

Defendants *in Rem.*

Case No. 1:13-cv-06326 (TPG)

ECF CASE

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE
GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO
SPECIFIED UNLAWFUL ACTIVITY**

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PRELIMINARY STATEMENT

The version of the fraud on the Russian Treasury (the "Treasury Fraud") told in the first, second and third complaints has been exposed by discovery to be false. It was contrived and skillfully sold by William F. Browder to politicians here and abroad to thwart his arrest for a tax fraud conviction in Russia. This public relations narrative was swallowed whole by the Government, which incorporated it into its complaint without investigation, a situation this Court has described as "troubling." When placed under oath, however, Browder's own witnesses revealed that he authorized the supposedly unauthorized acts alleged in the three complaints and knew about the events that the complaints allege he was unaware of. From this discovery, it is plausible Browder stole the money from the Russian Treasury or, at least, knew about the fraud before it occurred. The Government's motion seeks to avoid the embarrassment of presenting at trial a story Defendants have proven to be untrue. If this Court grants summary judgment on disputed facts and legal theories, Browder will broadcast his victory worldwide as undeserved vindication. The Court has repeatedly stated that this case is about Defendants' conduct – whether they engaged in money laundering. However, the statute requires the Government to prove a predicate act to money laundering, a Specified Unlawful Activity. 18 U.S.C. § 1956(a)(1) & (c)(7). The unlawful proceeds that are allegedly laundered must come from this Specified Unlawful Activity, and the defendant must know the proceeds are criminal in nature and intend to conceal or disguise them.

A foreign fraud on the Russian Treasury is not a predicate act to money laundering. The manner in which the Treasury Fraud was carried out thus is an essential element of the Government's claims. Defendants have repeatedly said that the Government has not identified conduct constituting a Specified Unlawful Activity – and the Government is now on its sixth and seventh theories, which are as much without merit as the prior five. The two new theories are

based upon demonstrably false facts and fail to state a claim as a matter of law. This case is about fraud on the Russian Treasury; it is not about fraud on an investor or trustee of Browder's Hermitage Fund. Shortening the trial by relieving the Government of its obligation to prove a Specified Unlawful Activity would deprive Defendants of an important, meritorious defense.

Defendants have repeatedly pointed out that the Government conducted no material investigation before filing the complaint and application for a worldwide protective order. (*E.g.*, Dkt. 80.) After discovery disproved Browder's storyline, the Government implicitly acknowledged Defendants have been right all along; it has substantially abandoned the fact statement and Specified Unlawful Activity contained in the Second Amended Complaint that this Court found sufficiently alleged to deny Defendants' Motion to Dismiss the Amended Complaint. (Dkt. 310.) In other words, the Government represented to this Court that it had evidence to prove a case that justified the Amended Protective Order and the continuation of this lawsuit, but once again, the Government misled the Court.¹ The Government's new factual narrative in this motion demonstrates that it now realizes the illusory nature of its complaint, yet this new story contains numerous disputed factual contentions, including many that are demonstrably false.²

Defendants can agree that the Treasury Fraud occurred (but not in the amounts the Government alleges), and Sergei Magnitsky died in detention (although that fact lacks any relevance to this lawsuit). However, beyond those facts, the Government's motion for partial summary judgment must be denied for the following reasons:

¹ The Government should not have been surprised by Defendants' discovery that put the lie to Browder's story. In an exchange of diplomatic notes with the Russian Federation, the U.S. Attorney was informed that the Russian prosecutors had investigated the same allegations and found them to be without merit. *See* Declaration of Natalya Veselnitskaya filed concurrently herewith.

² *See* Defendants Opposition to the Government's Rule 56.1 Statement submitted herewith.

- The facts asserted in the Government's Rule 56.1 Statement are disputed, incomplete, irrelevant, and prejudicial.
- In its Rule 56.1 Statement, the Government relies upon inadmissible hearsay statements by politicians who imbibed Browder's story and regurgitated it without any investigation.
- The Government's new theories of Specified Unlawful Activity—fraud on a foreign bank—fail because they do not satisfy the essential elements of this theory and produced no proceeds that could be laundered.
- Defendants are prejudiced by new factual allegations and legal theories that are not even made in the Second Amended Complaint filed on October 23, 2015, just five weeks before trial. Pursuant to Fed. R. Civ. P. 56(d), Defendants are entitled to discovery or if discovery is impractical at this late date, to have these new allegations stricken.

Prevezon and its owner Denis Katsyv are nothing but collateral damage to Browder's flight from justice and the Government's irresponsible failure to investigate. Prevezon never received any stolen proceeds from the Russia Treasury (as confirmed by the Government's "tracing expert," who at his deposition testified he could not be sure Defendants received any stolen Treasury funds) (Ex. 43³ at 8:14-10-25); Prevezon was not willfully blind to the source of funds from its independent investor; and Prevezon did not seek to conceal or disguise unlawful proceeds (proceeds it never received). As the Government has admitted, Prevezon engaged in perfectly ordinary real estate investments. (Ex. 44 at 300:13-301:7.) Prevezon will be deeply prejudiced if it is forced to tell an abbreviated story at trial of how it got caught in the Government's nightmarish web.

Rather than summary adjudication based upon an incomplete, inadmissible and disputed factual record and legal theories, this matter should proceed to trial, so that a jury can fairly and fully evaluate the Government's claims. (*See* Tr., Oct. 21, 2015 Hr'g at 43 "the important thing,

³ Citation to exhibits to the Declaration of Mark A. Cymrot in Support of Defendants' Memorandum of Law in Opposition to the Government's Motion for Summary Judgment is indicated by "Ex. ___."

for the sake of both the government and Prevezon, is to have a trial . . . because if Prevezon is innocent of what it's doing, it needs to get this off its back . . .").

STATEMENT OF FACTS

The Government now tells a completely different story from the one it told in its complaints, each one breathlessly repeating Browder's story of corrupt Russian tax officials, state-sanctioned torture and murder, a puppet judicial system, and a nefarious and entirely undefined criminal "Organization." The Government's original story was that members of the "Organization" *fraudulently re-registered* three Hermitage Companies (Parfenian, Rilend and Makhaon), created contracts to establish false liabilities, enforced those liabilities through sham lawsuits, and then submitted fraudulent amended tax returns based upon *judgments from the sham lawsuits* to recover a refund for taxes these three companies paid the prior year.

Now, mere weeks before it must prove that story with competent witnesses and admissible evidence, the Government jettisons the so-called "Organization" (of which it admits Defendants were never a part). (Dkt. 213 at 4-6.) The new story turns an about-face and asserts that its *entire case* is based on the actions of two individuals: Markelov and Khlebnikov, the individuals convicted in Russia of hoodwinking the Russian Treasury out of billions of rubles. Casually abandoning scores of allegations in its complaints, most importantly, the Government now claims for the first time that the role of Browder's companies in the Treasury Fraud is immaterial to its case. That admission kills the Specified Unlawful Activity of fraud against a foreign bank—HSBC Private Bank (Guernsey) Ltd. ("HSBC Guernsey")—alleged in the Second Amended Complaint.

The Government's attempt to cut Browder out of the picture is no accident. Discovery has shown that Browder had a motive to commit the Treasury Fraud, which was to steal back the money his companies paid in taxes to the Russian Federation for the 2006 tax year. He had the

opportunity to commit the Treasury Fraud, as he had been expelled from Russia, had nothing to lose and had all the information he needed about the three Hermitage Companies and their tax payments. And his agents took affirmative acts that furthered the Treasury Fraud, contrary to the narrative in the Government's filed complaints. Browder also had no reason to be transferring any stolen proceeds to Prevezon and Mr. Katsyv, who he did not know.

After discovery, in which Browder and his agents have been subjected to U.S. civil discovery procedures, Defendants have proven that Browder and his agents engaged in a series of misrepresentations to execute the fraud, to distance themselves from it, and to pin it on the Russian officials investigating Browder for a separate tax fraud his companies committed. They perpetuated the same fraud on the prosecution here, as the Government now implicitly admits.

I. DISCOVERY HAS DISCREDITED THE GOVERNMENT'S FALSE NARRATIVE

A. The Hermitage Companies Were Never Stolen

The Government's case as well its motion requires the Government to establish that the Hermitage Companies were stolen from Hermitage by fraudsters and were then used to execute the Treasury Fraud. (Dkt. ¶ 381 ("the Organization *fraudulently re-registered* the Hermitage Companies in the names of members of the Organization" in order to "orchestrate[] sham lawsuits against these companies").) When examined under oath, however, the agents from Browder's corporate service provider, Georgiades & Pelides, testified that: (1) powers of attorney used to authorize the transfer of the three Hermitage Companies bore their signatures, which thus means the re-registrations were authorized; and (2) they also signed false affidavits stating those signatures were forgeries. Ex. 18 at 73:19-74:5, Ex. 66 at 62:21-64:6. Concerning the key false affidavits, the agents testified:

Q. This was a document that your employer asked you to sign; is that correct?

A. Yes. . . .

Q. Prior to signing this document, you did not do any investigation into the contents of this document.

A. No. I am informed by my employer. . . .

Q. Prior to being informed about this document by your employer, did you have personal knowledge of any of the statements in this document?

A. No.

Id. at 74:18-76:24; *see also* Ex. 66 at 109:8-21. This testimony demonstrates that the re-registration of the three Hermitage companies was done, not by some undefined “Organization,” but by *Browder’s own organization*. The companies were therefore never “stolen” from Browder’s organization, nor were their re-registrations fraudulent as the Government has alleged.

More importantly, this testimony establishes that Browder, whose word the Government uncritically accepted when bringing this lawsuit, solicited false affidavits in an effort to conceal Hermitage’s connection to the acts underlying the Treasury Fraud.

B. Hermitage and Browder Knew of the “Sham Lawsuits” Before the Refund Requests were Filed

The Government alleges that the fraudulently re-registered Hermitage companies filed “sham lawsuits” on fraudulent contracts in order to generate losses that would substantiate the Treasury Fraud tax refund requests. (Dkt. 381 ¶ 19.) Key to this version of events is that Hermitage did not learn of the “sham lawsuits” until October 2007, which was after the judgments were entered. (*Id.* ¶ 55.)

Essential to Browder’s narrative as set forth in the Second Amended Complaint has been that a company by the name of Logos Plus, unbeknownst to Hermitage, filed lawsuits in July 2007 against Rilend, Parfenion, and Makhaon in St. Petersburg seeking millions in liability. As Browder testified to the U.S. Helsinki Commission:

LogosPlus then sued our companies in St. Petersburg Arbitration Court, claiming huge damages. Neither we nor HSBC were notified of these claims since the registered address for the companies had been fraudulently changed along with the other details. A team of lawyers we had never met appeared in St. Petersburg claiming to represent the (former) Hermitage companies in the proceedings. These lawyers pleaded guilty, “fully accepting” all of the claims and consent to the court’s judgment of \$380 million in damages against the Hermitage companies.⁴

Ex. 49 at 3. Browder’s testimony, however, is false. Rilend, Parfenion, and Makhaon received notice of the Logos Plus lawsuits against via registered mail sent to the same mailboxes where these companies received its HSBC Bank Statements. Rilend is exemplary:

- Logos Plus initiated lawsuit P-51203-2 against Rilend on July 24, 2007. The address listed on the face of the statement of the claim for Rilend was 13/2 Staropimenovsky Lane, Moscow, 121099. See Ex. 37 at 154:8-13 (stating Rilend’s registered address is listed on first page of lawsuit); Ex. 60.
- A registered mailing receipt dated July 24, 2007 was generated for this lawsuit with the tracking number of “191015 (85) 144778 0.” See also Ex. 38 at 168:23-172:20. Ex. 61.
- The envelope for this lawsuit was sent to Rilend at 13/2 Staropimenovsky Lane, Moscow, 121099. The envelope contains a tracking number of “191015 (85) 144778 0.” Ex. 61.
- At all relevant times, including during 2006-07, HSBC Bank listed the address for Rilend on its account statements at 13/2 Staropinmovsky Lane, Moscow 121099. Ex. 62.
- Firestone Duncan (one of Browder’s Russian law firms) had property at 13/2 Staropinmovsky Lane, Moscow 121099. Ex. 39 at 83:16-84:7.
- Jamison Firestone, Browder’s lawyer, testified that “provisions were always made to make sure that we could receive legal notices” via “systems in place . . . designed to make sure that we got notice for anything we responsible for.” Ex. 39 at 84:21-86:24.

Hermitage also received notice of a Logos Plus lawsuit brought against Parfenion,⁵ and similarly received notices for a Logos Plus lawsuit brought against Makhaon.⁶

⁴ See also Dkt. 381 ¶¶ 33-37 (describing supposedly sham lawsuits brought by Logos Plus against Hermitage companies); Ex. 51 at 2 (claiming to have discovered the St. Petersburg lawsuits via a phone-call from a Russian bailiff in mid-October 2007).

⁵ Logos Plus initiated lawsuit P-51201-2 against Parfenion on or around July 24, 2007; Parfenion’s address was listed as 19/9 Obratsova Street in Moscow, 121099. Ex. 57. A registered mailing receipt dated July 24, 2007 was generated for this lawsuit with the tracking number “191014 (85) 14783 4.” Ex. 57. An envelope for this lawsuit

This evidence demonstrates that Firestone Duncan received notice of the lawsuits in July of 2007—not October of 2007 as publicly claimed—which was well before the tax refund requests were filed. (Def’s Rule 56.1 Resp. to ¶ 13.) Browder could have then run into court and stopped the lawsuits and the Treasury Fraud but he did nothing. The documents demonstrate that the “sham lawsuits” proceeded with Hermitage’s knowledge and acquiescence, suggesting that Hermitage and Browder were involved in obtaining the judgments that were essential to the Treasury Fraud tax refunds.

C. The Refund Applications were Made Based Upon the Judgments from the Sham Lawsuits.

The Second Amended Complaint alleges the amended tax returns that resulted in the fraudulent refunds were based upon the fraudulent judgments from the sham lawsuits that Browder had notice of. Now, in its Rule 56.1 Statement the judgments from the sham lawsuits played no role, but instead, the Government contends that the refunds were paid from based upon the forged contracts. This statement is demonstrably false. Def.’s Rule 56.1 Resp. to ¶¶ 11-13.

D. The Search of Hermitage’s Offices was Justified by Browder’s Tax Fraud

The Government alleges that members of the Organization conducted illegal raids on Hermitage’s office and that of its attorneys, in the law firm of Firestone Duncan, in order to obtain the documents and seals necessary to carry out the Treasury Fraud. (Dkt. 381 ¶¶ 24-26.) However, the Rule 56.1 Statement makes no mention of the “Organization.”

was sent to Parfenion at 19/9 Obraztsova Street in Moscow, 121099; the envelope contains a tracking number 191014 (85) 14783 (4).” Ex. 58. At all relevant times, including during 2006-07, HSBC Bank listed the address for Parfenion on its account statements as 19/9 Obraztsova Street in Moscow, 121099. Ex. 59.

⁶ Logos Plus initiated lawsuit P-51202-1 against Makhaon on or July 24, 2007; Makhaon’s address was listed as 19/9 Obraztsova Street in Moscow, 121099. Ex. 54. A registered mailing receipt dated July 24, 2007 was generated for his lawsuit with the tracking number “191014 (85) 14781 0.” Ex. 55. An envelope for this lawsuit was sent to Makhaon at 19/9 Obraztsova Street in Moscow, 121099; the envelope contains a tracking number “191014 85 14781 0.” *Id.* At all relevant times, including during 2006-07, HSBC Bank listed the address for Makhaon on its account statements as 19/9 Obraztsova Street in Moscow, 121099. Ex. 56.

Discovery has shown that those searches were conducted in connection with an investigation into Browder's own criminal tax fraud, for which he was convicted—and the underlying facts of which were resolved in civil disputes by Russian courts that Browder ignored. *See* Ex. 50 at 4. These civil judgments were entered against Browder's companies for falsely claiming they were employing disabled Afghan war veterans. Ex. 46 at 68:17-72:25, 78:18-79:4, 72:3-25, 78:18-79:4, 81:9-82:9, 82:14-90:25; *see also* Exs. 21, 23-24, 63-64. Rather than pay those judgments, Browder sold the companies to his security firm which bankrupted the companies liable for the judgments. (Ex. 46 at 73:12-92:20.) The criminal tax investigation thus followed. The police search on the Hermitage and Firestone Duncan offices was justified by a legitimate criminal tax investigation.

The truncated story without the "Organization" appears to be an effort to protect Browder from charges that he sold out Sergei Magnitsky. A reporter, Oleg Lurie, who spoke to Mr. Magnitsky on two occasions reported that Mr. Magnitsky feared he had been sold out by his superiors at Hermitage. When asked in his deposition whether he had asked Mr. Magnitsky to take responsibility for the fraudulent tax returns, Browder did not object vehemently, he replied:

Q: Did you ever have somebody suggest to Mr. Magnitsky that he should take responsibility for the Saturn and Dalnaya Step tax returns?

A: I don't remember.

(Ex. 25 at 376:23-377:3). Lurie also reported that he was approached by a person identifying himself as coming on Browder's behalf who offered him a bribe to change his story. Ex. 35 ¶¶ 67-69. The Government has not even asked Browder whether he was making an effort to suborn perjury. Ex. 36 at 374:13-18.

E. Hermitage Refused to Accept Return of its Corporate Seals

When the Russian police searched Hermitage's offices, the Government alleges that the investigators confiscated Hermitage's corporate seals and certificates during this search, "den[ie]d] requests from Hermitage to return the corporate documents and seals," and used those certificates and seals to effectuate the fraud. (Dkt. 381 ¶ 25.) This story is key to Browder's version of events, as it discredits those investigating Browder's own frauds while simultaneously pinning the Treasury Fraud on someone other than Hermitage.

This story too is false. As even Browder admitted, Russian authorities in fact offered to return the documents and seals to Hermitage, but Browder's people refused to accept them until the investigation was closed (and thus after the refunds had issued). (Ex. 45 at 144:8-146:8.) What is more, Browder acknowledged that he had heard of a forensic study showing that the certificates and seals used in the tax refund applications were *different* from those that were in the custody of Russian officials—blowing a gaping hole in the Government's theory of the case and suggesting that the tax refund applications were prepared by someone who, like Browder at the time the applications were prepared, did not possess the actual seals and documents but who nevertheless had knowledge of their contents. *Id.*

F. The Hermitage Fund Lost No Value

The Government's new claim is that an investor in the Hermitage Fund, HSBC Suisse, was defrauded by a legal reserve created to recover the re-registered companies. However, the Government's narrative omits Browder's admission that the Hermitage Fund suffered no financial loss in connection with the change of ownership of the Hermitage Companies. Ex. 26 at 149:23-156:21 (testifying that Parfenion, Makhaon, and Rilend's only assets were "bank accounts" with "\$10,000-\$15,000" but that he "[didn't] know" whether the shareholding vehicles [Kone and Glendora] or Parfenion, Makhaon, and Rilend lost anything of value). If, as Browder

admitted, the Hermitage Fund lost no value, the fraud on a foreign bank fails because HSBC Private Bank (Suisse)'s ("HSBC Suisse") share did not lose any value.

G. The Explanation for the Legal Reserve Exposes More Hermitage Lies

According to the Government's new theory of fraud, HSBC Suisse was an investor of its own funds in the Hermitage Fund. The Fund supposedly in July of 2007 (before the Russian Treasury Fraud occurred in December 2007) took a reserve on its financial statements in anticipation of paying legal fees to recover ownership of Parfenian, Rilend and Mahkoan. (Dkt. 403 ¶ 9.) That reserve allegedly reduced the value of the HSBC Suisse interest when it redeemed its shares. (*Id.* ¶ 32.) Thus, the theory of fraud on HSBC Suisse is dependent upon the transfer of ownership being unauthorized (which the Government acknowledges is a disputed fact). (Dkt. 415 at 4 n.2.) If the transfers were authorized, the legal reserve was unnecessary for the purpose that the Government now claims.

But this new factual theory also exposes more Browder lies. Browder is on record as stating that the Hermitage Fund did not realize the companies had been stolen until three months after the legal reserve as taken, in October of 2007. (Ex. 51 at 2.) These statements are in irreconcilable conflict. If the reserve was taken in July to fight the theft, Hermitage had to know about the theft; their story about October is a false statement. And if the reserve was taken after the tax police raided the offices and seized corporate records on June 4, 2007, then the provision for legal services was actually to fight off a tax investigation in which Hermitage was the target, and not to recover three shell companies that Browder acknowledges had no value. (*See* Dkt. 381 ¶ 24.) Indeed, an entry on Hermitage's financials demonstrating just that was redacted without explanation in an exhibit submitted by the Government in support of this motion. *Compare* Dkt. 400 Ex. D3 at ¶ 18 *with* Ex. 2 at ¶ 18.

ARGUMENT

I. THE GOVERNMENT HAS THE BURDEN TO DEMONSTRATE THAT ITS ALLEGATIONS ARE NOT DISPUTED, INCOMPLETE AND LEGALLY INSUFFICIENT

Summary judgment is appropriate only if the court determines that there is no genuine issue of material fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. P. 56(a). The Government, as movant, has the burden of demonstrating that there are no genuine issues of material fact. *Id.* “[A]ll that is required [from a nonmoving party] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *see also Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

Summary judgment is also improper where “it is unclear that the moving party is entitled to judgment as a matter of law.” *Chappell & Co. v. Frankel*, 367 F.2d 197, 203 (2d Cir. 1966); Fed. R. Civ. P. 56(a). That is, the motion should not be granted where the “facts fail to show that the moving party is entitled to judgment as a matter of law.” *Vermont Teddy Bear Co., Inc. v. I-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).

“If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper.” *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996). Any ambiguities must be resolved and all inferences must be drawn against the moving party. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986).

Although the rules permit the consideration of partial summary judgment, it should not be entertained where the evidence is “incomplete and support[s] competing inferences.” *Latsis v. Chandris Inc.*, No. 91 Civ. 6900 (LAP), 1998 WL 458095, at *7 (S.D.N.Y. Aug. 4, 1998) (citation omitted). Partial summary judgment is also inappropriate where the issues subject to

the motion are intertwined with issues that will necessarily need to be resolved at trial. *Berman v. Royal Knitting Mills*, 86 F.R.D. 124, 127 (S.D.N.Y. 1980).

II. THE GOVERNMENT IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE DISPUTED FACTUAL RECORD

A. The Rule 56.1 Statement is Disputed, Incomplete in Material Ways and Prejudicial

The Government's recitation of supposedly undisputed facts is disputed and incomplete in material ways that are directly relevant to the two new Specified Unlawful Activity claims, fraud on a foreign bank. The Government's attempt to sweep Browder's lies under the rug through entry of its misleading story on summary judgment is inappropriate and must be denied, because even this truncated story is hotly contested.

1. The Hermitage Companies Were Not "Held" by HSBC Guernsey

The Treasury Fraud story begins with the Hermitage Companies—Rilend, Parfenion, and Makhaon—that were indirectly owned by the Hermitage Fund, a trust. (Ex. 26 at 152:17-153:17.) The Government now wants to claim the Hermitage Companies were "held" by HSBC Guernsey in order to support its theory that HSBC Guernsey was "harmed" (significantly, not defrauded, which is what the statute requires) when those companies were fraudulent re-registered. (Dkt. 399 ¶ 7.) This assertion is demonstrably inaccurate. None of the evidence the Government cites—not the Hermitage Fund financial statements, not the excerpts from the Russian corporate registry entries on the Hermitage Companies, and not a *non sequitur* deposition of a Government witness—even suggests that HSBC Guernsey "held" the Hermitage Companies.

The evidence produced in discovery actually disproves the Government's assertion in two ways. First, the uncontested record demonstrates that holding companies Kone and Glendora, not any HSBC entity, owned the Hermitage Companies. (Ex. 26 at 152:17-153:17.)

(showing that Kone and Glendora own the Hermitage Companies). And second, a trustee does not hold assets, the trust owns the assets, and it is the trust, not the trustee that may be “harméd” when assets are transferred. Thus, the Rule 56.1 Statement, para. 7 is both incorrect and disputed.

2. The Hermitage Companies Were Never Stolen

As described above, evidence obtained in discovery shows that the Hermitage companies were never “stolen” from the Hermitage Fund, nor were their re-registrations fraudulent. (*See* pp 5-6, *supra*.) The Government admits now that the manner of the re-registration—whether it was authorized or not—is a disputed issue. (Dkt. 408 n.7.) The Government argues that the manner of the re-registration is not relevant to its fraud on a foreign bank theory, but, the Rule 56.1 Statement, para. 14 states that the re-registrations were “unauthorized” and the unauthorized nature of the transfers is a material fact to both new legal theories. The recitations in the Rule 56.1 Statement, paragraphs 9 and 14 are, thus, incomplete, misleading and disputed.

3. Hermitage and Browder Knew of the “Sham Lawsuits” Before the Refund Requests were Filed

In yet another obvious attempt by the Government to excise Browder and his culpability from this case, the Government’s Rule 56.1 Statement now omits any reference to the sham lawsuits. (Dkt. 399 ¶¶ 10-14.) The Government’s Rule 56.1 Statement omits the sham lawsuits because discovery shows that they were conducted with Hermitage’s knowledge—they were served upon Hermitage’s law firm, Firestone Duncan, raising the inference that Hermitage and Browder were involved in procuring the judgments that led to the Treasury Fraud. (*See* pp. 6-8, *infra*.)

4. The Refunds Were Made Based Upon Judgments from Sham Lawsuits, Not Forged Contracts

The Statement in the Government's Rule 56.1 Statement that the tax refunds were based upon forged contracts is demonstrably false and thus disputed. (See Dkt. 399 ¶¶ 10-14 and 20.) The refunds were based upon purportedly sham lawsuits as the complaint alleges. (Dkt. 381 ¶¶ 19-20.) Those false and disputed paragraphs are belied by the Second Amended Complaint itself, which alleges that the tax refund applications were based upon *judgments from lawsuits*, which in turn were based upon the alleged forged contracts. (*Id.*) The Government's artful but inaccurate omission of the lawsuits from its Rule 56.1 Statement is an implicit admission that a grant of summary judgment in this case requires an incomplete and incorrect recitation of the facts. Thus, the Rule 56.1 Statement paragraphs 10-14 and 20 are materially incomplete and disputed.

5. The So-Called "Organization" is Omitted from the Government's New Story

The three complaints center their story on an amorphous and undefined criminal "Organization" that stole the Hermitage Companies, orchestrated the "sham lawsuits," sought and obtained the refunds, distributed a part of the proceeds to Prevezon through a complex chain of 109 transfers, and murdered Sergei Magnitsky. The Government has admitted that Defendants were not members of this "Organization," but the "Organization" supposedly transferred \$1.97 million to the Prevezon bank account in Zurich. (Dkt. 213 at 4-6; Dkt. 381 Ex. B.) Yet the "Organization" is *nowhere to be found* in the Government's Rule 56.1 Statement, which asserts that the fraud was carried out by just three unsophisticated individuals. (Dkt 399 ¶¶ 15-18.) Those individuals could not have been acting alone, according to the Second Amended Complaint. (Dkt. 381 ¶¶ 2-3, 21.) The variance between the Government's prior

pleadings and its Rule 56.1 Statement itself establishes a material issue of fact as to those paragraphs.

The “Organization’s” existence and activities—or lack thereof—remain “relevant to several aspects of this case” even if the Government’s summary judgment motion is granted, and thus the Government’s motion will not have the desired effect of shortening the trial as the Government incorrectly claims. (Dkt. 311 at 4 n.1.) The Government has consistently maintained this position. (*E.g.*, Dkt. 229 at 4 n.2 & 34 n.35 (Organization’s acts relevant to Defendants’ receipt of funds and proportionality of forfeiture); Dkt. 88 at 4-5 n.3 & 20 n.10 (same).) According to the Government, then, the “Organization’s” scope and activities are inextricably intertwined with multiple aspects of this case. Because of this, Defendants are of course entitled to introduce proof concerning the “Organization” at trial—including whether the “Organization” was involved in the Treasury Fraud. As the Government is certainly aware, a grant of summary judgment will do nothing to shorten the trial.

6. Hermitage Refused to Accept Return of its Corporate Seals

The Rule 56.1 Statement, para. 7-22 is materially incomplete and disputed. The Government’s account of the alleged fraud ignores the facts that Hermitage refused to accept return of its corporate documents and seals, further evidence that the re-registrations were authorized. (*See* pp. 9-10, *supra*.)

7. The Hermitage Fund Lost No Value

The Government’s Rule 56.1 statement sets forth a series of facts regarding the trading activities of HSBC Suisse, but omits Browder’s admission that the Hermitage Fund suffered no financial loss in connection with the (authorized or unauthorized) change of ownership of the Hermitage Companies. (*See* p. 10, *supra*.) As explained in further detail below, without any loss, theories of “fraud” against HSBC Suisse fail.

8. The Purpose of the Legal Reserve is Disputed

The Rule 56.1 Statement's description of the reserve taken by Hermitage is disputed. (See Dkt. 399 ¶¶ 27-32.); *see supra.* at 10-11. The reserve could not have been taken for the stated purpose – for legal fees to recover the re-register companies – since it would have been taken supposedly before Hermitage learned that the ownership of Parfenion, Rilend and Makhaon were transferred from Kone and Glendora to Pluton. The purpose of the reserve seems to have been to defend Hermitage and Browder from a legitimate criminal tax investigation. The investor, HSBC Suisse, thus, was not “harmed” by a reserve to recover the re-registered company and the whole theory of fraud on a foreign bank collapses.

9. The Government has Not Identified a “Foreign Bank”

The Rule 56.1 Statement includes no factual support for the proposition that any one of the HSBC entities is a foreign bank within the meaning of the International Banking Act of 1978. The Statement identifies at least three HSBC entities but some of them are clearly not banks, such as HSBC Management (Guernsey) Ltd. (“HSBC Management”), for which the Government's own witness has testified is not a bank. (Ex. 34 at 77:23-78:4.) The Government's brief states that HSBC Holdings plc is “clearly” a bank but provides no factual support which is of course required on summary judgment. In law a bank is a bank and a bank holding company is not a bank but a holding company subject to a vastly different set of regulators, regulations, and statutes, and with wholly different powers. *See* 12 U.S.C. § 1841(a) & (c) (defining “bank” and “bank holding company” separately).

As for HSBC Guernsey, it was not acting as a bank but as a trustee and HSBC Suisse was acting as an investor, and not a bank. The Government has submitted no evidence that these entities were regulated as a bank when in these non-bank roles. Indeed, the Government's proposed order omits to find fraud *against a foreign bank* altogether, instead stating: “it has been

established as a matter of law that the fraud described in Exhibit A constituted specified unlawful activity.” (Dkt. 397-1.) This omission of a required finding—that an enumerated specified unlawful activity is established—is not just sloppy: it is prejudicial to meaningful appellate review. This critical element of the Government’s showing of *fraud against a foreign bank* is, for these reasons, lacking and thus must be proved at trial.

10. HSBC Suisse, HSBC Guernsey, and HSBC Management Were Not “Defrauded”

The Government’s assertion that HSBC Suisse was “defrauded” is contradicted by the testimony of its own witness. HSBC Suisse never reported the alleged “fraud” to regulators, never informed its chief accounting officer that there was fraud, and never wrote down (or discounted) the value of its investment. (Ex. 27 at 102:11-105:8; Ex. 28 at 8:11-9:5.) The Government does not even try to claim that HSBC Suisse sold its shares in the Hermitage Fund because of “fraud.” Separately, the Government’s 56.1 Statement does not have any factual support whatsoever for the Government’s argument that HSBC Guernsey or HSBC Management were “harmed.”

B. The Government’s Case Is Dependent on Inadmissible Evidence

The Government has admitted that this case is a product of Browder’s advocacy and is based almost entirely on his say-so. It is a single-source case, from a source with no personal knowledge. As the Government conceded in a deposition, it used its interviews with Browder and his associates at Hermitage, and bank documents provided by them, as the basis for its complaint. (Dkt. No 81-1, Hyman Dep., at 16:17-17:4, 19:2-20:8, 28:7-33:2.) The Government’s 56.1 Statement relies upon “Findings of Fraud by Investigative Authorities.” (Dkt. 399 ¶¶ 23-26.)

The evidence submitted in support of the Government's motion comes almost entirely from Browder and his associates, either directly or once removed. Indeed, everything aside from Russian court decisions and HSBC documents can be traced to Browder. This includes:

1. Multiple reports from various non-governmental organizations and other bodies that are based almost exclusively on information provided to them from Browder and his affiliates. (Dkt. 402 Ex. F; Dkt. 400 Exs. C1-C4.)⁷; and
2. Excerpts from depositions of people who worked for Browder or his agents (Dkt. 400 Exs. E3-E4.);⁸

The Government's case is utterly reliant on a story and evidence proffered by a source who has been completely discredited by recent sworn evidence.

Summary judgment is improper when specific facts call into question the credibility of the moving party's witness. *Sterling Nat. Bank & Trust Co. of New York v. Federated Dep't Stores, Inc.*, 612 F. Supp. 144, 146 (S.D.N.Y. 1985) ("If the credibility of the movant's witness is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied."); *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158 (Fed. Cir. 2004) ("summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movants witnesses."). This is particularly the case where, as here, the party seeking summary judgment bears the burden of proof, see *Chem. Bank v. Hartford Acc. & Indem. Co.*, 82 F.R.D. 376, 378-79 (S.D.N.Y.1979)

⁷ Very few of the documents the Government relies upon in support of its summary judgment motion were actually filed with the Court. Defendants have repeatedly requested that the Government file the documents on which it relies in order to create a proper record, see Ex. 11, but the Government has refused to do so, without justification. The unfiled documents are therefore not properly before the Court and may not be considered on summary judgment. While Defendants analyze the improper documents when explaining why summary judgment is improper, Defendants do not waive their objection to the Court's consideration of those documents on this motion. The unfiled exhibits not properly before the Court include: Exhibits A through N to the Declaration, Dkt. 403, as well as all of the exhibits referenced in the Monteleoni and Hyman declarations, Dkts. 400 & 401.

⁸ In addition, the Government's case relies on photographs that a confidential witness associated with Browder purportedly took of portions of a Russian criminal court file (Dkt. 400 Ex. B1-31), and Hermitage Fund reports and consolidated financial statements. (Dkt. 400 Ex. D3, D4; HSBC Suisse 30(b)(6) Decl. Exs. A-B, D, F, H, I, L, N.)

and where, also the case here, the witness is “interested in the result of the suit.” *Sartor v. Ark. Nat’l Gas Corp.*, 321 U.S. 620, 628 (1944).

Browder and his agents *created* (or are the ultimate sources for) the vast majority of the evidence the Government offers in support of summary judgment. It is inconceivable that a summary judgment motion based on evidence both *manipulated* and *created* by a convicted tax cheat and his agents would warrant summary judgment—particularly so when the evidence concerns a tax fraud case that the convicted tax cheat has repeatedly lied about. Because of the specific, articulable deficits in Browder’s credibility, this Court cannot enter the proposed findings of fact that the Government requests without making impermissible credibility determinations concerning Browder and his associates.

The Government’s summary judgment motion is also improper because it is reliant on inadmissible evidence, which should not be considered. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) (“only admissible evidence” need be considered on summary judgment); *Faulkner v. Arista Records LLC*, 797 F. Supp. 2d 299, 306 (S.D.N.Y. 2011) (granting motion to strike hearsay exhibits and paragraphs of Local Rule 56.1 statement based on the hearsay exhibits). Rather than do a competent investigation of the facts, or base its case on reliable documents and testimony, the Government instead relies upon inadmissible hearsay and evidence that it cannot authenticate.

1. The Andreas Gross Report is Inadmissible

The Government’s 56.1 Statement heavily relies upon a declaration and report by Andreas Gross, a rapporteur to the Council of Europe. (Dkt. 398 at at 5, 11; Dkt. 399 ¶¶ 8, 9, 14-21, 26; Dkt. 402.) The Government concedes his report is hearsay, but incorrectly argues that it is admissible as a public record. (Dkt. 398 at 11 (citing Fed. R. Evid. 803(8)(A)(iii)).) The public records exception does not sanction the admission of hearsay statements contained within

a public record, and Gross's report is based entirely upon them. *United States v. Awad*, No. 06 CR. 600 (DLC), 2007 WL 1988382, at *4 (S.D.N.Y. July 3, 2007); *United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997) ("Decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under this exception merely because they appear within public records).

Gross's report largely consists of double and triple hearsay. He did not interview participants in the relevant events. His report is based on hearsay conversations with Browder and his associates at Hermitage (who *claim* that they not involved directly in the relevant events) rather than a proper investigatory source. (Dkt. 402-6 at Sec B.1.1.). Indicative of this utter dependence on Hermitage's agents who disclaim personal knowledge is his extensive account of his conversations with Edward Khareitdinov, an attorney for Hermitage. Nearly three full pages of Gross's report—pages 21 through 23—contain nothing but a regurgitation of what he claims Khareitdinov told him. Passages such as these, where Gross simply recounts what he claims others told him, are classic examples of inadmissible hearsay and cannot be admitted.

So too are Gross's conversations with law enforcement personnel from various jurisdictions inadmissible. Gross admits that his report is based extensively on such conversations with individuals who have no personal knowledge of the events at issue. (Dkt. 402-6 at Sec B.1.1; Dkt 402 ¶ 23); *Robins v. Whelan*, 653 F.2d 47, 52 (1st Cir. 1981) ("reporting agency must have firsthand knowledge of the investigation by which it accumulates the published factual findings"). Gross's compilation of a report from separate hearsay sources does not qualify as an admissible public record.

Separately, the public records exception does not apply if the circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803(8)(B). Gross's purported investigation occurred in

2013, six years after the alleged tax fraud at issue. He apparently did not have access to persons with direct knowledge of the relevant events. Gross is a career politician without any training in Russian law, and who has expressed anti-Russia views in the past. (Ex. 40.) Gross has also been accused of bias with regard to his reporting by a British House of Commons member, and by Azerbaijan. (Ex. 41, 42.) Rather than conducting an objective investigatory assessment, Gross's charge from the Council of Europe was to put together a report "refusing impunity for the killers" of "whistleblower Sergei Magnitsky" (after Gross previously wrote a report covering the same subject matter and reaching the same conclusions). (Dkt. 402-2.).

The Government submitted an affidavit from Andreas Gross in support of this motion, but Gross refused to be deposed for fear of Defendants' cross-examination and will not appear as a witness at trial. (Dkt. 408.). On this ground alone, his affidavit and report should be stricken.

The Gross report should thus be stricken and the portion of the Rule 56.1 Statement that relies upon it should be deemed contested.

2. The Human Rights Council Report and Annex is Inadmissible

The Government also relies upon an annex to a report prepared by the Russian Presidential Human Rights Council in support of its narrative. (Dkt. 399 ¶¶ 8, 9, 14, 19-21, 25 (citing Dkt. 400 Ex. C3).) This is also inadmissible hearsay. The findings of the Human Rights Council were just "preliminary conclusions" of the working groups of the Council, and thus are not admissible under Rule 803(8). (Dkt. 400 Ex. C1 at 1; Declaration of Kirill Kabanov ("Kabanov Decl.") ¶ 6, submitted herewith); *City of New York v. Pullman Inc.*, 662 F.2d 910, 914-15 (2d Cir. 1981) (refusing admission of preliminary report); *Toole v. McClintock*, 999 F.2d 1430, 1434-35 (11th Cir. 1993) (noting Rule 803 makes no exception for "tentative or interim reports").

In addition, the annex cited by the Government was not even authored by members of the Human Rights Council—rather, it was written by a NGO called the “National Anti-Corruption Committee.” (Dkt 400 Ex. C3; Kabanov Decl. ¶ 19.) An NGO’s report is not produced by a “public office,” nor is it the product of a “legally authored investigation,” and it is therefore not admissible under 803(8). *See, e.g., Ames v. Stevens*, No. 9:12-CV-01487 MAD, 2015 WL 5513021, at *7 (N.D.N.Y. Sept. 17, 2015) (excluding report by non-profit organization)

Additionally, the annex to the Human Rights Council report suffers from the same hearsay and trustworthiness problems as the Gross’s report, as it largely based on information supplied by Browder and Hermitage. (*See* Dkt. 400 Ex. C1 at 1 (“[T]he facts presented in the materials submitted by Hermitage Capital . . . have still not been examined.”); Kabanov Decl. ¶¶ 8-10, 13.)⁹

C. The Government Has Disputed The Validity of the Two Convictions that Form the Backbone of Its Summary Judgment Motion.

The Government’s motion places a newfound reliance on the Russian convictions of Markelov and Khlebnikov, but only on highly edited portions of those convictions. In other words, the Government is attempting to rely upon portions of the convictions that support its case but ignore portions that tell a different story than the Government’s newest version. The Government cites the two convictions (Exhibits F1 and F2 to the Hyman Declaration) to establish: that ownership of the Hermitage Companies was transferred to OOO Pluton; that

⁹ The Government also places extensive reliance on photographs allegedly taken of documents within a Russian court file by a Government witness. (Dkt. 400, Exs. B1-B31.) These documents are inadmissible, because the Government cannot rely on the photographs to prove that the documents therein are actually what they purport to be (the first level of hearsay), or that the contentions and transactions referenced in the documents ever occurred (the second layer of hearsay). The Government identifies no hearsay exception for these documents, nor can it prove the documents’ authenticity under Fed. R. Evid. 901(a). The Government also relies upon “commercially reported” Russian court decisions, but does not establish the reliability of the purported source, preventing the Court from taking judicial notice of these documents. (Dkt. 399 ¶ 22; Dkt. 400 Exs. A1-A9); *Liberty Mut. Ins. Co. v. Roaches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992). Defendants intend to file motions *in limine* seeking the exclusion at trial of the inadmissible evidence relied upon in the Government’s submission, that will address these issues in greater depth.

Markelov and Khlebnikov were appointed as directors of those companies; that Markelov forged backdated contracts with sham counterparties; that Markelov submitted fraudulent amended tax returns on behalf of the Hermitage Companies based on the forged contracts; that Markelov and Khlebnikov submitted refund applications; and that those refunds were issued. In other words, the Government relies on the convictions to establish each and every critical aspect of the Treasury Fraud.

The Government's principal reliance on the findings in those documents is astounding in light of Special Agent Hyman's unequivocal testimony as a Rule 30(b)(6) witness speaking for the United States just weeks ago that *the Government rejects those findings and those convictions*:

Q. Do you accept the Russian findings?

A. No, we do not.

Q. Do you reject the Russian findings?

A. Yes. . . .

Q. And do you accept the Russian court decisions or not?

A. Which court decisions are you talking about?

Q. The conviction of Markelov?

A. No, we do not.

Q. The conviction of Khlebnikov?

A. No, we do not. . . . we're not relying on their conviction.

Ex. 48. The Government now asks this Court to rely upon the very findings that, under oath, the Government rejected. This clear statement by a party opponent that the convictions' findings are not credible itself creates an issue of material fact as to the reliability of those findings, thus precluding summary judgment as to any paragraph of the Government's 56.1 Statement citing to

those documents for support. (See Dkt. 399 ¶¶ 9, 10, 11, 13, 18, 19, 20, & 21); *Muller-Paisner v. TIAA*, 528 F. App'x 37, 41 n.2 (2d Cir. 2013) (party opponent admission considered on summary judgment); *Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 282 n.1 (5th Cir. 2014) (statement of party opponent admissible as summary judgment evidence); *Montone v. City of Jersey City*, 709 F.3d 181, 200 n.11 (3d Cir. 2013) (opposing party's deposition testimony "is admissible as a party-opponent admission, and thus should have been considered in resolving the summary judgment motions.").

The Government, as the party that bears the burden of proof, has the affirmative burden adduce evidence supporting its contentions, which it has failed to do. *Goenaga v. Mar. of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) ("A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists."). Where "the cited materials do not support the factual assertions in the [56.1 statement], the Court is free to disregard the assertion." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73-74 (2d Cir. 2001). Summary judgment in favor of an unsupported factual record is improper.

III. THE GOVERNMENT DOES NOT ESTABLISH THE SPECIFIED UNLAWFUL ACTIVITY OF FRAUD AGAINST A FOREIGN BANK

The Government's motion is based on the incorrect premise that "harm" to HSBC (Suisse), HSBC Guernsey, and HSBC Management suffered in connection with the fraud from the Russian Treasury constitutes "fraud . . . against a foreign bank," a Specified Unlawful Activity enumerated in the money laundering statute. 18 U.S.C. § 1956(c)(7)(B)(iii). The Government asserts in its motion that it is seeking summary judgment on grounds that "a specified unlawful activity was committed in Russia." (Dkt. 398 at 1.) It goes on to argue that the Treasury Fraud "constituted fraud on a foreign bank." (*Id.*) However, the Russian Treasury is not a foreign bank. The Government is trying to fit an inapplicable statute into its scheme.

Under the money laundering statute, “an offense against a foreign nation involving . . . fraud, or any scheme or attempt to defraud . . . against a foreign bank” constitutes a Specified Unlawful Activity. 18 U.S.C. § 1956(c)(7)(B)(iii). However, the Government’s motion is deficient for multiple reasons:

- The Government alleges false statements were made to the Russian Treasury. Nowhere does the Government allege—because it cannot—that the perpetrators of the Treasury Fraud committed a fraud on HSBC (Suisse), HSBC Guernsey or HSBC Management.
- The Government alleges that the Russian Treasury relied upon false tax refund applications. The Government has not alleged that HSBC Suisse, HSBC Guernsey, or HSBC Management relied upon any acts of the perpetrators of the Treasury Fraud.
- The intended victim of the fraud was the Russian Treasury. The Government alleges no facts that would justify a finding that the perpetrators of the Treasury Fraud intended to defraud an investor or trustee in the Hermitage Fund, including HSBC Suisse.
- Browder’s concession that the Hermitage Fund lost no value by the transfer of Parfenion, Rilend and Makhaon eliminates any possibility that HSBC Suisse, HSBC Guernsey, or HSBC Management were injured by the Treasury Fraud, another essential element of a fraud claim.
- Since there was no injury, the Government cannot allege that Defendants laundered the proceeds of the fraud against a foreign bank, rather than the proceeds of a fraud on the Russian Treasury (which is denied, of course). The Government makes the leap between the two alleged frauds without any factual predicate or even reasoning.
- The Government also has not identified a bank that was defrauded since HSBC Suisse, HSBC Guernsey, and HSBC Management were not acting in the role of a bank in connection with the Hermitage Fund.

These deficiencies are fatal to the Government’s new and untimely Specified Unlawful Activity theories.

A. The Alleged “Harm” To HSBC Suisse Does Not Constitute Fraud Against a Foreign Bank

The Government’s contention is that HSBC Suisse as investor in the Hermitage Fund was “defrauded” by the Treasury Fraud. As an initial matter, the victim of the fraud was the Russian Treasury, and not the Hermitage Fund. The Government alleges that the Hermitage Fund took a

write down of \$7 million as a reserve against legal fees for recovering Parfenion, Rilend and Makhaon. (Dkt. 399 ¶ 28.) HSBC (Suisse), as an investor of its own funds in the Hermitage Fund, was allegedly “harmed” when it redeemed its shares because the reserve reduced the value of HSBC (Suisse)’s interest. (*Id.* ¶ 29.)

These facts are disputed. *See supra*, p. 18. But this legal theory also satisfies none of the elements of bank fraud. If the transfer of the three companies were unauthorized, the Government has conceded that summary judgment must be denied because that fact is contested. (Dkt. 408 n.7.) If the transfers were authorized, there was no fraud on the Hermitage Fund. In either case, an investor in the Hermitage Fund would have no standing to assert fraud; the Fund would have to make the claim.

The Government also cannot show that the perpetrators intended to defraud HSBC Suisse. The closely analogous domestic federal bank fraud statute, 18 U.S.C. § 1344, imposes liability on whoever “knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution.” 18 U.S.C. § 1344(1). This provision requires specific intent to defraud a bank. As the Second Circuit has stated:

[A]lthough a bank need not be the immediate victim of the fraud, the government is required to prove that a bank was *an actual or intended victim* . . . i.e., that the defendant engaged in or attempted to engage in a pattern or course of conduct designed to *deceive a [bank]* into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss.

United States v. Laljie, 184 F.3d 180 (2d Cir. 1999) (internal citations and quotations omitted) (emphasis added); *see also United States v. Loughrin*, 134 S. Ct. 2384, 2389-90 (2014) (noting that § 1344(1), “as all agree, includes the requirement that a defendant *intend* to ‘defraud a financial institution’”) (emphasis added). These concepts apply with equal force to the “fraud . . . against a foreign bank” provision of 18 U.S.C. § 1956(c)(7)(B)(iii). *See Hardt v. Reliance*

Standard Life Ins. Co., 560 U.S. 242, 251 (2010) (when interpreting a statute, courts “begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose.”). The Government has not, and cannot, provide any admissible evidence showing that the perpetrators of the Russian theft intended to defraud Hermitage Fund investor HSBC Suisse, rather than the Russian Treasury.

The Government’s claim of “harm” is a contested fact. See *supra*. p. 18. The reduced share value of HSBC Suisse’s interest is contested by Browder’s testimony that Hermitage did not lose any money when the Hermitage shell companies were re-registered. (Ex. 45 at 149:23-156:21.) HSBC Suisse never reported the alleged “fraud” to regulators, never informed its chief accounting officer that there was fraud, or wrote down the value of its investment. (Ex. 27 at 102:11-105:8; ex. 28 at 8:11-9:5.) These facts alone bar summary judgment. However, the legal theory is also contested.

HSBC Suisse’s asserted “injury” is no more cognizable than that of a shareholder, who expressing a grievance with a corporation for a harm that equally affects all shareholders, attempts to maintain a claim. Just as a shareholder in that instance would not have a redressable injury under basic corporate law, so does HSBC Suisse’s claim fail here as well. See, e.g. *Debussy LLC v. Deutsche Bank AG*, 05 Civ. 5550 (SHS), 2006 WL 800956, at *3 (S.D.N.Y. Mar. 29, 2006) (dismissing complaint and noting that “a claim for diminution in value of shares is an indirect harm” and thus plaintiff lacks standing to bring claim), *aff’d* 242 Fed. Appx. 735 (2d Cir. 2007); *Jones v. Niagara Frontier Trans. Auth.*, 836 F.2d 731, 736 (2d Cir. 1987) (“A shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation”).

The restitution statute cited by the Government is inapplicable; it provides that restitution is only available where the victim is “directly and proximately” harmed by the offense at issue. 18 U.S.C. § 3663A(a)(2). (See Dkt. 398 at 13-14.) Where, as here, the aggrieved party is multiple steps removed from the theft from the Russian Treasury at issue, it is not a victim of fraud. *United States v. Grundhoefer*, 916 F.2d 788, 794 (2d Cir. 1990) (finding direct restitution to loan recipients “wholly inappropriate” for fraud against U.S. Government that had indirectly affected loan recipients); *In Re Local #46 Metallic Lathers Union*, 568 F.3d 81, 88 (2d Cir. 2009) (employees of company that had engaged in fraud and therefore suffered losses when salaries went unpaid were not “victims” entitled to restitution); see also *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1318 (1992) (noting that at common law, “a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person . . . was generally said to stand at too remote a distance to recover”).¹⁰

B. HSBC Guernsey and HSBC Management Were Not Defrauded

The Government further argues that HSBC Guernsey and HSBC Management were defrauded when their duties as trustee and manager of Hermitage Fund were “interfered” with in some unspecified way. Interference does not equate to fraud and the Government cites no law or any facts in its Rule 56.1 Statement to support its argument.

Neither HSBC Guernsey as Trustee nor HSBC Management is a bank, according to the Government’s evidence and witness. (Dkt. 399 ¶ 2,5; Ex. 34 at 77:23-78:4.)

In responding to Defendants’ motion to dismiss, the Government argued that HSBC Guernsey was the victim of fraud on a foreign bank because “the registered ownership of

¹⁰ The inapposite case law cited by the Government concerns cases where injured parties themselves—and not investors in companies allegedly affected by misconduct of third parties—expended money. (Dkt. 398 at 13-14); *United States v. Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (approving restitution of legal fees spent by corporation in remediating a fraud against a corporation by its personnel); *United States v. Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) (approving restitution of certain expenses incurred by bank after bank robbery).

Hermitage companies was *fraudulently* transferred away from HSBC Guernsey to conspirators.”

(Dkt. 229 at 21 (citing Dkt. 174. ¶¶ 15, 26-28).) The Court relied on this representation in denying the motion, stating:

Additionally, the court would also sustain the claims at this stage based on the SUA of “an offense against a foreign nation involving ... fraud, or any scheme or attempt to defraud, by or against a foreign bank[.]” 18 U.S.C. § 1956(c)(7)(B)(iii). The AVC alleges that “HSBC Private Bank (Guernsey) Limited (‘HSBC Guernsey’) is a Guernsey-based entity that served as trustee to the Hermitage Fund during all relevant periods,” and that “[u]nbeknownst to Hermitage or HSB Guernsey, members of the Organization used the seized corporate documents and seals to *fraudulently* re-register ownership of [the Hermitage Companies] with the Russian corporate registry.” (AVC ¶¶ 15, 26-28, 34.)

(Dkt. 310 at 23-24.) (emphasis added). Confronted with evidence obtained in discovery that the companies were not in fact fraudulently re-registered, the Government abandons this position and represents that it does not “assert or rely” on the theory that the companies were fraudulently re-registered. (Dkt. 408 n.7.)

Instead, the Government relies on a new theory that HSBC Guernsey and HSBC Management were the victims of fraud because had their duties as trustee and manager “interfered” with by the fraud on the Russian treasury. The Government’s new theory is unpled, inchoate, and frankly incomprehensible. The Government identifies no facts in its Rule 56.1 Statement that describe how these entities were defrauded, because indeed it cannot. HSBC Guernsey was acting as a trustee for a trust that indirectly owned Hermitage shell companies called Parfenion, Makhaon, and Rilend. These three companies were not owned by HSBC Guernsey but, rather, by Cypriot Holding companies named Glendora and Kone. (Ex. 26 at 149:23-156:21.) The Holders of the Fund, not HSBC Guernsey, are the beneficiaries of the trust. (Ex. 3 at 32). And the discovery shows that HSBC’s client Hermitage had knowledge of the re-registration of Parfenion, Makhaon, and Rilend, debunking the notion that there was any wrongful “interference.” (Def’s Rule 56.1 Resp. to ¶ 13.)

Likewise, HSBC Management—itself not a bank, but a management company—did not own the assets in the trust, but instead was designated the official manager. But as Browder explained in his deposition, Browder, and not HSBC, was the one actually providing investment management for the Hermitage Fund. (Ex. 26 at 149:23-156:21.) Browder testified that neither Hermitage nor the trust lost anything as a result of the alleged re-registration of companies. (*Id.*) And again, HSBC's client Hermitage had knowledge of the re-registration of the Hermitage Companies. (Def's Rule 56.1 Resp. to ¶ 13.) As a factual matter, HSBC Guernsey and HSBC Management did not have their duties "interfered" with by the theft from the Russian treasury in a manner that constitutes fraud.

Additionally, the Government identifies no legal principle that provides that the trustee and manager of a trust suffer cognizable injury where the corpus of the trust is damaged. (*See* Dkt. 398 at 14-15.) *United States v. Bindlay*, ___ F.3d ___, 2015 WL 6444932 (2d Cir. Oct 26, 2015) cited by the Government, stands for the unremarkable proposition that defendants who personally engage in a fraud scheme involving deceit can be held liable when they deny a victim the right to control his or her own assets. *United States v. Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) merely notes that the expenses associated with an internal investigation may be properly considered to eligible for restitution. Neither stands for the proposition that HSBC Guernsey or HSBC Management became victims of fraud when a trust they were officially administering allegedly suffered harm. And obviously there are no proceeds of any fraud on either.

The Government also has set forth no facts demonstrating the other elements of a fraud claim, including showing that the perpetrators of the fraud in Russia intended to defraud HSBC Guernsey as Trustee or HSBC Management. Because the Government cannot show specific

intent to defraud the HSBC entities in question, the Government's new Specified Unlawful Activity fails.

C. **The Government Has Not Identified the Proceeds from the Bank Fraud that Were Laundered**

The Government's new Specified Unlawful Activity theories fail for the independent reason that the Government cannot establish that the alleged "fraud against a foreign bank" produced any proceeds. In order to sustain a claim for money laundering, the Government is required to show that the property at issue constitutes proceeds of a Specified Unlawful Activity. That is, "the government is required to link the moneys in question to specified unlawful activities." *United States v. Gotti*, 459 F.3d 296, 337 (2d. Cir. 2006). In its zeal to prosecute this case, the Government ignores this essential requirement.

The Government's essential case is that the money stolen from the Russian Treasury was laundered through a series of transactions, and that the Defendants allegedly knowingly received a portion of the proceeds of that money. HSBC is entirely collateral to that series of alleged events. It cannot be said that the "harm" to HSBC Suisse—as an investor in the Hermitage Fund—produced any proceeds alleged to be at issue in this case. Rather, any harm that HSBC Suisse experienced in the diminution of its investment value was entirely separate from the proceeds of the Treasury Fraud.

Likewise, there is no credible assertion that the "interference" that HSBC Guernsey as Trustee and HSBC Management allegedly experienced in their roles as manager and trustee of the Hermitage Fund produced any proceeds of fraud. The Government has explicitly disclaimed any reliance on the theory that HSBC Guernsey was harmed when companies it held were allegedly "fraudulently re-registered," (Dkt. 408 at n.7.), and the Government identifies no harm to these companies in its 56.1 statement.

Indeed, the case law concerning Section 1956(c)(7)(B) makes plain that this sub-section intended to authorize the Government to pursue the proceeds of specific, enumerated crimes—such as fraud against a foreign bank or bribery of a foreign public official. *United States v. Xu*, No. 2:02-CR-00674-PMP-LRL, 2008 WL 1315632, at *1-*2 (D. Nev. Apr. 10, 2008) (use of fraud against a foreign bank predicate to recover proceeds of money allegedly stolen from Bank of China); *Real Property Known as Unit 5B of Onyx Chelsea Condo*, 2012 WL 1883371, at *5 (S.D.N.Y. May 21, 2012) (use of bribery of a foreign public official predicate to recover proceeds of alleged bribe to former First Lady of Taiwan). But where the proceeds of such enumerated crimes cannot be traced to the property at issue, the claim cannot be sustained. *E.g.*, *United States v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1, 5 (D. D.C. 2013) (dismissing complaint seeking forfeiture of aircraft where the complaint did not set forth a “specific indication that the Jet is derived from or traceable to illicit activity.”). There is no plausible basis for concluding that the property at issue in this case is the proceeds of any fraud upon HSBC. Therefore, summary judgment should be denied.

D. The Government Has Not Shown an Applicable Violation of Russian Law

The Government’s fraud against a foreign bank theories fail for the additional reason that it has not shown a violation of applicable Russian law. In order to sustain this SUA, the Government must put forth evidence showing “*an offense against a foreign nation* involving . . . fraud, or any scheme or attempt to defraud . . . against a foreign bank.” 18 U.S.C. § 1956(c)(7)(B)(iii). (emphasis added). Significantly, “an ‘offense against a foreign nation’ refers to an offense which is ‘prohibited under the law of the foreign nation in which it is committed.’” *United States v. Awan*, 459 F. Supp. 2d 167, 182-83 (E.D.N.Y. 2006) (quoting *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 802 (N.D. Ill. 1999)).

The Government asserts in its motion that the alleged fraud against HSBC (collectively, without identifying entity in question) was committed in Russia, and asserts in the operative complaint that the alleged fraud against HSBC (Guernsey) constituted a violation of Russian law. (Dkt. 398 at 1; Dkt. 381 at ¶ 151.)

Astonishingly, the Government does not set forth in its motion or operative complaint what law of Russia was violated, despite the requirement that a party seeking to use foreign law provide reasonable notice to the opposing party. Fed. R. Civ. P. 44.1. Defendants fail to understand how any Russian law is violated when a Swiss-based private bank suffers an alleged diminution in value in its interests in a Guernsey-based fund due to their legal expenses. Nor do Defendants understand how Russian law is violated when a Guernsey-based administrator and manager suffer alleged “interference” to their administrative duties with regard to a Guernsey-based fund.¹¹ The Government has not carried its burden on this point and is not entitled to summary judgment on this specified unlawful activity.¹²

IV. THE SUMMARY JUDGMENT MOTION SHOULD BE DENIED BECAUSE IT RELIES ON UNPLED FACTUAL ALLEGATIONS AND THEORIES OF LIABILITY

The assertion of new theories of Specified Unlawful Activity, on November 3, 2015, for a trial on December 7, 2015, is untimely and constitutes trial by ambush.

¹¹ In addition, because this Specified Unlawful Activity relies upon both conduct and a violation of law that is entirely foreign, it is barred by the presumption against extraterritoriality. *See Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010).

¹² Nor should the Government be entitled to brief its vague, conclusory allegation of a Russian law violation on reply, thus depriving Defendants the opportunity to fairly respond. *See Bertuglia v. City of New York*, 839 F. Supp. 2d 703, 737 (S.D.N.Y. 2012) (new arguments raised on reply should not be considered).

The Government never mentioned HSBC Suisse in the first complaint, the amended complaint or the Second Amended Complaint, filed on October 23, 2015.¹³ (Dkts. 1, 174, 381.) Indeed a witness from HSBC Suisse testified on November 14 that the Government only reached out to HSBC Suisse at some point after June 30, 2015. (Ex. 47 at 123:25-124:15.) The instant motion, filed on November 3, was the first time Defendants received any information concerning the factual contentions accompanying the Government's new theory.

Likewise, the Government presents an equally brand new theory that HSBC Guernsey and HSBC Management were "defrauded" when their respective duties as trustee and manager were "interfered." (Dkt. 398 at 5-6.) In its previous submissions, the Government has represented that its fraud on a foreign bank theory was based upon pleaded allegations that the registered ownership of the Hermitage Companies was fraudulently transferred. (Dkt. 229 at 21 (citing Dkt. 174 ¶¶ 15, 26-28).) In light of contrary evidence produced in discovery, the Government now represents that its summary judgment motion does not "assert or rely on" the fraudulent re-registration theory. (Dkt. 408 at 4 & n.7.)

It is fundamentally improper for the Government to introduce new factual allegations and legal theories on the eve of trial in the form of a summary judgment motion, and the motion should just be denied out of hand. *Southwick Clothing LLC v. GFT (USA) Corp.*, No. 99 CV 10452 (GBD), 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004) ("A complaint cannot be amended merely by raising new facts and theories in [briefing], and hence such new allegations and claims should not be considered in resolving the [summary judgment] motion."); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) ("[Where] the

¹³ The statement by AUSA Monteleoni to the Court that HSBC Suisse was in the Complaints was untrue. His suggestion that we should have known about it because there is a reference to Hermitage having hired attorneys is risible. (See 11/6/15 Hr'g Tr. at 13-14.)

complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court.”).¹⁴

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny the Government’s motion for partial summary judgment in its entirety.

Dated: November 17, 2015
New York, New York

Respectfully submitted,

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¹⁴ In the alternative, the motion should be denied and Defendants should be granted leave to conduct additional discovery in support of their opposition to the motion. Fed. R. Civ. P. 56(d). The Defendants understand that the Court wants this case to proceed to trial, but suggests that the Government is seeking to deprive the Defendants of due process of law in the interests of expediency. See Eulogy by Dean Norman Redlich on January 19, 1989 on the death of United States District Court Judge Edward Weinfeld (“First and foremost, despite all of the cynicism and overcommercialization of the profession, we continue to believe in the moral basis of law, and no one better symbolized that moral basis than Edward Weinfeld. He did not propound an over-arching moral philosophy. Rather he lived a moral life and understood the importance of process in reaching the moral decision. He understood that morality in law starts with the way the system treats individual persons with whom it comes in contact. When he said ‘There is no such thing as an unimportant case,’ he made an important moral statement. The process of adjudication—respect for litigants, lawyers, witnesses and jurors—intellectual rigor, impartiality, all of these were essential ingredients of his moral calculus.”).

In December 2012 Sergei Magnitsky Rule of Law Accountability Act of 2012 was signed by US President Obama. The adoption of this Act was preceded by a three-year lobbying campaign of its supporters, which began even before the events described in the Act.

The last drop that prompted Congress to pass the act, was the testimony to the Committee on Foreign Affairs of a former US citizen – William Browder, who was the initiator of the adoption of that Act which had an extremely negative impact on the interstate relations between Russia and the US.

Available documentary evidence and testimony, including those collected in a civil case before the Federal Court of the Southern District of New York, confirmed that the “facts” reported by Browder to the US Congress, put down into the text of the act from his hearsay, were either deliberately distorted, or contrary to the truth. However, the same story has been put as the basis of the Global Magnitsky Act currently considered in the Congress.

Governmental and legal investigations revealed that William Browder, CEO of Hermitage Capital Management (Guernsey) and a financial advisor to Hermitage hedge fund (which existed until 2013 under the control of HSBC Group), a British citizen, who renounced his US citizenship in 1998 for tax reasons, had for 10 years lived in Russia on a tourist visa, in the period from 1999 to 2006 implemented in the territory of Russia an illegal scheme of buying up Gazprom shares by foreign companies to bypass the ban on foreign direct investments into Gazprom shares without permission of the Government of Russia.

The applied share purchase scheme not only allowed buying the shares at a price 1.5 times lower than through the American depository receipts, but also allowed investors and their advisers avoid government control and monitoring of capital sources, its movement and taxation in US and Russia corresponding to the investment activities.

In addition to Hermitage Fund, one of Browder’s largest investing customers was a US Group – Ziff Brothers Investments.

In the period of late 1999 to 2004, two companies – Speedwagon Investors 1 and 2, registered in New York, and owned by the said US investors, acting through three Cypriot companies, Giggs Enterprises Limited, Zhoda Limited, Peninsular Heights Limited illegally acquired more than 133 million Gazprom shares in the amount exceeding USD 80 million in the name of the Russian companies Kameya, Lori, Excalibur, Sterling Investments.

Once Browder’s activities drew the attention of the Russian law enforcement authorities, and he was not allowed any more to visit Russia on a tourist visa, in January 2006 all the assets controlled by Ziff Brothers Investments were removed from the jurisdiction of the Russian Federation. In 2006 US owners of the chain of companies mentioned above gained an income of over USD 800 million, including 66 million Gazprom shares received as dividends. According to preliminary estimates, the damage to the Russian budget in the form of unpaid taxes from those activities exceeded RUB 1 billion. There is every reason to believe that the investment activity was not declared and was not included in the reports to the US Securities Committee and US tax authorities, and no taxes were paid by US companies on the income received as a result of the turnover of the shares of the Russian companies.

In 2007, realizing the realistic threat of exposure by both the Russian and US law enforcement authorities, Browder accomplished an egregious scheme of embezzlement of funds from the Russian Treasury, the main element of it being to create an alibi of him having nothing to do with the embezzlement, by way of simulation of theft of three Russian portfolio companies from Hermitage Fund (HSBC). Later on the death in detention of one of Browder’s financial advisors – Sergei Magnitsky, who was arrested on a completely different matter (in a criminal case brought in 2004 against Browder and his accomplices on tax evasion) was used by Browder in creating an image of an “anti-corruption crusader” politically persecuted by Russia turning Magnitsky into “a lawyer who disclosed the theft of budget funds, was tortured and murdered, and consequently posthumously convicted because he defended Browder.” There is not a jot of truth in Browder’s story, but this is the doctrinal essence of the story known as the “Magnitsky case” put in as a basis for the US Act that caused the most severe damage to the US-Russian relations in recent

years.

The collected evidence can be brought before the Subcommittee on Oversight and Investigations of the Committee of the House of Representatives, and other concerned US government agencies to investigate the causes and the reliability of information that prompted the adoption of the Magnitsky Act.

Changing attitudes to the Magnitsky story in the Congress, obtaining reliable knowledge about real events and personal motives of those behind the lobbying of this destructive Act, taking into account the pre-election political situation may change the current climate in the interstate relations. Such a situation could have a very favorable response from the Russian side on many key controversial issues and disagreements with the United States, including matters concerning the adoption procedure.

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

13-cv-6326 (TPG)

6 PREVEZON HOLDINGS, LTD., et al.,

7 Defendants,

8 -and-

9 ALL RIGHT, TITLE, AND INTEREST IN THE REAL
10 PROPERTY AND APPURTENANCES KNOWN AS THE 20
11 PINE STREET CONDOMINIUM, 20 PINE STREET,
NEW YORK, NEW YORK 10005, UNIT 1816, et al.,

12 Defendants in Rem.
-----x

13
14 New York, N.Y.
November 30, 2015
15 3:20 p.m.

16 Before:

17 HON. THOMAS P. GRIESA

18 District Judge

19 APPEARANCES

20 PREET BHARARA

United States Attorney for the
Southern District of New York

21 BY: PAUL M. MONTELEONI, ESQ.
22 MARGARET S. GRAHAM, ESQ.
23 CRISTINE I. PHILLIPS, ESQ.
JAIMIE L. NAWADAY, ESQ.
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24 BAKER & HOSTETLER, LLP

Attorneys for the Prevezon Defendants/Movants
25 BY: MARK A. CYMROT, ESQ.
JOHN W. MOSCOW, ESQ.

1 (In open court)

2 THE CLERK: Motion hearing in the matter of the United
3 States of America v. Prevezon Holdings Ltd., et al. All
4 parties present, your Honor.

5 THE COURT: We have a motion. Who wants to argue for
6 the motion?

7 MR. MONTELEONI: Good afternoon, your Honor. Paul
8 Monteleoni for the government. As the Court knows, we are
9 going to trial on January 6, and at that trial, a number of
10 things will be in dispute. One thing that is not in dispute is
11 one particular element of our case, and that is what we're
12 seeking partial summary judgment on, to narrow and focus the
13 trial.

14 So as background, this case alleges that the
15 defendants engaged in money laundering. The three elements of
16 each of the government's claims in general terms are, first,
17 that a criminal offense occurred that is of a specific kind of
18 crime constituting what's known as specified unlawful activity,
19 a statutory term that means that the offense is a money
20 laundering predicate. The second element is that the
21 defendants engaged in transactions involving the proceeds of
22 that predicate offense. And the third is that the defendants
23 had criminal intent. So, expressed in general terms, those are
24 the elements.

25 THE COURT: Again, what's the second?

1 MR. MONTELEONI: The second is that the defendants
2 engaged in transactions, financial transactions of some sort,
3 that involved the proceeds of the predicate offense. So you
4 have to prove that there was an underlying crime that's of the
5 type of crime that counts. You have to prove that the
6 defendants did something with the proceeds of that crime. And
7 you have to prove that the defendant has intent. So now our
8 motion is seeking a partial summary judgment just as to the
9 issue of whether that underlying predicate crime existed. So
10 we're seeking partial summary judgment that there was a fraud
11 in Russia and that this fraud constituted a money laundering
12 predicate offense.

13 It is literally undisputed that there was a fraud in
14 Russia. Defendants explicitly admit that. The question for
15 you to decide is whether this amounts to a money laundering
16 predicate offense. And there are both some factual issues
17 raised by the papers regarding that and some legal issues.
18 Neither of those issues that defendants raise are correct. But
19 I want to talk about the factual ones first.

20 Factually, there is no dispute at all that the -- that
21 a fraud occurred in Russia. That fraud resulted in large tax
22 refunds payments to three specific bank accounts in late 2007.
23 This is admitted on page 2 of the defendants' memorandum of
24 law.

25 The defendants do object to some of the factual

1 details, not the way that this fraud was committed, but they
2 agree that these refund payments were paid because of fraud,
3 not because someone had legitimately overpaid their taxes and
4 were getting the overpayment back.

5 Part of the reason that the defendants admit that is
6 they have to admit it, because everyone who has looked into
7 these refunds agrees they were paid as a result of fraud. The
8 Russian government has looked into these refunds and concluded
9 that. The Council of Europe, an intergovernmental
10 organization, has conducted an investigation and concluded
11 that. And two of the fraudsters have admitted that, as they
12 pled guilty to Russian fraud offenses for this. So all of
13 these materials are admissible evidence for the limited points
14 that they're being offered for in these motions, and the
15 defendants don't have any evidence that contradicts these
16 points because there is no evidence that contradicts the very
17 basic limited set of facts setting forth the most simple
18 mechanics of the fraud, and the most refined statement of those
19 facts is in the proposed orders that we've submitted with our
20 reply papers.

21 Attachment 1 is the proposed order that sets forth a
22 statement of facts that has actually been modified to
23 accommodate some of the concerns that the defendants raised in
24 their opposition papers. We don't think that there is really
25 merit to them, but we think we can take a lot of them off of

1 the table by modifying them. So if you look at that statement
2 of facts, all of those facts are really just true.

3 The factual issues that the defendants are raising are
4 a very lengthy, elaborate story that they believe that they
5 want to present where they're claiming that certain people were
6 in on the fraud. We think that that's a red herring. We think
7 it is certainly not true. If there's a trial we'll prove that
8 is not true. The defendants have suggested in their papers
9 that we agree with their story. We don't agree with it. But
10 we think it's a red herring because it's not necessary to this
11 motion. Whether or not the defendants' story about who was in
12 on the fraud was accurate, the partial summary judgment would
13 still be appropriate; it would still be a money laundering
14 predicate.

15 So if you went through these statements of facts, the
16 only things that are being objected to by the defendants
17 factually are things that aren't even in the statements of
18 facts. They're objecting saying, well, this is accurate but we
19 also think that some other facts should be said.

20 THE COURT: I'm not following you very well. The
21 government is moving for partial summary judgment. Right?

22 MR. MONTELEONI: That's correct, your Honor.

23 THE COURT: Now, what does the government want to have
24 partially judged?

25 MR. MONTELEONI: The government would like this Court

1 to enter an order granting partial summary judgment that a
2 fraud occurred in Russia that constitutes specified unlawful
3 activity under the money laundering statute.

4 THE COURT: Stay specific.

5 MR. MONTELEONI: Sure. So, specifically, the
6 government is asking you to enter the proposed order, which is
7 attached to our reply papers but I could hand up a copy if you
8 would like right now.

9 THE COURT: I don't need to have any more papers. Now
10 I'm asking you to answer questions. What is it you want me to
11 partially find?

12 MR. MONTELEONI: That a tax refund fraud was committed
13 in Russia and that that fraud was a fraud not just against the
14 Russian treasury but also against HSBC, which is a foreign
15 bank.

16 THE COURT: All right. Am I correct that the
17 government contends that -- let me back up. The government
18 must show a specified unlawful act. Right?

19 MR. MONTELEONI: Yes.

20 THE COURT: And the specified unlawful act that the
21 government is contending is fraud on a foreign bank, right?

22 MR. MONTELEONI: In this motion, yes.

23 THE COURT: In the motion.

24 MR. MONTELEONI: Exactly.

25 THE COURT: And so you want the Court to find, in your

1 motion, that there was fraud on a foreign bank. Right?

2 MR. MONTELEONI: That's correct.

3 THE COURT: The foreign bank you're talking about is
4 HSBC, right?

5 MR. MONTELEONI: Yes, specifically three HSBC
6 entities, each of which counts as a foreign bank under the
7 statute.

8 THE COURT: Just a minute. Let me check something.

9 Now, are the three companies you're talking about
10 these companies that have, at least part of their names,
11 Rilend, R-i-l-e-n-d?

12 MR. MONTELEONI: No, your Honor. Those are companies
13 that are held by the Hermitage fund. The three HSBC entities
14 have different roles in the Hermitage.

15 THE COURT: Wait a minute. What are the companies
16 that you're referring to now?

17 MR. MONTELEONI: All right. So the HSBC entities that
18 are each foreign banks are HSBC Guernsey, the trustee of --

19 THE COURT: Just a minute. All right. HSBC Guernsey.

20 MR. MONTELEONI: -- HSBC Management, and HSBC Suisse.

21 THE COURT: And you said it a moment ago, but what
22 role did they play in your argument?

23 MR. MONTELEONI: Yes. So HSBC Guernsey is the trustee
24 of an entity called the Hermitage fund, an investment fund.

25 THE COURT: And I know you said this a moment ago but

1 say it again: what is the significance of that, please?

2 MR. MONTELEONI: Well, the fund was defrauded in
3 several ways by a complex fraud scheme, and that affected HSBC
4 Guernsey in its role as trustee.

5 THE COURT: Oh, so, in other words, you're now talking
6 about fraud on a foreign bank. Is that right?

7 MR. MONTELEONI: Yes. HSBC Guernsey, HSBC Management,
8 and HSBC Suisse are each foreign banks that were victims of the
9 fraud scheme.

10 THE COURT: Just a minute, please.

11 And the money laundering scheme, I know you said this
12 but say it again, what is the significance of that?

13 MR. MONTELEONI: So fraud on a foreign bank is a
14 predicate offense for money laundering under Section 1956(c)(7)
15 (B)(iii).

16 THE COURT: Without the statute citation say it again.
17 It is a predicate offense --

18 MR. MONTELEONI: A predicate offense for money
19 laundering, the first of the three elements of money
20 laundering.

21 THE COURT: In other words, that there has to be --
22 would you mind going back over the three elements, please.

23 MR. MONTELEONI: Yes. So the first is that there is
24 some predicate offense, a crime that's of a certain sort.

25 Fraud on a foreign bank is one of those sorts of crime. This

1 is known as a specified unlawful activity under the statute.

2 THE COURT: Just a minute. OK. Go ahead.

3 MR. MONTELEONI: The second is that the defendants
4 engaged in transactions involving the proceeds of the specified
5 unlawful activity.

6 THE COURT: Let me make a note. The defendant engaged
7 in what?

8 MR. MONTELEONI: Transactions.

9 THE COURT: Go ahead.

10 MR. MONTELEONI: And those transactions involved the
11 proceeds of the specified unlawful activity.

12 THE COURT: OK. And then go ahead.

13 MR. MONTELEONI: And the third is that the defendants
14 had the appropriate type of criminal intent.

15 THE COURT: Now, I think we were in our discussion or
16 your discussion with me you were focusing on the first element,
17 right?

18 MR. MONTELEONI: Yes, your Honor.

19 THE COURT: And the government's contention is that
20 the specified unlawful activity, or at least a specified
21 unlawful activity, was fraud on a foreign bank. Right?

22 MR. MONTELEONI: That's correct.

23 THE COURT: And you contend that the fraud on a
24 foreign bank was committed against HSBC Guernsey; is that
25 right?

1 MR. MONTELEONI: That's one, yes. And two others.

2 THE COURT: And the other --

3 MR. MONTELEONI: The second one is HSBC Management.

4 THE COURT: Just a minute. And the third is?

5 MR. MONTELEONI: HSBC Suisse.

6 THE COURT: Now, what is it that is now shown by the
7 facts beyond any need for a trial?

8 MR. MONTELEONI: So, first, that a fraud was committed
9 that caused the Russian treasury to pay 5.4 billion rubles to
10 accounts in the name of three companies in December of 2007.

11 THE COURT: Now, that's not what you call a fraud on a
12 foreign bank, right? Or is it?

13 MR. MONTELEONI: Well, it is because the stat -- I
14 was, for all of these elements I'm just using condensed
15 versions of it. The technical statutory language is an offense
16 against a foreign nation involving fraud or a scheme or attempt
17 to defraud by or against a foreign bank. So here the fraud
18 scheme included fraud on a foreign bank.

19 THE COURT: Well, what was the fraud on the foreign
20 bank, the fraud on HSBC Guernsey or what?

21 MR. MONTELEONI: Yes. HSBC Guernsey and HSBC
22 Management were defrauded because they were the trustee and
23 manager of an investment fund, the Hermitage fund, and
24 fraudsters gained control of three companies that were held by
25 the investment fund. Those companies are Rilend, the one you

1 mentioned, Parfenion, and Makhaon.

2 THE COURT: Just a minute. Rilend, R-i-l-e-n-d?

3 MR. MONTELEONI: Yes.

4 THE COURT: And then how do you pronounce the second?

5 MR. MONTELEONI: Parfenion.

6 THE COURT: Parfenion.

7 MR. MONTELEONI: P-a-r-f-e-n-i-o-n.

8 THE COURT: And then there's a third.

9 MR. MONTELEONI: Yes. Makhaon is, I think, how you
10 pronounce it. It's spelled M-a-k-h-a-o-n.

11 THE COURT: Now, what role did they play?

12 MR. MONTELEONI: Those were assets of the fund that
13 the foreign banks were manager and trustee of. So they were
14 fund assets. And when fraudsters gained control of those
15 companies, the fraudsters fabricated fake liabilities against
16 those companies. So the fraudsters, through forged documents
17 and court judgments based on forged documents, caused hundreds
18 of millions of dollars of liabilities against these fund
19 assets. And that interfered with HSBC Management and HSBC
20 Guernsey in their duties to protect the fund assets and to
21 prevent fraud, because all of a sudden --

22 THE COURT: Wait. Say that, the latter thing you just
23 said, repeat that.

24 MR. MONTELEONI: So fraudsters forged huge fake
25 liabilities against these fund assets. And in so doing, that

1 disrupted the duties of HSBC Management and HSBC Guernsey,
2 which were obligated to prevent fraud and to conserve fund
3 assets. All of a sudden, through forgeries, fraudsters are
4 imposing huge liabilities on fund assets. So that is a
5 deprivation of HSBC Management and HSBC Guernsey's right to
6 control and ability to safeguard the assets of the funds. And
7 that is a fraud on these two HSBC entities, and they are
8 victims of that.

9 The third HSBC entity was defrauded in an even more
10 direct way.

11 THE COURT: You mean HSBC Suisse?

12 MR. MONTELEONI: Yes, because HSBC Suisse was actually
13 an investor in the fund. HSBC Suisse had shares in this
14 investment fund. And when the fraudsters generated false
15 liabilities against these assets of the fund, the fund had to
16 set aside millions of dollars for legal fees to undo those
17 false liabilities. The fund had to hire lawyers to go to court
18 and undo these forged contracts, these fabricated documents and
19 the judgments based on them.

20 Now, those lawyers had to have their legal fees. The
21 legal fees came out of the assets of the fund. So the
22 investors of the fund had their investment diminished by the
23 millions of dollars of legal fees that were set aside. And in
24 fact HSBC Suisse as an investor lost over \$1.9 million just to
25 these legal fees. So it, as an investor in the fund, was

1 defrauded in a very direct way by having its investment
2 depleted by legal fees to remediate the fraud scheme. So that
3 is also fraud on the foreign bank HSBC Suisse.

4 THE COURT: Well, but here of course we're talking
5 about whether the government is entitled to partial summary
6 judgment. Now, what is it that you say is something that can
7 be summarily found by the Court because there is no factual
8 issue? What is it?

9 MR. MONTELEONI: Well, so first of all, that the fraud
10 even happened in the first place, that it wasn't just repayment
11 of taxes. Everyone agrees on that. Two of the fraudsters were
12 convicted. They admitted to that. The Russian government
13 agrees with that. An investigating intergovernmental body
14 agrees to that. So if the Court doesn't do anything else, it
15 could at least drastically streamline the trial by approving
16 the fact findings that set forth just the very barebones
17 summary that the fraud happened, which is in a second proposed
18 order that the government has attached. So that is something
19 that would take a while to try but doesn't need to be tried
20 because everyone agrees it was a fraud.

21 But beyond that, the government believes that based on
22 the fact that the fraud was committed and based on the
23 certified business records of HSBC, which show the duties of
24 HSBC Management and HSBC Guernsey and which show the depletion
25 of HSBC Suisse's investment, that the Court can rule as a

1 matter of law that this fraud was a specified unlawful
2 activity.

3 THE COURT: So that's what you say should be summarily
4 found by the Court, that there was a specified unlawful
5 activity.

6 MR. MONTELEONI: Yes.

7 THE COURT: What would that leave for trial?

8 MR. MONTELEONI: Then we would present evidence that
9 the funds from these tax refunds were moved through a money
10 laundering network to the defendants, in a series of
11 transactions, so there would be expert testimony from both
12 sides about the tracing of the fraud proceeds to the
13 defendants. And that would be part of the proof of the second
14 element, that the defendants engaged in transactions with these
15 proceeds. There are sub-elements of that element, that those
16 transactions happened in the United States, etc. And then,
17 third, and what I think might be the biggest focus of trial,
18 is, the government would have to prove that the defendants
19 acted with the appropriate level of criminal intent, that they
20 knew or were willfully blind to the fact that these were the
21 proceeds of crime, and several other intent details that differ
22 based on the specific counts. But it would essentially be that
23 the defendants got fraud proceeds, that they did transactions
24 with them, and that they knew what they were doing.

25 THE COURT: All right. Now, look, your motion for

1 partial summary judgment is, you feel you are entitled to
2 judgment that there was specified unlawful activity. Is that
3 right?

4 MR. MONTELEONI: That's correct, your Honor.

5 THE COURT: I'm going to turn to the defense side.
6 Why isn't it appropriate for the Court to find on summary
7 judgment that there was a specified unlawful activity?

8 MR. CYMROT: Your Honor, because the facts have been
9 disputed and because their claim of fraud on the foreign bank
10 fails to state a claim upon which relief can be granted. Both
11 grounds are needed and both grounds are lacking. So I don't
12 know if your Honor has ever entered summary judgment in a fraud
13 case. It is extremely rare. And it shouldn't be entered in
14 this case. There was no fraud on a foreign bank. And I can
15 demonstrate that the government has actually admitted that
16 there are facts in dispute.

17 THE COURT: Well, wait a minute. Isn't it correct
18 that there is no dispute about the fact that there was fraud
19 perpetrated on the Russian government?

20 MR. CYMROT: Correct. But how it happened is hotly
21 disputed. We have two widely different stories that both will
22 have to present evidence to a jury and the jury will have to
23 decide how it happened, whether these banks --

24 THE COURT: What are the issues about how it happened?

25 MR. CYMROT: Your Honor, the government says that

1 these three companies, Parfenion, Rilend, and Makhaon, were
2 stolen from the Hermitage fund. And the defendants have
3 evidence from the discovery that they were transferred based
4 upon powers of attorney given by representatives of the
5 Hermitage fund. They were not illegally taken. And the fraud
6 on HSBC Suisse, Guernsey, and Management depend upon the fact
7 that those three companies were stolen. And I can hand you up
8 pleadings from the government that said the summary judgment
9 motion does not contest that that fact is disputed. And they
10 tried to state a claim without that fact. And they couldn't.
11 Mr. Monteleoni just told you that those companies were stolen,
12 they were forged transfers, he said.

13 MR. MONTELEONI: That is not what I just said in open
14 court in front of you.

15 MR. CYMROT: OK. I have pleadings. I have docket
16 no. 415. You remember, judge, we objected to this motion
17 because it would interfere with trial preparation and it was
18 without a basis. Docket 415, footnote 2 on page 4, "Among the
19 other things, although the government will prove at trial if
20 relevant that the organization described in the complaint
21 fraudulently reregistered the Hermitage companies," that's
22 Rilend and companies, "away from Hermitage and HSBC, the motion
23 does not rely on that potentially disputed fact." That's what
24 they said. But that is the basis of their claim. Docket
25 no. 408 has the same statement: "Insert an entirely false

1 quotation that the motion claims that the Hermitage companies
2 were fraudulently reregistered, when these words don't appear
3 in the motion; in fact the motion stays clearly to the
4 undisputed facts that the fraudsters who controlled the
5 companies fabricated false liabilities." They are saying that
6 is a disputed fact and they're trying to stay away from it.

7 Now let me show you one more document, Judge, which is
8 the Hermitage financial statements that they rely upon. They
9 say that HSBC Suisse was an investor in the Hermitage fund.
10 And then say there was a provision made where this \$1.9 million
11 was reserved on the financial statement. The provision is
12 shown in the financial statements, on page 23, note 17: "These
13 entities were legally appropriated by third parties." That is
14 the basis for the reservation of the \$1.9 million. That is the
15 basis of the fraud claim against HSBC Suisse. It is disputed.
16 The facts are disputed. And there are many facts that are
17 disputed in their motion. They say that there was this
18 organization that committed the fraud. Yet the discovery has
19 shown that Mr. Browder, who is the Hermitage fund, and HSBC
20 knew about what was going on at the time it was happening, so
21 they either kept quiet or they were involved. That is a huge
22 factual dispute. You cannot enter summary judgment on a fraud
23 claim when you have those kind of disputes, your Honor.

24 When is summary judgment entered on a fraud claim? It
25 almost never occurs, for good reason.

1 There are many factual disputes, your Honor. And I
2 will say, what are the proceeds? What are the proceeds? We're
3 talking about a money laundering case, your Honor. The money
4 laundering has to occur from the proceeds of the specified
5 unlawful activity. There are no proceeds of this bank fraud
6 that they're talking about. There are no proceeds to be
7 laundered. None of the money they're talking about came from
8 HSBC Guernsey, Management, or Suisse. None of the proceeds are
9 there to be laundered. How can you have a money laundering
10 claim when there are no proceeds that they are proving are
11 being laundered?

12 Your Honor, the other thing is, as a matter of law,
13 these three companies are not foreign banks within the meaning
14 of the money laundering statute. The money laundering statute
15 is very specific. It talks about entities involved in the
16 business of banking. A trustee, a manager, and an investor are
17 not involved in the business of banking as defined by the
18 regulations that are referred to in the International Banking
19 Act, which is specifically referred to in the money laundering
20 statute.

21 I know I'm going fast. I don't know if I've gone
22 beyond you, your Honor, but the point of the matter is, as a
23 matter of fact and as a matter of law, this is a disputed case.

24 Now, we've proposed to your Honor in a separate motion
25 the way to cut it down, that these specified unlawful

1 activities that they're talking about fail to state a claim
2 upon which relief can be granted. There is only one that they
3 have asserted that states a claim. And that's that the fraud
4 on the Russian treasury occurred by reason of bribery. Now, if
5 they can prove that, they have a specified unlawful activity.
6 But that is the only one that satisfies a claim. All right.
7 If you were to limit them to bribery, they would then have the
8 same basic tracing issues be that are involved in the money
9 laundering. It would be a much narrower case. We filed a
10 separate motion on this, your Honor.

11 We can submit to you tomorrow -- and I'm sorry it
12 wasn't done today but there were transaction issues --

13 THE COURT: What tomorrow?

14 MR. CYMROT: We can submit to you a list of eight
15 undisputed facts that relate to the fraud on the Russian
16 treasury. What the government has tried to get you to do is
17 sign an order that would decide all of these fraud issues. It
18 would be fundamentally wrong. It would deny our clients
19 fundamental rights to a trial on those issues. And those
20 issues don't state a claim and shouldn't be in the trial for
21 that reason also. We can make the case narrower as you want by
22 deciding which of these specified unlawful activities actually
23 state a claim, because this one doesn't.

24 THE COURT: Which one doesn't?

25 MR. CYMROT: The three-bank bank fraud does not state

1 a claim. Have you heard anything that sounded like fraud? An
2 investor in the Hermitage fund lost money because, eight months
3 after the theft of the Russian treasury, there were legal fees
4 that were paid. Does that sound like fraud? I don't know any
5 fraud that sounds like that. Eight months later, with many
6 business decisions in between, made by the Hermitage fund.
7 There's no proximate cause there. The trustee loses control
8 over property. That's not a fraud. They don't cite a single
9 case that says that's a fraud. They cite restitution cases.
10 They don't cite any fraud cases. Where are their cases? If
11 this is a fraud, they ought to have cases. They have no cases.
12 This is disputed, your Honor. It's disputed on the facts and
13 it's disputed on the law.

14 None of them are banks, but certainly management is
15 not a bank. Management, does that sound like a bank? A
16 trustee is not a bank, not for the purpose of this statute.
17 It's not engaged in the business of banking. That's what the
18 statute says.

19 You don't have a bank. You don't have a fraud. And
20 the allegations of fraud are all disputed. How can you
21 possibly enter summary judgment in that situation?

22 THE COURT: As long as we're here this afternoon, I
23 would like to make something of the afternoon. Now, it is my
24 memory of what I've done in the case that these facts occurred:
25 there was fraud on the Russian treasury, and the details of

1 that I won't try to recite at the moment. That there was fraud
2 on Russia. That is my memory of the facts.

3 Now, that fraud on Russia yielded, in American dollar
4 terms, about 2 hundred and 16 or 17 million dollars. Now, you
5 can't just walk into the Citibank branch in Brussels and say,
6 here is \$217 million, I would like to deposit to the account of
7 somebody, who was supposed to benefit from the fraud.
8 Obviously the fraud was not committed without the idea that
9 somebody would reap a benefit from the fraud.

10 Now, the United States of America comes into it as far
11 as I know because government claims that proceeds of the fraud
12 were handled in such a way that some of them came to the United
13 States and were invested here in real estate.

14 Now, the government claims that what happened to those
15 funds is called money laundering; in other words, money that is
16 obtained illegally was dealt with the way illegal funds get
17 dealt with, that is, through money laundering, trying to get
18 the funds into a form that can benefit the criminals. And the
19 government contends that Prevezon was involved in money
20 laundering.

21 Prevezon contends that it was not so involved, that
22 what it did with its funds was to take legitimate investors'
23 money and invest the money legitimately, for legitimate
24 investors.

25 MR. CYMROT: And I would add, your Honor, that they

1 never --

2 THE COURT: Just a minute.

3 MR. CYMROT: They never received any of this money.

4 THE COURT: Can you let me finish?

5 MR. CYMROT: Yes. Go ahead.

6 THE COURT: The government contends that Prevezon, in
7 some way, participated in money laundering. That is the case
8 the government seeks to make out against Prevezon.

9 Now, look, we have a statute, an American statute,
10 which deals essentially with money laundering, and certain
11 things have to be proved to show a violation of that statute.
12 There has to be a showing of what is called a specified
13 unlawful activity. The government contends that it has shown a
14 specified unlawful activity, namely, fraud on a foreign bank,
15 as far as I understand their case. The fraud on the foreign
16 bank is fraud on HSBC Guernsey, as I understand it, and also
17 fraud perhaps on a Russian bank.

18 MR. CYMROT: No, your Honor. No, they haven't named
19 any Russian bank.

20 THE COURT: All right. Then I'm mistaken. I stand
21 corrected.

22 MR. MONTELEONI: The three HSBC entities are HSBC
23 Guernsey, HSBC Management, and HSBC Suisse.

24 THE COURT: OK. Very good. Thank you. That is a
25 good correction.

1 Now, look, the reason I'm going through this is that I
2 don't think I recited completely all the issues, but the
3 question before the house now is whether the government is
4 entitled to partial summary judgment. And as I understand it,
5 the government contends that it has shown beyond any triable
6 issue a specified unlawful activity, namely, fraud on a foreign
7 bank. Am I right, Mr. Monteleoni?

8 MR. MONTELEONI: That's correct, your Honor.

9 THE COURT: OK. So the issue before me is, are there
10 or are there not factual issues. The government says that it
11 has shown beyond any triable issue of fact that there was a
12 specified unlawful activity, right, Mr. Monteleoni?

13 MR. MONTELEONI: That's correct, your Honor.

14 THE COURT: OK. And that it's made that showing, the
15 showing is clear beyond any triable issue. Now, why is that
16 not the case?

17 MR. CYMROT: You're speaking to me, your Honor?

18 THE COURT: Yes.

19 MR. CYMROT: Because the scheme that they describe as
20 fraud on a foreign bank is both disputed as to facts and
21 disputed as to law.

22 THE COURT: What is the factual dispute?

23 MR. CYMROT: All right, your Honor. That these three
24 companies were illegally appropriated from --

25 THE COURT: What three companies?

1 MR. CYMROT: Rilend, Makhaon, and Parfenion.

2 THE COURT: What do they have to do with the case? I
3 know the answer, but I'm asking you.

4 MR. CYMROT: What do they have to do with the case?
5 They submitted what they had -- the government says they were
6 illegally appropriated from subsidiaries of the Hermitage fund,
7 that there were forged contracts created, then there were
8 lawsuits that were collusive that created liabilities, and that
9 those liabilities were put in tax certificates that led to the
10 fraud on the Russian treasury. We dispute every single step of
11 that way. We dispute the fact that those companies were
12 misappropriated illegally from the subsidiaries of the
13 Hermitage fund. We dispute the fact that there were
14 independently contracts. We have proven that the Hermitage
15 fund lawyers had notice of these supposedly sham lawsuits. We
16 have proven that the certificates that were used to make the
17 tax returns, the tax filings were certificates that were not
18 stolen by the fraudsters in the way that the government
19 contends. The government has a very complex fraud scheme, and
20 we dispute every single step of the way. That's one thing.

21 THE COURT: Wait a minute, Mr. Cymrot.

22 Look, let me turn to Mr. Monteleoni.

23 MR. MONTELEONI: Yes, your Honor. You'll notice
24 that --

25 THE COURT: Just a minute.

1 MR. MONTELEONI: I'm sorry.

2 THE COURT: You're relying on fraud on a foreign bank
3 as the predicate act. Right?

4 MR. MONTELEONI: In this motion, yes.

5 THE COURT: In this motion. What is the foreign bank?

6 MR. MONTELEONI: HSBC, three HSBC companies.

7 THE COURT: Say the latter again?

8 MR. MONTELEONI: Three HSBC companies -- HSBC
9 Guernsey, HSBC Management, HSBC Suisse.

10 THE COURT: OK. Let me pause a minute. So you're
11 relying on the fact that there was fraud committed against HSBC
12 Guernsey, right?

13 MR. MONTELEONI: Yes, as well as two other HSBC
14 companies.

15 THE COURT: As well as what?

16 MR. MONTELEONI: As well as HSBC Management and as
17 well as HSBC Suisse.

18 THE COURT: What if fraud was only committed on one?

19 MR. MONTELEONI: Any one would make it a money
20 laundering predicate.

21 THE COURT: In other words, if there was fraud
22 committed against HSBC Guernsey, that would be sufficient?

23 MR. MONTELEONI: That's correct, your Honor.

24 THE COURT: Now, do you claim that there was fraud
25 committed against HSBC Guernsey beyond any trial issue of fact?

1 MR. MONTELEONI: Yes.

2 THE COURT: And what was that fraud?

3 MR. MONTELEONI: That fraud was that fraudsters forged
4 contracts that were then used in lawsuits to fraudulently
5 generate huge liabilities against companies that HSBC Guernsey
6 was a trustee of and that HSBC Guernsey had the responsibility
7 to safeguard against fraud.

8 THE COURT: Well, that's the basic fraud in Moscow,
9 right?

10 MR. MONTELEONI: Exactly, that the fraud in Moscow
11 also victimized HSBC Guernsey because, as a trustee, HSBC
12 Guernsey had the duty to make sure that the companies in its
13 trust were not being subjected to completely forged liabilities
14 by fraudsters.

15 THE COURT: Here's what's confusing me a bit. I have
16 in my mind that there was, at least the government contends
17 that there was fraud in Moscow from which 216 million dollar
18 equivalents were derived. That's what I have in my mind. Now,
19 that is in my mind what I'll call the basic fraud.

20 MR. MONTELEONI: Sure.

21 THE COURT: Now, I have also in my mind that the
22 government contends that after the basic fraud was committed
23 and money was obtained, then there had to be the laundering of
24 that money.

25 MR. MONTELEONI: Yes.

1 THE COURT: And in my mind, the basic fraud is
2 different from the laundering that occurred to dispose of the
3 proceeds of the fraud.

4 MR. MONTELEONI: Yes, essentially yes.

5 THE COURT: Now, what I have in my mind is that the
6 government contends that Prevezon was an instrument of the
7 laundering.

8 MR. MONTELEONI: That's right.

9 THE COURT: I don't have the idea that the government
10 contends that Prevezon did the initial fraud in Moscow.

11 MR. MONTELEONI: We do not allege that they committed
12 the basic fraud.

13 THE COURT: So what the government is saying is that
14 Prevezon helped launder the money.

15 MR. MONTELEONI: Exactly.

16 THE COURT: Now, if the government is moving for
17 partial summary judgment, and I know you've said this numerous
18 times but, again, why is the government entitled to partial
19 summary judgment in connection with the laundering?

20 MR. MONTELEONI: The government is only moving for
21 partial summary judgment because the basic fraud is an element
22 of the money laundering. If I engaged in a transaction with
23 money that came from a totally noncriminal source, I couldn't
24 have committed money laundering. So if you want to prove that
25 I committed money laundering, you have to prove that the source

1 of the money was from some kind of crime.

2 THE COURT: Well, that's exactly right. But here's
3 the thing. And I don't know whether this is significant or
4 not. But in my mind, there is the basic fraud, where the
5 Russian government was robbed of \$216 million or something like
6 that. Right?

7 MR. MONTELEONI: Yes, depending on the exchange rate,
8 yes.

9 THE COURT: OK. Now, I'm repeating myself, but I'm
10 going to do it. My understanding is that the government
11 contends that Prevezon was involved in laundering, not the
12 basic fraud.

13 MR. MONTELEONI: Exactly.

14 THE COURT: OK. Now, what does the government contend
15 Prevezon did to launder?

16 MR. MONTELEONI: It received funds derived from the
17 basic fraud, invested them initially in Europe, then invested
18 portions of them in New York real estate. And it reinvested
19 the income from that real estate in further real estate. So it
20 disguised the portion of the proceeds of the basic fraud that
21 it received in a real estate business in New York, which was
22 funded in part with the proceeds of the basic fraud.

23 THE COURT: OK. Now, let's come to the government's
24 motion for partial summary judgment. What is that motion?

25 MR. MONTELEONI: We are asking the Court to find that

1 there is no triable issue of fact that the basic fraud
2 occurred, and also that the basic fraud victimized three
3 foreign banks, in addition to the Russian treasury.

4 THE COURT: OK. Now, let me make a note. Say it
5 again.

6 MR. MONTELEONI: We are asking the Court to find that
7 there is no triable issue of fact that the basic fraud
8 occurred. It is proven beyond any genuine dispute that the
9 basic fraud took place.

10 THE COURT: And go on. What's the rest of your...

11 MR. MONTELEONI: All right. And that the basic fraud
12 victimized not only the Russian treasury, but also HSBC
13 Guernsey, HSBC Management, and HSBC Suisse.

14 THE COURT: A little slower. The Russian treasury...

15 MR. MONTELEONI: Not only the Russian treasury, but
16 also HSBC Guernsey, also HSBC Management, and also HSBC Suisse.

17 THE COURT: Just a minute. That's all under the
18 heading "specified unlawful activity." Is that right?

19 MR. MONTELEONI: Exactly, that these facts, that I
20 just mentioned together, constitute the first element of the
21 money laundering counts, specified unlawful activity.

22 THE COURT: OK. Now just a minute. That still, if
23 you win that motion, it still leaves for trial the conduct of
24 the defendant, right?

25 MR. MONTELEONI: Yes. Both the conduct of the

1 defendant and also the tracing of money from the Russian
2 treasury to the defendants.

3 THE COURT: But the conduct of the defendant.

4 MR. MONTELEONI: Yes, exactly.

5 THE COURT: Because, am I correct that if the motion
6 for partial summary judgment is granted, you're not seeking a
7 finding about the defendant?

8 MR. MONTELEONI: Exactly.

9 THE COURT: You're seeking a finding about the basic
10 fraudulent activity that occurred in Moscow, right?

11 MR. MONTELEONI: That is exactly right.

12 MR. CYMROT: May I speak, your Honor?

13 THE COURT: Just a minute.

14 Well, let me say this. Right now, I don't see that
15 there remains any triable issue of fact as to whether the basic
16 fraud occurred against the Russian government.

17 MR. CYMROT: Your Honor, that's --

18 THE COURT: Wait a minute. Now, what I believe is
19 left is all of the issues about the defendants' conduct, but --
20 am I right, Mr. Monteleoni?

21 MR. MONTELEONI: Yes, your Honor.

22 THE COURT: So what you have in the government's
23 motion is not a finding, a request for a finding of any kind of
24 guilt on the part of Prevezon, but simply that a fraud was
25 committed against the Russian government, and it seems to me it

1 was.

2 MR. CYMROT: No, your Honor, not the way they say it.

3 THE COURT: I'm not asking about the way they say it.

4 MR. CYMROT: But it is critical to a U.S. crime. If
5 there is a fraud on the Russian treasury and that money were to
6 come to the United States, there would be no crime in the
7 United States. All right? The only way it becomes a crime is
8 if there is a specified unlawful activity. Only way. In other
9 words, if that money, the 216 million, let's say they
10 transferred it directly to New York and they spent it in New
11 York, that is not a U.S. crime. Nothing happened here that's
12 criminal. It has to be that it occurred by bribery, by fraud
13 on a bank, or certain other ways that aren't really relevant
14 right here. And the way it happened --

15 THE COURT: Can I interrupt you?

16 MR. CYMROT: Yes.

17 THE COURT: It is my understanding that the government
18 is seeking to take out of the trial the facts about what
19 occurred in Moscow.

20 MR. CYMROT: No --

21 THE COURT: Wait a minute.

22 MR. CYMROT: In Cyprus and a lot of other places.

23 THE COURT: Can I finish?

24 MR. CYMROT: Yes, your Honor.

25 THE COURT: You interrupted and I didn't finish. I'm

1 going to start again.

2 My understanding is that the government is seeking to
3 take out of the trial the facts which undoubtedly occurred.
4 And that is that there was a fraud on the Russian government
5 which resulted in the government being defrauded of, in dollar
6 terms, about \$216 million. Now, it's my understanding that
7 that is what the government is seeking to do. In other words,
8 the government is seeking to take out of the trial facts which
9 undoubtedly occurred. I know they occurred. Everybody in this
10 room knows they occurred. But the government is not seeking to
11 take out of the trial anything about the conduct of Prevezon.

12 Mr. Monteleoni, am I right?

13 MR. MONTELEONI: That is right. I would add that, in
14 addition to the fact that a fraud occurred, the government --
15 in order for the full relief we're requesting in the motion,
16 partial summary judgment to be granted, we need not just that
17 the fraud occurred, but also a few other details about the fact
18 that it harmed a foreign bank. If the Court is not --

19 THE COURT: Wait a minute, wait a minute. Go a little
20 slower.

21 MR. MONTELEONI: The government absolutely is asking
22 the Court to take out of the case the undisputed details about
23 the fact that the basic fraud occurred in Moscow. It is also
24 asking for a little bit more in this motion. The additional
25 facts that it's asking are for the Court to find that the basic

1 fraud also victimized HSBC. And the reason that it's asking
2 that is because that would simplify the trial because only
3 certain types of crimes are predicate offenses for money
4 laundering, and if it is established that this fraud victimized
5 the foreign banks of HSBC, then the specified unlawful activity
6 would be established. If the Court is able to make that
7 finding, which the government believes is really not subject to
8 real dispute on the papers, then that is the order that the
9 government is seeking.

10 If the Court does not wish to make that finding, the
11 Court could still drastically simplify the trial by making the
12 fact findings of paragraphs up to 21 on the government's
13 proposed order, which just set forth the skeletal details of
14 the basic fraud. It wouldn't simplify the trial as much, but
15 it would simplify the trial substantially.

16 THE COURT: OK. Let me see if I understand. I'm not
17 looking at the papers for the moment. Let me ask you this. In
18 other words, in what you talked about in the last few minutes,
19 you talked about what I'll call two phases of things. One is
20 the basic fraud that occurred in Moscow. The other is a fraud
21 against HSBC Guernsey.

22 MR. MONTELEONI: Yes. That is included in the basic
23 fraud.

24 MR. CYMROT: No. No, you cannot say that.

25 MR. MONTELEONI: That is the government -- the

1 government is asking the Court to find that that is included in
2 the basic fraud.

3 MR. MOSCOW: That's challenged.

4 MR. CYMROT: That's challenged. That's clearly
5 challenged.

6 MR. MONTELEONI: It is not genuinely disputed.

7 THE COURT: If you want to talk among yourselves,
8 there's a hallway out there, and you are welcome to use it and
9 I can leave you alone.

10 MR. CYMROT: No, your Honor. We need your help on
11 this.

12 MR. MONTELEONI: I apologize, your Honor. The
13 government's view is that there is not a genuine dispute under
14 Rule 56 that the basic fraud included fraud on HSBC.

15 THE COURT: I know that. But I'm asking you a little
16 different question.

17 MR. MONTELEONI: I apologize.

18 THE COURT: And that is, suppose in my mind there are
19 what I'll call two phases of what you just said. One is the
20 fraud that occurred in Moscow. The second phase occurred, the
21 fraud against HSBC Guernsey.

22 MR. MONTELEONI: Yes.

23 THE COURT: You hear what I'm saying.

24 MR. MONTELEONI: All right.

25 THE COURT: OK. Now, what you're saying is, what the

1 government is saying is, there was no genuine issue of fact
2 about a fraud being committed in Moscow. And there is also no
3 genuine issue of fact about the idea that there was a fraud
4 committed against HSBC Guernsey. That's your position.

5 MR. MONTELEONI: That's correct, your Honor.

6 THE COURT: On the motion for summary judgment.

7 MR. MONTELEONI: Yes.

8 THE COURT: OK. Now, let me turn to the defense.

9 MR. CYMROT: There is no genuine issue, your Honor.

10 THE COURT: Can you just let me --

11 MR. CYMROT: Yes. OK. Sorry. I thought you were
12 waiting for me to talk.

13 THE COURT: Probably I should. You go ahead.

14 MR. CYMROT: OK. There's no genuine issue that false
15 tax certificates were submitted in Moscow and that the dollar
16 equivalent of \$216 million was --

17 THE COURT: In other words, the fraud was committed in
18 Moscow.

19 MR. CYMROT: That, if you call that phase one, there
20 is no dispute about that. We'll submit an order tomorrow on
21 that area. Phase two, that there was a fraud on HSBC, is hotly
22 contested, in many ways. And you cannot take that out of the
23 case. It would be highly prejudicial.

24 THE COURT: I want to focus on what you just said.

25 MR. CYMROT: Yes, your Honor.

1 THE COURT: What are the issues about HSBC that you
2 just mentioned?

3 MR. CYMROT: Yes, OK. So the government's claim is
4 that these three companies were illegally taken from HSBC
5 Guernsey as a trustee. And we have witnesses who are agents of
6 Hermitage who said they authorized those transfers. So that's
7 contested. That's contested with their own witnesses.

8 The next thing is that there were false contracts
9 created and lawsuits that were filed to create liabilities. We
10 have shown that Hermitage had notice of those lawsuits, they
11 knew about them, so they were not false lawsuits that some
12 organization created. They were on notice of these lawsuits.
13 And they didn't do anything that suggests that they were
14 involved.

15 The next thing is that they say there were
16 certificates stolen by the Russian interior ministry police in
17 order to get certificates that were used in the tax returns.
18 That has been disputed.

19 So every step of the alleged fraud against HSBC has
20 been disputed with very specific facts. And what it comes down
21 to, Judge, is, the government alleges there was an
22 organization, unnamed, mysterious organization that did all
23 this, and the evidence points that Hermitage and Mr. Browder
24 did it. That is the heart of the dispute. And HSBC is
25 Mr. Browder's agent. They were not defrauded. There are

1 factual disputes at each step of the way. And I know that
2 doesn't involve the defendants, but it is critical to them
3 proving the crime.

4 Let me repeat. If that \$216 million was stolen in
5 Moscow and came to New York, without a specified unlawful
6 activity being committed, that money would not be illegal in
7 New York, even though it was stolen in Moscow. They have to
8 prove a specified unlawful activity. They have to prove how
9 the fraud occurred that involved a U.S. crime, a specified
10 unlawful activity. And they don't have one. And certainly
11 fraud on this bank is disputed.

12 THE COURT: Let me say this, to conclude the
13 afternoon. In my view the government's motion for partial
14 summary judgment presents some points that are very well taken.
15 In other words, there are certain things that are not in
16 dispute. There are a lot of things that are hotly in dispute.
17 But some things are not in dispute. And I keep referring and
18 I'll refer to it again: the basic fraud in Moscow is not in
19 dispute. It was committed. And \$216 million was stolen from
20 Russia. That is not in dispute.

21 Now, the problem is, in trying to eliminate issues by
22 granting partial summary judgment, the problem with that is, it
23 isn't that the government's motion is not well taken, but it
24 seems to me at the trial it will be necessary to put on
25 evidence of that background. I cannot see a trial that does

1 not start with the basic evidence about what occurred in
2 Moscow. I think it would be meaningless to the jury to start
3 in the middle of things. And therefore, here's what I'm going
4 to say this afternoon, because trial is coming up soon. I am
5 going to deny the government's motion for partial summary
6 judgment. But I am going to require that the lawyers meet with
7 me to frame the issues so we're not wasting time on things that
8 are not in dispute and wasting time on things that the jury
9 doesn't need to hear about. So we do, it seems to me, want to
10 frame the issues so we don't waste time on things that are not
11 in dispute, but we want to present the case to the jury in a
12 way that will be meaningful to the jury. That means that the
13 lawyers and I have to have some more pretrial work together.
14 And with that we will adjourn for the day. Thank you.

15 MR. CYMROT: Thank you, your Honor.

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