16-132

To Be Argued By:
Paul Monteleoni

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-132

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,

(*Caption continued on inside cover*)

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE UNITED STATES OF AMERICA

Preet Bharara,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

Paul Monteleoni,
Cristine Phillips,
Margaret Garnett,
Assistant United States Attorneys, Of Counsel.

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, TITILE 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, ANY AND ALL ASSETS OF PREVEZON SEVEN USA, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITILE 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, TITILE 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

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Defendants,

—v.—

HERMITAGE CAPITAL MANAGEMENT LTD.,

Movant-Appellant.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-132

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Appellee,

—v.—

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Defendants-Appellants,

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JANUARY 22, 2014, AND ALL PROPERTY TRACEABLE THERETO,

Defendants,

—v.—

HERMITAGE CAPITAL MANAGEMENT LTD.,

Movant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Movant-appellant Hermitage Capital Management Ltd. ("Hermitage") appeals from an Opinion and Order entered on January 8, 2016, in the United States District Court for the Southern District of New York, by the Honorable Thomas P. Griesa, United States District Judge, denying Hermitage's motion to disqualify counsel for defendants-appellants Prevezon Holdings Ltd. and several related real estate companies (collectively, "Prevezon" or the "defendants").

On September 10, 2013, the United States filed a civil forfeiture and money laundering penalty complaint, 13 Civ. 6326 (TPG), against Prevezon, in the United States District Court for the Southern District of New York. The case was assigned to Judge Griesa. On October 11, 2013, John Moscow, Esq., and Baker & Hostetler LLP entered notices of appearance on behalf of Prevezon.

On December 15, 2015, Hermitage moved to disqualify Mr. Moscow and Baker & Hostetler from representing Prevezon. The motion was granted by Judge Griesa on December 18, 2015. On January 8, 2016, following further briefing, Judge Griesa reversed his December 18 order, denying Hermitage's motion and reinstating Prevezon's counsel. Trial of the case against Prevezon was set for jury selection on January 27, 2016, and opening statements on February 1, 2016.

Judge Griesa denied Hermitage's motion to certify the issue for immediate interlocutory appeal and to stay the trial. Hermitage filed a motion with this Court for an emergency stay of proceedings in the District Court, including the trial, pending resolution of its appeal. The Government filed an affirmation in support of that motion. A motions panel of this Court heard oral argument on Hermitage's motion on January 22, 2016, and issued a stay pending appeal on January 25, 2016.

Statement of Facts

As described in the Second Amended Complaint, filed on October 23, 2015 (Docket Entry 381),[1] the

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[1] "A." refers to the appendix filed with Hermitage's brief on appeal; "SPA" refers to the special appendix filed with Hermitage's brief on appeal; "CA." refers to the redacted version of the confidential appendix filed with Hermitage's brief on appeal; "SA" refers to the supplemental appendix filed with the Government's brief on appeal; "Def. Stay Br." refers

Government is seeking the forfeiture of property and the imposition of civil money laundering penalties on Prevezon for the New York laundering of the proceeds of a complex Russian tax fraud scheme. In 2007, a Russian criminal organization including corrupt Russian government officials (the "Organization") defrauded the Russian treasury of approximately $230 million, through an elaborate scheme (the "Russian Treasury Fraud"). Prevezon received a portion of these proceeds through an international network of shell companies and laundered it by purchasing Manhattan real estate using funds that, at a minimum, had been commingled with fraud proceeds.

The Government's claims are based on money laundering and thus require proof of a specified unlawful activity. The specified unlawful activities alleged in the Second Amended Complaint either consist of or derive from the Russian Treasury Fraud. As Prevezon disputes many of the relevant details, the Government expects that a substantial portion of the trial will necessarily consist of the Government proving the specifics of how the Russian Treasury Fraud

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to Prevezon's brief opposing Hermitage's emergency stay motion before this Court; "Gov. Stay Aff." refers to the Government's affirmation supporting the motion; "Docket Entry" refers to an entry in the District Court's docket; "Compl." refers to the Second Amended Complaint filed in the District Court (found at A. 300-81); and "Decl." refers to the draft declaration prepared by Baker & Hostetler in its previous representation of Hermitage (found at CA. 4-28).

was committed. The defense filings in the District Court make clear that Prevezon, through its counsel Baker & Hostetler, intends to contest this proof by accusing Hermitage of committing the Russian Treasury Fraud. Although the Government also expects to advance theories at trial that could establish a specified unlawful activity regardless of the identities of the perpetrators of the Russian Treasury Fraud, the culprits' identities could be decisive if the jury rejects these other theories. Thus, whether the Government prevails against at trial may ultimately turn on whether Prevezon succeeds in convincing the jury that Hermitage committed the Russian Treasury Fraud.

A. The Russian Treasury Fraud

As alleged in the Second Amended Complaint, the Russian Treasury Fraud involved the theft of three corporations from a fund associated with Hermitage and the use of these stolen corporations to make false tax refund applications. The Hermitage Fund is a foreign investment fund advised by Hermitage that invested in Russia in the early 2000s. (A. 308-10 (Compl. ¶¶ 14, 18-19)). Members of the Organization stole the corporate identities of three portfolio companies of the Hermitage Fund (the "Hermitage Companies") and used these stolen identities to file fraudulent claims for tax refunds with the Russian government. (A. 310-11 (Compl. ¶¶ 19-21)). This scheme was a variant of a well-known criminal practice in

Russia referred to as corporate raiding, or "reiderstvo."[2]

To steal the identities of the Hermitage Companies, members of the Organization caused officers from the Russian Interior Ministry to search the Moscow offices of the Hermitage Fund and its law firm in mid-2007, and to confiscate the original corporate documents of the Hermitage Companies. (A. 312-13 (Compl. ¶¶ 24-25)). Using these documents, members of the Organization fraudulently re-registered ownership of the Hermitage Companies away from their rightful owner—HSBC Private Bank (Guernsey) Ltd. ("HSBC Guernsey"), trustee for the Hermitage Fund—into the names of three convicted criminals (A. 313-14 (Compl. ¶¶ 26, 28)), using an order from an apparently bogus arbitration court (A. 313-14 (Compl. ¶ 27)).

With the stolen corporate identities of the Hermitage Companies in hand, members of the Organization forged backdated contracts with fake commercial counterparties, pursuant to which the Hermitage Companies appeared to owe huge sums of money. (A. 314-16 (Compl. ¶¶ 29-32)). The counterparties, also controlled by members of the Organization, sued

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[2] *See generally, e.g.*, Philip Hanson, *Reiderstvo: Asset-Grabbing in Russia*, Chatham House (2014), *available at* https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300AssetGrabbingRussiaHanson1.pdf.

the stolen Hermitage Companies based on the forged contracts. (A. 316 (Compl. ¶ 33)). These lawsuits were sham proceedings in which members of the Organization represented both the counterparties and the Hermitage Companies, orchestrating the proceedings so as to fraudulently procure huge judgments against the Hermitage Companies. (A. 316-17 (Compl. ¶¶ 34-37)).

Members of the Organization then used the fraudulently-procured judgments to apply for tax refunds on behalf of the stolen Hermitage Companies, claiming that these judgments constituted losses negating previously-earned profits and entitling the companies to a refund of the taxes the Hermitage Companies had paid in 2006 (*i.e.*, before the companies were stolen). (A. 317-19 (Compl. ¶¶ 38-41)). Tax officials working for the Organization corruptly approved those refund requests, totaling $230 million, within one business day, and the full $230 million was paid just two days later. (A. 318-20 (Compl. ¶¶ 40, 43-45)). The refunds were paid from the Russian treasury to accounts the Organization had created in the name of the Hermitage Companies. (A. 328-29 (Compl. ¶¶ 77-79)).

B. Hermitage's Retention of Baker & Hostetler

Hermitage discovered these fraudulent lawsuits after the fact and pursued legal recourse on several fronts. (A. 322-23 (Compl. ¶¶ 55-56)). Hermitage and HSBC hired counsel in Russia to file criminal complaints and appear in civil proceedings to contest the fraud. Facing retaliation in Russia (A. 323-24 (Compl.

¶¶ 58, 61-63)), Hermitage also hired John Moscow of Baker & Hostetler to investigate the true perpetrators of the Russian Treasury Fraud as part of a strategy to avoid Hermitage being falsely accused of committing it. This retention involved almost $200,000 of billings and lasted for several months, during which (1) Mr. Moscow met with a supervisor in the United States Attorney's Office for the Southern District of New York to attempt to convince the Office to investigate (A. 117-18);[3] and (2) Baker & Hostetler drafted a 25-page declaration in support of an application for a Southern District of New York subpoena pursuant to 28 U.S.C. § 1782 (CA. 4-28). This draft declaration set forth in detail the Russian Treasury Fraud, as Hermitage understood it at the time. The purpose of the subpoena was to obtain records from New York banks to assist Hermitage in tracing the proceeds of the Russian Treasury Fraud to their ultimate recipients.

Hermitage subsequently terminated its attorney-client relationship with Baker & Hostetler. A later declaration, completed by a different law firm, was used to successfully obtain a 28 U.S.C. § 1782 sub-

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[3] Though it involved the same subject matter, that meeting did not ultimately result in the instant action. As set forth below, Hermitage contacted the Government again after developing additional information, leading to the filing of the complaint in this case.

poena for the bank records sought by the Baker & Hostetler draft declaration.[4]

C. The Complaint and Its Relation to Baker & Hostetler's Work for Hermitage

Hermitage eventually made progress tracing the proceeds of the Russian Treasury Fraud, which were moved through an elaborate international money laundering network to recipients in Russia and elsewhere. Hermitage again provided that information to the Government, which investigated and ultimately filed the Complaint against Prevezon, seeking *in rem* forfeiture and civil money laundering penalties against the defendants, which are eleven related real estate companies that received some of the proceeds of the Russian Treasury Fraud and invested portions in Manhattan real estate.

The Government's claims against Prevezon allege money laundering, and thus almost uniformly require proof of transactions involving the proceeds of specified unlawful activity. *See* 18 U.S.C. §§ 1956(a)(1), 1957(a). The principal specified unlawful activity alleged in the operative complaint is the Russian Treasury Fraud. (A. 361-66 (Compl. ¶¶ 150-64)). The Russian Treasury Fraud is alleged to constitute a foreign corruption offense under 18 U.S.C. § 1956(c)(7)(B)(iv), which designates as a specified unlawful activity an offense under foreign law involv-

[4] Hermitage later provided the Government with the returns for this subpoena, which were then produced in discovery in this action.

ing "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." (A. 361-62 (Compl. ¶¶ 149, 152)). It is also alleged to constitute an offense involving foreign bank fraud under 18 U.S.C. § 1956(c)(7)(B)(iii), which includes an offense involving "fraud, or any scheme or attempt to defraud, by or against a foreign bank." (A. 361-62 (Compl. ¶¶ 149, 151)). The Second Amended Complaint also alleges two specified unlawful activities derivative of the Russian Treasury Fraud: (i) transfers of the proceeds of the Russian Treasury Fraud through the United States constituting transportation of stolen property in violation of 18 U.S.C. § 2314 (A. 361-63 (Compl. ¶¶ 149-50, 154)); and (ii) earlier instances of money laundering as predicate offenses for later money laundering transactions (A. 361, 363 (Compl. ¶¶ 149, 154-55); *see* 18 U.S.C. § 1956(c)(7)(A); 18 U.S.C. § 1961(1)(B)).[5]

Because the Russian Treasury Fraud underlies the specified unlawful activities alleged, the operative complaint in this action sets forth a detailed account of the Russian Treasury Fraud that is extremely similar to the draft declaration prepared by Baker & Hostetler in the course of its representation of Hermitage. (*Compare* CA. 4-5 (Decl. ¶ 3) (summarizing $230 million fraud scheme) *with* A. 304-05, 309-11 (Compl. ¶¶ 2, 18-21) (summarizing same fraud); CA.

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[5] Of course, for the earlier transactions to constitute money laundering, some other specified unlawful activity must be proven.

8 (Decl. ¶ 12) (describing Russian law enforcement searches of offices of Hermitage and its law firm and seizures of computers and documents) *with* A. 312 (Compl. ¶ 24) (describing same events); CA. 9 (Decl. ¶¶ 15-16) (describing Hermitage first learning of sham lawsuit in October 2007 from St. Petersburg court) *with* A. 322 (Compl. ¶ 55) (describing same events); CA. 9-10 (Decl. ¶¶ 17-18) (describing fraudulent reregistration of stolen companies using corporate records and documents seized in Interior Ministry searches) *with* A. 312-13 (Compl. ¶¶ 25-26) (describing same events); CA. 9-10 (Decl. ¶¶ 17, 19) (describing forging of backdated contracts with one sham counterparty) *with* A. 314-15 (Compl. ¶¶ 29-31) (describing same events and forging of backdated contracts with additional sham counterparties); CA. 11 (Decl. ¶ 21) (describing errors in sham contracts and use of stolen passport) *with* A. 315-16 (Compl. ¶ 31-32) (describing same facts); CA. 10-11 (Decl. ¶ 20) (describing lawyers purportedly appearing on behalf of stolen company and conceding full liability as to one sham counterparty) *with* A. 316-17 (Compl. ¶¶ 34-37) (describing same facts and similar conduct with respect to additional sham counterparties); CA. 15 (Decl. ¶ 31) (describing refund requests based on $973 million in fraudulently procured judgments, equal to stolen companies' previous profits) *with* A. 318-19 (Compl. ¶¶ 40-41) (describing same events); CA. 15 (Decl. ¶ 32) (describing refund of $230 million in taxes based on these refund requests, granted two days after claim was filed) *with* A. 319-20 (Compl.

¶ 44) (describing approval of $230 million in tax refunds within one business day of applications)).[6]

Also like the Baker & Hostetler draft declaration, the operative complaint alleges that the same criminal organization perpetrated an earlier 2006 tax refund fraud that bore the same modus operandi and involved subsidiaries of Rengaz Holdings, an investment fund associated with Renaissance Capital. (*Compare* CA. 19-22 (Decl. ¶¶ 47-55) (describing similarities between 2006 fraud involving Rengaz subsidiaries and $230 million fraud scheme) *with* A. 320-22 (Compl. ¶¶ 46-54) (describing these similarities)). The Baker & Hostetler draft declaration alleges that Renaissance Capital personnel were involved with both the 2006 fraud and the 2007 Russian Treasury Fraud that victimized Hermitage. (CA. 4-5, 22-26 (Decl. ¶¶ 3, 5, 56-72)). The Government presently expects to introduce at trial evidence regarding the connection of Renaissance Capital personnel to the Russian Treasury Fraud.[7]

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[6] The original complaint is identical to the Second Amended Complaint on these points. (*See* Docket Entry 1).

[7] Additionally, the Baker & Hostetler draft declaration and the complaint both set forth facts regarding the Russian authorities' retaliatory response to Hermitage's whistleblowing. (*Compare* CA. 11-12 (Decl. ¶¶ 22-23) (describing Hermitage complaints to Russian authorities, who assigned complaints to officer named as participant in fraud) *with* A. 322-23

D. The Emergency Pre-Discovery Trial Date and Notice to the Court of the Conflict

Baker & Hostetler entered an appearance in the District Court on behalf of Prevezon in late 2013. In mid-February of 2014, before discovery had begun, Baker & Hostetler briefly convinced the District Court to set an emergency trial date on a six-week schedule. This schedule was patently insufficient for civil fact and expert discovery and trial preparation in a case of this complexity. In fact, Baker & Hostetler had previously made a good-faith scheduling proposal to the Government under Federal Rule of Civil Procedure 26(f), providing for a ten-month pretrial schedule, but when they demanded an emergency trial date (by surprise at a court conference on a different subject) they did not inform the District Court of the fact that this proposal was many times longer than their emergency trial demand. (Docket Entry 81-4 at 1). The District Court initially granted the request for an emergency expedited trial.

Although the District Court ultimately adjourned the trial upon learning of the defendants' own good-faith proposal and the complexity of discovery, before the adjournment was granted the Government informed the District Court of the conflict in order to allow the District Court to undertake the appropriate

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(Compl. ¶ 56) (describing same events); *compare* CA. 14, 16-17 (Decl. ¶¶ 29, 34-35) (describing criminal cases being opened against Hermitage attorneys) *with* A. 324 (Compl. ¶ 63) (describing same events)).

inquiry. (Docket Entry 106-1). After adjourning the trial date at the outset of a conference, the District Court turned to the conflict and decided to take no action since the Government was not moving for disqualification at that time. (Docket Entry 77 at 1, 25-29).

Shortly after the initial trial date was adjourned, Prevezon elected to put party discovery on hold for an extended period, while pursuing subpoenas to Hermitage's CEO William Browder. Prevezon also filed a motion to dismiss the Complaint; while the motion was pending, they issued a series of subpoenas directed at Browder (Def. Stay Br. 11), and stated in subpoena-related briefing that discovery was "on hold" pending resolution of the motion to dismiss.[8] (SA 5).

E. The First Disqualification Motion and Baker & Hostetler's Representations to the Court

In 2014, Hermitage filed a complaint with the Southern District of New York's Grievance Committee and that in the summer of 2014 the Grievance Committee notified Hermitage it was taking no action on the complaint, without prejudice to Hermitage raising the issue with Judge Griesa. (Docket Entry 137-13).

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[8] The period during which Prevezon either caused or consented to discovery being on hold was March 31, 2014, to June 15, 2015, or over 14 months.

With the permission of the District Court, Hermitage and Browder moved for Baker & Hostetler's disqualification on September 29, 2014.[9] In responding to this motion, counsel for Baker & Hostetler maintained that the Russian Treasury Fraud was "irrelevant" (A. 58), and that the representation was not adverse to Hermitage because both Hermitage and Prevezon were innocent (A. 192-93, 202). Notably, Baker & Hostetler specifically disclaimed any intent to accuse Hermitage of committing the Russian Treasury Fraud. (A. 175-76).

Judge Griesa relied on these representations in denying the motion in October 2014, noting that "[t]here is no indication that [Mr. Moscow] is any substantial way taking a position which involves an attack upon or an attempt to hold liability with regard to Hermitage" (A. 297), and remarking that, by contrast, "[i]f Mr. Moscow was now turning on the former client and attacking the former client, I mean, that wouldn't even be a hard case" (A. 286).

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[9] In connection with this motion, the Government wrote to the District Court listing the similarities between the complaint and the Baker & Hostetler draft declaration (Docket Entry 141); explaining the Russian Treasury Fraud's status as a specified unlawful activity (A. 158-59); and advising that Hermitage was a victim of the Russian Treasury Fraud (A. 162-63).

F. The Government's Partial Summary Judgment Motion and Baker & Hostetler's Accusations

On November 3, 2015, the Government filed a motion for partial summary judgment. (Docket Entries 397, 398). The Government's motion was limited to a narrow issue suited to summary adjudication—whether the Russian Treasury Fraud was committed and involved fraud against a foreign bank (a specified unlawful activity) because of its impact on three HSBC entities associated with the Hermitage Fund. (A. 384-85). Specifically, the motion relied on the fraud's harm to HSBC Guernsey as trustee of the Hermitage Fund and legal owner of its assets; to the fund manager HSBC Management (Guernsey) ("HSBC Management"); and to HSBC Private Bank (Suisse) S.A. ("HSBC Suisse"), a proprietary investor in the Hermitage Fund. (A. 388-90). The motion did not raise other theories of harm on a foreign bank, or the other specified unlawful activities such as the foreign corruption offense. (A. 395 n.7, 396 n.9, 400).

Prevezon's response to the Government's partial summary judgment motion was a total reversal of course from Baker & Hostetler's previous representations to Judge Griesa that they could represent their current clients Prevezon without attacking their former client Hermitage. First, far from adhering to the claim made in the course of the first disqualification motion that the Russian Treasury Fraud was "irrelevant," Prevezon's response to the Government's motion asserted that "[t]he manner in which the Treasury Fraud was carried out . . . is an essential element

of the Government's claims" (A. 445), and that to grant partial summary judgment on this issue would be to "deprive Defendants of an important, meritorious defense" (A. 446*; see also* A. 406 ("Hermitage is central to everything, and the case has changed.")). Second, far from adhering to Baker & Hostetler's previous position that they could continue their representation of Prevezon without being adverse to Hermitage, the responsive briefing flatly accused Hermitage of committing the Russian Treasury Fraud. (*See* A. 449 ("Defendants have proven that [Hermitage CEO] 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."); A. 516 ("[W]hat it comes down to, Judge, is, the government alleges there was an organization, unnamed, mysterious organization that did all this, and *the evidence points that Hermitage and Mr. Browder did it. That is the heart of the dispute.*" (emphasis added))).[10]

Judge Griesa denied the Government's partial summary judgment motion, ruling that although many of the Government's points were "well taken," the narrative of the Russian Treasury Fraud should be presented at trial. (A. 517-18). Though they have agreed that the tax refunds at issue resulted from

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[10] Although this is a matter for trial, for the avoidance of doubt, Baker & Hostetler's accusations are false. Hermitage is a victim—not a perpetrator—of the Russian Treasury Fraud.

fraud, the defendants have declined to stipulate that a specified unlawful activity occurred, and have indicated that they will contest at trial the Government's attempt to prove that the Russian Treasury Fraud involved corruption or fraud against a foreign bank. (*See, e.g.*, A. 445-48, 517). The defendants also filed a still-pending motion to dismiss several of the alleged specified unlawful activities, but not the foreign corruption offense. (Docket Entries 436, 437). Accordingly, at trial, at a minimum, the Government will attempt to prove (and the defendants to refute) that the Russian Treasury Fraud involved "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." 18 U.S.C. § 1956(c)(7)(B)(iv).

G. The Second Disqualification Motion and Judge Griesa's Grant of the Motion

Hermitage again moved for disqualification of Baker & Hostetler on December 15, 2015. On December 18, 2015, following expedited argument,[11] Judge Griesa granted the motion, noting that "one of BakerHostetler's primary defense strategies in the present case involves asserting that Hermitage had substantial responsibility for what is well known as

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[11] Prevezon filed a letter opposing the motion (Docket Entry 494), but did not request an adjournment of argument or any opportunity to file a longer brief until the District Court made clear at the argument that it was troubled by the conflict. The District Court denied that request.

the Russian Treasury Fraud," and that "the level of Hermitage's involvement in fraudulent activity may make the difference between proving or not proving the commission of certain alleged specified unlawful activities as a foundation for showing money laundering, which is at the heart of the present case." (SPA 1-2).

The District Court found that "BakerHostetler's change in defense strategy now makes the subjects of its former and current representation 'substantially related,'" and observed the "very real possibility that BakerHostetler will be in a position where it would be trying to show that its current clients (the Prevezon defendants) are not liable and showing this by attacking its former client (Hermitage) on the very subject of BakerHostetler's representation of that former client." (SPA 2).

H. Judge Griesa's Grant of Certification to Defendants, *Sua Sponte* Withdrawal of the Disqualification Decision, Reversal of that Decision, and Denial of Certification to Hermitage

After disqualifying Baker & Hostetler on December 18, 2015, Judge Griesa entered a series of orders that undid his earlier ruling.

Prevezon did not move for reconsideration of the disqualification order but instead, on December 21, 2015, sought to certify it for interlocutory appeal under 28 U.S.C. § 1292(b), and stay the district court proceedings pending resolution of the appeal. (A. 530). Judge Griesa granted the requested certifi-

cation and stay the next day, before the Government or Hermitage could respond to Prevezon's motions. (A. 531-32). After the Government sought clarification and expressed doubt as to the basis for certification, Judge Griesa *sua sponte* withdrew his order disqualifying Baker & Hostetler and called for further briefing. (A. 535-36).

Prevezon then filed a responsive brief in opposition to Hermitage's disqualification motion,[12] Hermitage filed a reply, and the Government wrote supporting disqualification. The Government and Hermitage explained the specific risk of retaliation against Hermitage-related individuals from Russian authorities.[13] Evidence of this risk included, among

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[12] Hermitage submitted a declaration from legal ethics expert Professor Bruce A. Green supporting disqualification. (A. 519-26). Prevezon, despite having advised the Court that it would do so (SA 73), did not submit any expert opinion in response. Instead it relied on the prior declaration of Professor Roy D. Simon, Jr., submitted with the initial disqualification briefing—before Baker & Hostetler accused Hermitage of committing the Russian Treasury Fraud. (Docket Entry 136). Thus, no expert that analyzed Baker & Hostetler's actual conduct—i.e., including its accusations against Hermitage—has offered an opinion that it is permissible.

[13] Indeed, the complaint sets forth a pattern of criminal cases brought against other Hermitage-affiliated individuals. (A. 323-24, 327 (Compl. ¶¶ 58, 61-74)).

other things, the fact that Hermitage's CEO Browder, having been barred from Russia, was prosecuted *in absentia* by Russia on charges of a separate Hermitage-related tax fraud, and that Interpol took the rare step of refusing to assist Russia, finding that the proceedings were "predominantly political in nature." (A. 603). Moreover, the Prosecutor General of Russia recently issued an open letter threatening further prosecution against Browder and accusing him of engineering the Russian Treasury Fraud and other crimes. (A. 581). The Prosecutor General referred to the case against Prevezon in the District Court as "a *unique chance to obtain evidence within the judicial procedures*" that Hermitage and the Government's account of the Russian Treasury Fraud "is nothing but the lying PR campaign ran by Browder and the latter's decision to *turn everything upside down, thus replacing the Browder affair with the Magnitsky affair, and avoiding punishment*."[14] (A. 583; *see also*

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[14] Sergei Magnitsky was a lawyer for Hermitage who played a pivotal role in exposing the fraud. He was arrested by Russian authorities and subsequently died in pretrial detention in Moscow. (A. 324-27 (Compl. ¶¶ 64-74)). As a result, Congress passed the Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496, mandating sanctions on those responsible. The Government does not allege that the defendants here are directly responsible for the arrest, detention, or death of Magnitsky, but Magnitsky's treatment underscores the very real possibility of retaliation against Hermitage-affiliated individuals in Russia.

A. 582 ("[W]e are following this process with interest from the sidelines.")). After the issuance of this letter, Russian authorities reportedly brought additional criminal charges against Browder. (A. 601).

On January 8, 2016, Judge Griesa reversed his previous order, denying Hermitage's motion for disqualification of Baker & Hostetler in another written opinion. The new opinion did not explain its change of position from, and indeed scarcely referenced, the earlier opinion granting disqualification. Instead, it found that the two representations were not "substantially related" because the Russian Treasury Fraud was "merely background information." (SPA 12-13). Judge Griesa did not reconcile this statement with his earlier finding that whether Hermitage was involved in the fraud "may make the difference between proving or not proving" specified unlawful activity. (SPA 1-2). Judge Griesa also characterized Mr. Moscow's work on the draft subpoena for Hermitage as "preparatory and minimal," evidencing no awareness that Baker & Hostetler prepared a detailed 25-page draft declaration with extensive similarities to the complaint, even though these facts had been presented to him in the earlier disqualification motion. (SPA 13; *see also* Docket Entry 141 at 1-3).

Judge Griesa's January 8 opinion also acknowledged the possibility of Russian enforcement action, noting that the threat was "not unreasonable," and there was "some factual support for the possibility that a suit could be brought against" Hermitage by the Russian government (SPA 15), but deemed this irrelevant since Hermitage was not a party to the

case before him against Prevezon. Judge Griesa also concluded that Hermitage had not met what he considered to be its burden of showing that it had shared confidences with Mr. Moscow and Baker & Hostetler.

On January 11, 2016, Hermitage moved before Judge Griesa for certification under section 1292(b) and a stay—the same relief Judge Griesa had immediately granted the defendants following the December 18 order. Judge Griesa denied Hermitage's request on January 15. (Docket Entry 529).

I. The Emergency Stay from this Court

On January 13, 2016, Hermitage noticed an interlocutory appeal and moved before this Court for an emergency stay based on the clear conflict and likely irreparable injury to Hermitage, requesting mandamus in the alternative.[15] The Government supported the motion, noting the significance of the Russian Treasury Fraud to this action and advising this Court of its concerns about the precedential effect of a refusal to disqualify. (Gov't Stay Aff.). Prevezon responded, arguing that Hermitage had little likelihood of success on the merits. (Def. Stay Br. 25-35). Prevezon also argued that the timing of Hermitage's disqualification motion was "tactical," faulting Hermitage for not seeking mandamus after defense counsel represented that they were not accusing Hermitage of committing the Russian Treasury Fraud

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[15] In light of the imminence of trial, the appeal and motion were filed before Judge Griesa's denial of certification. (A. 604).

and after the Court relied on that representation in denying Hermitage's first disqualification motion. (Def. Stay Br. 24-25).

A motions panel of this Court heard oral argument on the emergency motion on January 22, 2016, and issued a stay pending appeal on January 25, 2016.

ARGUMENT

In this civil forfeiture and money laundering penalty action, the District Court has permitted attorney John Moscow and the firm of Baker & Hostetler to defend alleged launderers of the proceeds of an elaborate Russian fraud scheme, despite the fact that Mr. Moscow and Baker & Hostetler previously represented one of the victims of the very same fraud for the express purpose of finding the true perpetrators of the fraud, bringing them to justice, and defending the victim against false accusations of participating in the fraud. Baker & Hostetler is not, however, simply defending an alleged beneficiary of the Russian Treasury Fraud. Mr. Moscow and Baker & Hostetler intend to defend their current client at trial by, at least in part, falsely accusing their former client of perpetrating the very fraud that was the subject of the former representation.

This reversal threatens serious harm to Hermitage, to the conduct of the Government's case against Prevezon, and to the integrity of the bar. First, Hermitage's principal and several of its agents have already been subject to retaliatory prosecutions

by Russian authorities. Hermitage's CEO, who is barred from Russia, has been tried in absentia in a proceeding that Interpol has rejected as "predominantly political in nature." The Prosecutor General of Russia has written an open letter—after Baker & Hostetler first made their accusations public—stating that he views the current action pending in the District Court as a potential source of evidence against Hermitage's CEO. There is thus a very real possibility that evidence introduced by Baker & Hostetler at this trial, including the scandal of cross-examination of Hermitage's CEO by its former counsel on the same subject, will be used to support new retaliatory prosecutions against Hermitage-affiliated individuals by the Russian government. Notably, Judge Griesa accepted the validity of these concerns, remarking that Hermitage's fear was "not unreasonable" and had "factual support," but nonetheless permitted the representation to continue.

Second, Judge Griesa's order—allowing a crime victim's former attorney to accuse the victim of committing the very crime that was the subject of the representation—is, in the Government's experience, unprecedented. Condoning such conduct, especially given the specific and pronounced risk to Hermitage and to any individual affiliated with it, would set a new precedent that would severely harm crime victims' interests and could chill the cooperation of victims with law enforcement. Judge Griesa's decision denying disqualification is a clear abuse of discretion, marked by numerous legal errors and clear errors of fact, and is the product of an unusual procedural history including Judge Griesa's *sua sponte* and essen-

tially unexplained reversal of an earlier decision granting disqualification. The order denying disqualification should be swiftly reversed, with a directive to reinstate the order disqualifying Baker & Hostetler from representation of Prevezon.

POINT I

Judge Griesa Clearly Abused His Discretion by Not Ordering Disqualification

A. Applicable Law

1. Successive Representation Conflicts Generally

This Court reviews an order on a disqualification motion for abuse of discretion, reviewing factual findings for clear error and legal conclusions de novo. *GSI Commerce Solutions, Inc.* v. *BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010).

Under this Court's decision in *Evans* v. *Artek Systems Corp.*, counsel should be disqualified for a successive representation conflict when:

> (1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, the relevant privileged infor-

> mation in the course of his prior representation of the client.

715 F.2d 788, 791 (2d Cir. 1983).

"A 'substantial relationship' exists where facts pertinent to the problems underlying the prior representation are relevant to the subsequent representation." *Agilent Techs., Inc.* v. *Micromuse, Inc.*, No. 04-cv-3090, 2004 WL 2346152, at *10 (S.D.N.Y. Oct. 19, 2004) (citation omitted). The New York Rules of Professional Conduct define matters as substantially related if, among other things, they "involve the same transaction." N.Y. Rules of Prof'l Conduct 1.9 cmt. 3. Cases can be substantially related even if "the questions of law and fact" are "somewhat different," if both involve common issues. *Red Ball Interior Demolition Corp.* v. *Palmadessa*, 908 F. Supp. 1226, 1244 (S.D.N.Y. 1995); *see also Emle Indus., Inc.* v. *Patentex*, 478 F.2d 562, 571 (2d Cir. 1973).

If a substantial relationship is shown, where "the same individual lawyer participated in the prior and current representation, the movant is not required to make a specific showing that confidences were passed to counsel. Instead, the movant is entitled to the benefit of an irrebuttable presumption that confidences were shared." *DeFazio* v. *Wallis*, 459 F. Supp. 2d 159, 164–65 (E.D.N.Y. 2006) (emphasis added) (collecting cases); *see also, e.g.*, *Gov't of India* v. *Cook Indus., Inc.*, 569 F.2d 737, 740 (2d Cir. 1978) ("[A] court should not require proof that an attorney actually

had access to or received privileged information while representing the client in a prior case.").[16]

Meeting the *Evans* factors amounts to a showing of a "recognized form of taint" to the trial. *See Hempstead Video, Inc.* v. *Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005). When the *Evans* factors are not met, a court may still disqualify counsel if there is some *other* means of showing that a trial will be tainted, *see, e.g.*, *Tradewinds Airlines, Inc.* v. *Soros*, No. 08 Civ. 5901 (JFK), 2009 WL 1321695, at *5 (S.D.N.Y. May 12, 2009), but absent such showing it is generally inappropriate to disqualify counsel based on the appearance of impropriety alone, except in the "rarest cases." *Board of Educ. of City of N.Y.* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979); *see Cheng* v. *GAF Corp.*, 631 F.2d 1052, 1058-59 (2d Cir. 1980) (citing *Nyquist*, noting appearance of impropriety as alternative ground for disqualification), *rev'd on other grounds sub nom. GAF Corp.* v. *Cheng*, 450 U.S. 903 (1981).

This Court has not addressed successive representation conflicts harming nonparties who are not witnesses, but has recognized that prior representation of an objecting nonparty witness in a substantially

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[16] The presumption that a lawyer receiving confidences shared them with another lawyer is rebuttable by sufficient evidence of screening, *Hempstead Video, Inc.* v. *Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005), but has no relevance where the same lawyer participated in both representations.

related matter can justify disqualification. *United States* v. *James*, 708 F.2d 40, 45-46 (2d Cir. 1983). Moreover, courts in this Circuit analyze such conflicts using the *Evans* framework. *See Scantek Med., Inc.* v. *Sabella*, 693 F. Supp. 2d 235, 239 (S.D.N.Y. 2008) (citing *Lund* v. *Chemical Bank*, 107 F.R.D. 374, 376-77 (S.D.N.Y. 1985)). Finally, the Eighth Circuit has held that conflicts harming non-witness nonparties are at least as serious as those harming parties, at least as long as there is some identifiable detriment to the nonparty. *Zerger & Mauer LLP* v. *City of Greenwood*, 751 F.3d 928, 935 (8th Cir. 2014).

2. Crime Victim Interests

"The victim of a crime is not a detached observer of the trial of the accused." *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974). In criminal cases, courts routinely hold that the interests of an alleged crime victim are adverse to those of the alleged perpetrator. *See, e.g.*, *United States* v. *Gordon*, 334 F. Supp. 2d 581, 591 (D. Del. 2004) ("As to the assertion that the County is no victim but simply a neutral third-party with, at most, a rooting interest, I again hold that the United States has the more persuasive argument, indeed, the vastly more persuasive one."); *United States* v. *Fawell*, No. 02 Cr. 310, 2002 WL 1284388, at *7 (N.D. Ill. June 10, 2002) ("'[T]he former clients and alleged victims have an interest in seeing that [defendants] are convicted. Conversely, [the attorney's new client] has a great interest in being acquitted of all charges. These interests are *diametrically opposed and may not be reconciled.*'" (quot-

ing *United States* v. *Alex*, 788 F. Supp. 359, 362 (N.D. Ill. 1992)) (emphasis added)).

Accordingly, courts disqualify former counsel for alleged victims from defending alleged perpetrators being prosecuted for that offense. *See, e.g.*, *Davis* v. *Stamler*, 494 F. Supp. 339, 343-44 (D.N.J. 1980); *Alex*, 788 F. Supp. at 365; *United States* v. *Fawell*, 2002 WL 1284388, at *11. Precedents from such cases apply at least as high a standard for disqualification as in civil cases because of a criminal defendant's Sixth Amendment right to counsel of choice. *See United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592-93 (2d Cir. 1975); *see also United States* v. *DiTommaso*, 817 F.2d 201, 219 (2d Cir. 1987) (employing *Evans* test in criminal case).

B. Discussion

1. Judge Griesa Clearly Erred in Finding the Matters Not Substantially Related

Judge Griesa's conclusion that the two matters are not substantially related is clearly erroneous.

The applicable ethics rules make plain that the matters are substantially related. The commentary to the New York Rules of Professional Conduct defines matters as substantially related if they "involve the same transaction." N.Y. Rules of Prof'l Conduct 1.9 cmt. 3. Here, both representations involve the same transaction—the Russian Treasury Fraud. This alone shows the error in Judge Griesa's opinion, which quoted but then ignored this definition.

Underscoring the relationship between the two representations, one of Baker & Hostetler's "primary defense strategies" (SPA 1) is to convince a jury that the factual narrative set forth in the Baker & Hostetler draft declaration is false. The declaration was drafted in an effort to persuade a federal judge to authorize a bank record subpoena, which required establishing the basic facts of the Russian Treasury Fraud to the judge.[17] Now, however, when the Government is attempting to establish substantially the same facts, Baker & Hostetler is attempting to convince a jury that those facts are false. In light of this, there is simply no denying that "facts pertinent to the problems underlying the prior representation are relevant to the subsequent representation." *Agilent Techs., Inc.* v. *Micromuse, Inc.*, 2004 WL 2346152, at

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[17] In opposing a stay in this Court, defense counsel strained to suggest that the declaration was focused on the 2006 tax refund fraud and had little to do with the 2007 Russian Treasury Fraud. (Def. Stay Br. 27). But simply perusing the declaration makes clear that, in fact, Hermitage believed that the same criminal group—including Renaissance Capital personnel—was involved in both the 2007 Russian Treasury Fraud and the 2006 refund fraud (*see* CA. 4-5, 22-27 (Decl. ¶¶ 3, 5, 56-72)), and the declaration accordingly sought records related to *both* the Russian Treasury Fraud and the 2006 fraud (*see, e.g.*, CA. 27-28 (Decl. ¶¶ 73, 76-77)).

*10.[18] Moreover, the Russian Treasury Fraud is not just a criminal transaction with some connection to both representations—it is a matter Baker & Hostetler was retained to investigate for Hermitage, and it is at the heart of the elements the Government must prove to prevail in this trial.

Judge Griesa's characterization of the Russian Treasury Fraud as "merely background information" in this action (SPA 12-13) is clearly erroneous, as the defendants' conduct makes clear. When the Government sought partial summary judgment on that supposed "background information," the defendants recognized the importance of the issues, seeking more time to respond to the "important motion" (SA 41), and ultimately responding with a memorandum supported by well over 1,000 pages of documents. (Docket Entries 418-423). In their response, the defendants said that to grant partial summary judgment would be to "deprive Defendants of an important, meritorious defense," because they believed that establishing that Hermitage committed the Russian Treasury Fraud would prevent it from constituting specified unlawful activity. (A. 446).

Baker & Hostetler were right when they asserted in the District Court that "[t]he manner in which the Treasury Fraud was carried out . . . is an essential

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[18] The fact that the draft declaration was never filed does not alter the substantial relationship between the work Baker & Hostetler performed in drafting it and the current representation.

element of the Government's claims." (A. 445). Although they claimed in opposing a stay pending appeal that "the parties stipulate" that the Russian Treasury Fraud occurred (Def. Stay Br. 26), this is half-true at best.[19] Rather, Prevezon, through Baker & Hostetler, has made clear that they will not stipulate to facts establishing a specified unlawful activity, so regardless of any stipulation about the occurrence of the Russian Treasury Fraud (which does not presently exist), the Government still must prove at trial how the fraud was committed. Similarly, they claimed that "[t]he current lawsuit will not determine who committed the Russian Treasury Fraud" (Def. Stay Br. 26), and that "[t]he identity of the persons or entities responsible for that Fraud will not be a question presented to the jury" (Def. Stay Br. 29). These statements are true only in the extremely narrow and

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[19] It is perilous to rely on any such characterization. The proper analysis rests on whether the two representations involve the same criminal transaction or overlapping facts, not on a party's representations as to its strategy. *See, e.g.*, *Illaraza* v. *Hovensa, L.L.C.*, Civ. No. 2008-0059, 2012 WL 1154446, at *8, *9 n.7 (D.V.I. Mar. 31, 2012) (refusing to accept party's speculation that trial would proceed in a way that could avoid the conflict, where party's summary judgment opposition accused former client of a tort and party then attempted, in opposing disqualification, to disavow the accusations). As the defendants' reversal in this case shows, such representations can be unreliable guides.

technical sense of how the verdict sheet should be worded. But in every substantive sense they are not true. The Government will introduce at trial evidence that an Organization including corrupt Russian government officials (named individuals as well as unidentified persons) committed the Russian Treasury Fraud, and will ask the jury to conclude that the Government has proven a foreign corruption offense under 18 U.S.C. § 1956(c)(7)(B)(iv).[20] As their filings indicate, defendants will introduce evidence that purports to show that Hermitage CEO "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." (A. 449). This evidence will be in service of an argument to the jury that the Government has *not* proven a foreign corruption offense, because, they will argue, in fact Hermitage committed the Russian

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[20] Defense counsel suggested at oral argument on the stay motion that the Government's evidence of a corruption offense consisted solely of tracing a kickback to one of the officials. This is incorrect. Although the Government will prove a kickback (*see* A. 338-40 (Compl. ¶¶ 97-100)), that is far from the only evidence the Government will offer. The details of how the fraud was committed and of how Hermitage persons were treated upon reporting the fraud are highly probative that the offense involved corruption. (*See* Docket Entry 310 at 22-23 & n.7 (District Court citing such details in denying motion to dismiss)).

Treasury Fraud and allegations about Russian officials are merely part of Hermitage's concealment of that crime.[21] Similarly, as evidenced by the partial summary judgment briefing, Prevezon apparently will attempt to convince the jury at trial that because Hermitage was closely associated with HSBC, and supposedly committed the Russian Treasury Fraud, the crime could not have constituted an offense involving fraud against a foreign bank under 18 U.S.C. § 1956(c)(7)(B)(iii).

It is of course possible that these disputes will not prove decisive at trial—such as if the Government proves other specified unlawful activities to the jury's satisfaction, or if the defendants negate other elements of the Government's case—but whether a jury will view these disputes as dispositive at trial is hardly the issue. What cannot be disputed is that a key feature of the trial will be efforts by Prevezon's counsel to convince the jury that Hermitage committed the Russian Treasury Fraud. Indeed, Baker & Hostetler themselves described Prevezon's accusation that "Hermitage and Mr. Browder did it" as "the heart of the dispute" precluding partial summary judgment. (A. 516).

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[21] Prevezon's suggestion in the stay litigation that the identity of the perpetrators of the Russian Treasury Fraud matters only to the foreign-bank specified unlawful activity (Def. Stay Br. 26), is thus baffling. It is at least as relevant—if not more—to the corruption offense.

Judge Griesa's view, expressed in the January 8 order, that the Russian fraud is ancillary or "mere background" thus bespeaks a serious misunderstanding of the case. As Judge Griesa earlier found in the December 18 order—a finding he apparently abandoned but never addressed—"the level of Hermitage's involvement in fraudulent activity may make the difference between proving or not proving the commission of certain alleged specified unlawful activities" (SPA 1-2), and thus accusing Hermitage of the fraud is "one of BakerHostetler's primary defense strategies" in this case (SPA 1). There is thus no serious question that Judge Griesa clearly erred in finding that Baker & Hostetler's previous representation of Hermitage was "not substantially related" to its present representation of Prevezon.

2. Judge Griesa Erred as a Matter of Law in Finding Hermitage Not Cognizably Adverse to Prevezon

Judge Griesa's erroneous belief that the matters were not substantially related, and that the trial would not be tainted by Baker & Hostetler's participation, was infected by his views that Hermitage is a "mere spectator" to the litigation, and that Hermitage had a burden to identify confidences disclosed to its former attorney. Both of these propositions are legally incorrect.

a. Judge Griesa's Finding of No Substantial Relationship or Trial Taint Is Contrary to the Cases Protecting Crime Victim Interests and Nonparty Rights

Judge Griesa justified his finding of no substantial relationship and no trial taint in part by claiming that Hermitage was "a mere spectator to this litigation." (SPA 13; *see also* SPA 14). Despite noting that the Second Circuit imposes no requirement that the movant be a party (*see* SPA 4-5), he effectively applied Hermitage's nonparty and supposed "spectator" status as a decisive factor, shoehorning it into the analysis of the substantial relationship, inventing a new freestanding "trial taint" factor, and placing dominant weight on this status in both factors.

i. Hermitage Has an Interest in Disqualification as a Crime Victim

The characterization of Hermitage as a "mere spectator" flies in the face of the cases setting forth the obvious principle that "[t]he victim of a crime is not a detached observer of the trial of the accused," *Castillo* v. *Estelle*, 504 F.2d at 1245, and barring counsel for a victim from serving as counsel to the accused in criminal cases, *see United States* v. *Gordon*, 334 F. Supp. 2d at 591 (analyzing pro hac vice motion using disqualification framework); *United States* v. *Alex*, 788 F. Supp. at 365; *United States* v. *Fawell*,

2002 WL 1284388, at *11; *Davis* v. *Stamler*, 494 F. Supp. at 343-44.[22]

These cases, which were presented to but ignored by Judge Griesa, are fatal to the notion that Hermitage cannot be adversely affected simply because "Hermitage cannot be held liable as a result of this lawsuit" or because "Hermitage is not a party to this suit and its rights are not directly at stake." (SPA 13).[23] Crime victims are of course typically not parties to later prosecutions, but courts recognize that they nevertheless have interests in their outcomes. Judge Griesa's ruling—deeming a crime victim a "mere spectator" who cannot obtain disqualification even in a proceeding involving the *very same crime*—thus sets a harmful precedent for victims, who will be without recourse if their attorneys betray

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[22] The fact that disqualification is appropriate even in criminal cases makes it appropriate *a fortiori* where this civil forfeiture and penalty case serves similar interests in redressing the offense but does not implicate the Sixth Amendment. *See, e.g.*, *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996); *see also Madukwe* v. *Del. State Univ.*, 552 F. Supp. 2d 452, 465 n.9 (D. Del. 2008) (relying on *Gordon* to disqualify counsel in civil case).

[23] In any event, though Hermitage's rights may not be *directly* at stake, the District Court acknowledged that there was "factual support" for the "not unreasonable" fear of Russian action against Hermitage resulting from this case. (SPA 15).

them to help the perpetrators escape justice, or even turn around and accuse them of the crime.[24]

The fact that Prevezon is alleged to have laundered the proceeds of the Russian Treasury Fraud, not to have committed the fraud itself, does not change this analysis. Money laundering is a practical necessity for an offense of this magnitude, so a crime victim has a similar interest in enforcement proceedings against the launderers who make such offenses practical as against those who carry them out. And of course, Baker & Hostetler is not just attempting to defend the alleged money launderers—it is doing so by accusing Hermitage of committing the crime itself.

Prevezon cannot escape this logic by disputing Hermitage's status as a crime victim. This issue typically arises before trial, before there has been any adjudication of the alleged crime victim's status (or the alleged perpetrator's guilt), but courts nonetheless recognize the adversity, which inheres in the allega-

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[24] Judge Griesa's remark that "Hermitage was never the target of a U.S. investigation for the Russian Fraud" and therefore "Moscow did not 'switch sides'" (SPA 12) is a confusing non-sequitur. Hermitage, then and now, feared retaliatory Russian proceedings, and Mr. Moscow and Baker & Hostetler switched sides from fending off such proceedings to abetting them. The absence of a *U.S.* investigation of Hermitage is neither here nor there.

tions themselves,[25] and order disqualification. *See, e.g.*, *Alex*, 788 F. Supp. at 365; *United States* v. *Stout*, 723 F. Supp. 297, 309 (E.D. Pa. 1989); *Davis*, 494 F. Supp. at 343-44; *United States* v. *Fawell*, 2002 WL 1284388, at *11. Prevezon's claim that there is no adversity since Hermitage is not a crime victim thus puts the cart before the horse—that supposed "fact" is just what Baker & Hostetler is hoping to persuade the jury of at trial.

In any event, there is no question here that the complaint alleges Hermitage is a victim of the Russian Treasury Fraud.[26] That fraud resulted in, among other things: a law enforcement raid on the offices of Hermitage and its law firm (A. 312-13 (Compl. ¶¶ 24-25)); the theft of three Hermitage Fund corporations (A. 313-14 (Compl. ¶¶ 26-28)); the fraudulent imposition of hundreds of millions of dollars of fictitious liabilities upon them (A. 314-17 (Compl. ¶¶ 29-37)); the

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[25] Adversity of interests is determined with respect not to the result but to "the incentives faced by the lawyer before or during the representation because it often cannot be foretold what the actual result would have been." Restatement (Third) of Law Governing Lawyers § 121 cmt. c(i).

[26] The Russian Treasury Fraud was of such breathtaking scope that, as would be expected, there are other victims as well—the Russian taxpayers, the foreign banks that legally owned and managed the Hermitage Fund, the Hermitage Fund's investors, and Hermitage employees and agents, among others.

use of these stolen companies to perpetrate a theft from Russian taxpayers (A. 317-20 (Compl. ¶¶ 38-45)); the need for extensive legal action to remediate the fraud (A. 322-23 (Compl. ¶¶ 55-56, 59)); and the institution of retaliatory criminal proceedings against Hermitage agents who reported the fraud (A. 323-25, 327 (Compl. ¶¶ 58, 61-68, 72)). Hermitage, an entity with its primary business advising the eponymous Hermitage Fund (A. 308-09 (Compl. ¶ 14)), was obviously directly affected by these actions. Indeed, this Court has recognized that entities can be crime victims when their reputation and integrity are affected by criminal conduct, necessitating legal expenses to remediate. *See United States* v. *Maynard*, 743 F.3d 374, 381 (2d Cir. 2014).

Indeed, Baker & Hostetler itself, in connection with its prior representation of Hermitage, has explicitly recognized that Hermitage is a victim of the Russian Treasury Fraud. (CA. 4 (Decl. ¶¶ 1, 3) (Hermitage and its employees and law firms "became the victims of" the Russian Treasury Fraud)). Even while representing Prevezon in this case, Baker & Hostetler acknowledged that the complaint alleged that the Hermitage Fund was defrauded. (Docket Entry 239 at 8-9). The idea that Hermitage can be narrowly cordoned off as a disinterested bystander to the victimization of its own employees and agents and of the Hermitage Fund is both legally unsupported and utterly divorced from the facts of this case.

ii. Hermitage Has an Interest in Disqualification as an Affected Nonparty

Moreover, even were Hermitage not a crime victim, it would still have the right as a nonparty to expect that its former counsel would not act to its detriment in a substantially related matter.

Although this Court has not addressed a case in which an attorney previously represented a nonparty and non-witness on a substantially related matter, nothing in its precedents relies on the party status of the former client, and this Court's handling of cases involving witnesses confirms that a former client need not face direct liability in order to seek disqualification. Where a witness objects to a former attorney's questioning on a substantially related matter, "[t]he assessment of the fairness of an attorney's questioning of a former client must depend in large part on the view of the client." *United States* v. *James*, 708 F.2d 40, 46 (2d Cir. 1983).[27] Accordingly, this Circuit has deemed disqualification appropriate to protect the witness's interests and fairness to the Government where, as here, the witness moves or joins in a motion made by a party. *See id.* at 45-46 (affirming disqualification of attorney who had previously represented witness in substantially related

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[27] Where the former client does not object, courts typically permit the representation. *See, e.g.*, *Satina* v. *N.Y. City Hum. Res. Admin.*, No. 14 Civ. 3152 (PAC), 2015 WL 6681203, *2 (S.D.N.Y. Nov. 2, 2015).

matter over criminal defendant's objection).[28] Indeed, courts in this Circuit apply the *Evans* test to witnesses as well as parties. *See Scantek Med., Inc.* v. *Sabella*, 693 F. Supp. 2d at 239 (citing *Lund* v. *Chemical Bank*, 107 F.R.D. at 376-77).[29] They apply the same test when granting motions to intervene in order to move for disqualification, the functional equivalent to Hermitage's position here. *See Cole Mech. Corp.* v. *Nat'l Grange Mut. Ins. Co.*, No. 06 Civ. 2875, 2007 WL 2593000, at *6 (S.D.N.Y. Sept. 7. 2007); *Enzo Biochem., Inc.* v. *Applera Corp.*, 468 F. Supp. 2d 359, 360 (D. Conn. 2007). (*See also* Docket Entry 529 at 1).

Other courts agree. The Eighth Circuit has recognized that a former client suffering some detriment as the result of a prior representation can obtain disqualification, even as a nonparty and non-witness. *Zerger & Mauer LLP* v. *City of Greenwood*, 751 F.3d 928, 935 (8th Cir. 2014); *see also Kevlik* v. *Goldstein*,

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[28] Hermitage's CEO Browder will likely be a Government witness, either at a deposition session yet to be conducted or through live testimony.

[29] Although cross-examination of a former client may not always compel disqualification, where cross-examination of the former client relates to substantially related criminal matters, disqualification has been found necessary on that ground alone. *See Lorber* v. *Winston*, No. 12 Civ. 3571 (ADS)(ETB), 2012 WL 5904522, at *10 (E.D.N.Y. Nov. 26, 2012) (granting disqualification where witness was party).

724 F.2d 844, 851 (1st Cir. 1984).[30] Another court has, in notably similar circumstances, found that counsel for one party was cognizably adverse to his former client when the new client's trial strategy was to accuse the former client of a tortious act substantially related to the previous representation, even though the former client was just an employee of the adverse party and as such (like Hermitage here) would not be held directly liable as a result of the pending action. *Illaraza* v. *Hovensa, L.L.C.*, 2012 WL 1154446, at *6 (D.V.I. Mar. 31, 2012) (finding that "a clear conflict exists" where allegations in an opposition for summary judgment "clearly convey that [the current client] is either directly or indirectly accusing [the former client] of having defamed him").

This approach is consistent with the Restatement, which deems a representation materially adverse even without direct liability if the client "consider[s] the potential conflict a serious and substantial matter." *See* Restatement (Third) of Law Governing Lawyers § 121 cmt. c(ii). Of course, under the Restatement standard, there is no denying the adversity here.

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[30] The test the Eighth Circuit applied in *Zerger & Mauer* is similar to the Second Circuit's, requiring proof of an attorney-client relationship, a substantial relationship between the matters, and presuming the disclosure of confidences. *See Zerger & Mauer*, 751 F.3d at 932. Indeed, it arguably sets a higher standard than the Second Circuit, explicitly requiring material adversity as well. *See id.*

There is thus no legal basis for Judge Griesa's conclusions impermissibly limiting a nonparty's right to its former attorney's loyalty.

iii. Refusal to Disqualify Here Is Contrary to the Law on Crime Victim and Nonparty Rights

Judge Griesa's treatment of Hermitage's status as a nonparty and supposed "mere spectator" was key to his reasoning both in finding no substantial relationship (SPA 13), and in assessing the taint to the trial (SPA 14). This was error.

First, Judge Griesa was simply wrong in holding that trial taint was an additional freestanding ground to deny relief even if the *Evans* factors were satisfied. (SPA 8). Instead, this Court has been clear that a successive representation conflict—one satisfying the *Evans* factors—is a "recognized form of taint" to a trial. *Hempstead Video, Inc.* v. *Inc. Vill. of Valley Stream*, 409 F.3d at 133. Thus, when the successive representation test is satisfied, "it is the court's duty to order the attorney disqualified." *Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d at 571. Trial taint is only an independent inquiry when the *Evans* test is *not* satisfied, in which case a court may still order disqualification if a trial is tainted in some other way. *See Tradewinds Airlines, Inc.* v. *Soros*, 2009 WL 1321695, at *5. Judge Griesa committed a basic legal error when he relied on cases stating this point for the very different and incorrect proposition that when the *Evans* test *is* satisfied he may disregard it if he concludes there will be no trial taint. (SPA 8-9).

Second, Judge Griesa's rationale would effectively bar any nonparty from obtaining disqualification. If the advantage Prevezon obtains in this case is not trial taint because Hermitage is not a party (*see* SPA 14; *see also* Def. Stay Br. at 21), and the detriment Hermitage suffers by having its former counsel act to assist retaliatory prosecutions against its personnel is not trial taint because it occurs in separate proceedings (*see* SPA 14-15), it is hard to see how any nonparty could ever obtain disqualification. This is not only untethered from the test in this Circuit, which sets out no such per se rule, *see Emle Indus.*, 478 F.2d at 571, but also necessarily conflicts with the cases involving crime victims and other nonparties. When a crime victim's interest in accountability towards a beneficiary of the crime is thwarted by an unfair advantage gained by the victim's former lawyer, the trial is tainted. *See, e.g., United States* v. *Alex*, 788 F. Supp. at 364. Or when a nonparty's interest in avoiding being subject to a detriment by former counsel in a related matter is thwarted by the trial strategy of former counsel, the trial is also tainted. *See Zerger & Mauer*, 751 F.3d at 934; *see also James*, 708 F.2d at 46 (disqualifying former counsel for witness to prevent unfair advantage to defense). To hold that these effects—plainly present here—do not constitute cognizable trial taint would squarely conflict with these cases providing relief for crime victims and harmed nonparties.

Finally, the effect of a refusal to disqualify in these circumstances would be truly sweeping. The cases cited above do not allow a representation to continue where it causes detriment to a nonparty in a

substantially related matter, let alone where (1) the nonparty is an alleged crime victim and the attorney is attempting to help an alleged beneficiary of the offense escape accountability, (2) the attorney is accusing the former client of having in fact committed the offense that was the subject of the former representation, (3) a foreign nation has already instituted a politically motivated prosecution of a representative of the client, *and* (4) the chief prosecutor of the foreign nation has threatened further prosecution and referenced the very same pending case as a means of gathering evidence for those further prosecutions. The Government is unaware of any case in any jurisdiction countenancing such an extreme conflict.[31] But

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[31] The closest case the Government has found is still worlds apart from this. In *Satina* v. *New York City Human Resources Administration*, the court permitted an attorney to examine a former client—who did not move for disqualification—about a matter that was apparently not substantially related, and noted in passing that it was unlikely the attorney would argue the former client was complicit in the city's discriminatory employment practices but that in any event such an argument would only cause embarrassment and not actual adversity. 2015 WL 6681203, at *2. This comes nowhere near the circumstances here, where (a) the matters are substantially related, (b) the client objects, (c) the accusations are likely to be made and concern a crime, and (d) the accusations raise a serious risk of retaliatory prosecution by a foreign nation.

Judge Griesa has permitted just that. His analysis conflicts with the reasoning of this Circuit and the considered decisions of numerous courts protecting the rights of crime victims and nonparties, and is faulty as a matter of law.

3. Judge Griesa's Placement of the Burden on Hermitage to Identify Confidences is Contrary to the Law of this Circuit

Judge Griesa committed an additional legal error in placing the burden on Hermitage to identify confidences it had shared with its counsel. Under binding Circuit precedent, not only did Hermitage have no such burden, it was entitled to an irrebuttable presumption that it had shared such confidences.

The clear rule in these circumstances is that "where it can reasonably said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation, it is the court's duty to order the attorney disqualified." *Emle Indus.*, 478 F.2d at 571 (internal quotation marks omitted, emphasis in original). Judge Griesa did not apply this standard, instead relying on inapposite cases to put the burden on Hermitage.[32] Given Baker &

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[32] Judge Griesa not only placed the burden on Hermitage, he then put his thumb on the scale, faulting Hermitage for not showing that its confidences related to "how, why, or when Prevezon allegedly laundered Russian Fraud proceeds into the United States." (SPA 14). Whether Hermitage's confidences

Hostetler's 25-page draft declaration concerning the Russian Treasury Fraud, there is simply no question that they "*might* have acquired" confidential information. *Emle Indus.*, 478 F.2d at 571; *see also id.* at 572-73 (noting that confidences are still protected if the information appears in public sources).[33] It was,

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directly implicated Baker & Hostetler's current client is of no significance to the analysis of Hermitage's motion, given that Hermitage plainly did share confidences about the Russian Treasury Fraud itself, a key issue in the case against Prevezon.

[33] Judge Griesa's rejection of the presumption of sharing of confidences on the ground that the previous matter did not involve "litigation" (SPA 14), was both legally and factually erroneous. The draft declaration was intended to convince a judge to subpoena records for use in foreign proceedings, and thus was litigation in every relevant sense. (*See* CA. 6 (Decl. ¶ 7)). Additionally, this Court does not limit the presumption to litigation at all, let alone its in-court phase. *See Emle Indus.*, 478 F.2d at 570 (assessing relationship to prior "matters *or* cause of action" (internal quotation marks omitted, emphasis added)). Instead, this phrasing comes from the Restatement. *See* Restatement (Third) of Law Governing Lawyers § 132 cmt. d(iii). But even applying the Restatement's test and even construing the subpoena application as not "litigation," the result would still be the same—the scope of the information provided would be assessed by "the array of information that a lawyer ordinarily would have obtained to carry out that work,"

accordingly, "the court's duty" to order Baker & Hostetler disqualified.

Moreover, Judge Griesa seriously misstated the nature of the work by calling it "preparatory and minimal." (SPA 13). The representation lasted several months and involved almost $200,000 of billings, the drafting of a detailed 25-page declaration, and a presentation to the United States Attorney's Office to urge a criminal investigation. By contrast, district courts have disqualified counsel based on brief consultations with former prospective clients, in one case based on less than *two hours* of communications with the prospective client. *See Zalewski* v. *Shelroc Homes, LLC*, 856 F. Supp. 2d 426, 429, 437 (N.D.N.Y. 2012) (disqualifying attorney based on consultations lasting less than two hours); *Liu* v. *Real Estate Inv. Group, Inc.*, 771 F. Supp. 83, 84 (S.D.N.Y. 1991) (disqualifying counsel based on three meetings).

Judge Griesa therefore committed legal error in not irrebuttably presuming that Hermitage had shared confidences with Baker & Hostetler and ordering disqualification.

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and could also be "proved by inferences from redacted documents." *Id.* Here the 25-page draft declaration setting out a detailed factual narrative plainly shows that Baker & Hostetler obtained confidential information.

4. Judge Griesa Misapplied this Court's Precedent in Refusing to Disqualify Based on His View of the Equities

Judge Griesa also appeared to put substantial weight on factors not bearing on the test for disqualification, justifying his decision not to disqualify in part on a one-sided view of the equities. (SPA 15-16).

Judge Griesa stressed that the case was pending for somewhat over two years and that several million dollars were under pretrial restraint, but gave no weight to the defendants' role in creating this situation. The defendants waited until the eve of trial to disclose that they were abandoning their prior representations to Judge Griesa (and the Government) that Hermitage was immaterial to their defense and not adverse. The delay is thus attributable to them, and should not be used to reward their undisclosed turnabout. *See Alex*, 788 F. Supp. at 365 (refusing to disqualify for belatedly disclosed conflict "would discourage, rather than encourage, attorneys to disclose conflicts of interest."); *see also GSI Commerce Solutions, Inc.* v. *BabyCenter, LLC*, 618 F.3d at 212 n.3.

Other aspects of the defendants' conduct also undercut their claims of overriding urgency. Though they objected to a stay pending Hermitage's expedited appeal,[34] the defendants themselves have delayed the case when it is to their advantage. They put discovery on hold for more than a year during the pendency of

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[34] Defendants sought a stay pending their own appeal of the disqualification decision. (A. 530).

several motions, a meritless interlocutory appeal, and settlement discussions. (*See* Docket Entry 311 at 6 n.4). Once the defendants expressed their decision to move forward with discovery, the Government proceeded expeditiously such that, after document discovery began in mid-June of 2015, trial in this complex case was scheduled for February 1, 2016. The defendants' complaints of urgency must thus be taken in the context of their willingness—when they consider it advantageous—to put the case on hold for almost twice as long as the entire discovery period in the case.

The pretrial restraint also contains significant accommodations to Prevezon's interests. The amended protective order allowed the defendants to work with the Government to propose alternative investments for the restrained funds that would retain the District Court's jurisdiction over them. (Docket Entry 173 ¶¶ 5-6). Defendants never proposed any transactions that the Government rejected, and indeed the Government consented to several sales of property. (A. 357-58 (Compl. ¶¶ 138-41)). In fact, the defendants previously sought an interlocutory appeal of the amended protective order, and this Court dismissed the appeal, holding that "Prevezon failed to show that the amended protective order effectively 'shut down' its business." *United States* v. *Prevezon Holdings*, 617 F. App'x 56, 58 (2d Cir. 2015) (summary order).

On the other side of the scale, Judge Griesa placed patently insufficient weight on the impact on Hermitage of refusing to disqualify. On finding a successive representation conflict, "it is the court's duty to

order the attorney disqualified." *Emle Indus.*, 478 F.2d at 571 (internal quotation marks omitted). This is doubly so here, where the conflict and the risks posed to the former client are unusually severe. For Judge Griesa to find that the risk of Russian enforcement action against the former client (an unusual and pronounced risk, which he conceded had "factual support") was outweighed by the delay and inconvenience to Prevezon of getting new counsel (an incident of every disqualification, which was exacerbated by Prevezon's own conduct) was a serious abuse of discretion.

Moreover, to the extent that any equitable balancing was appropriate, Judge Griesa's ruling disregarded the larger implications of condoning an attorney conflict this extreme. Allowing a victim's attorney to represent those accused of benefiting from the same crime—and to then accuse the victim of committing that crime—would likely "have a chilling effect on obtaining victims' assistance" in future investigations. *Alex*, 788 F. Supp. at 365. A chilling effect is particularly likely here, where the attorney not only attempts to defend the alleged beneficiary by accusing the victim, but intends to do so in a way that poses a very real prospect of retaliatory foreign prosecution of the victim's personnel and associates. Finally, in addition to the implications for crime victims' rights and law enforcement interests, Judge Griesa, in weighing the equities, also ignored the trial court's responsibility to police the conduct of the bar, and ignored the risk that condoning such conduct will diminish public confidence in the legal profession and the courts. *See, e.g., United States* v. *Stout*, 723 F. Supp. at 309 ("[A]n

ordinary layperson would find it both troublesome and reproachful if I were to condone the representation of the alleged victimizer by the attorney who, little more than a year ago, enjoyed the status and financial rewards associated with his position as trusted advisor to the purported victim." (internal quotation marks omitted)); *see also Wheat* v. *United States*, 486 U.S. 153, 160 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."); *Hull* v. *Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975) ("The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount." (affirming disqualification, noting that considerations of judicial economy and choice of counsel "must yield . . . to considerations of ethics which run to the very integrity of our judicial process.")).

Accordingly, the District Court clearly abused its discretion in finding that a balancing of the equities authorized an unusual and especially injurious harm to a former client in order to avoid a standard and largely self-inflicted detriment to Prevezon.

POINT II

This Court Has Jurisdiction

A. Applicable Law

This Court has interlocutory jurisdiction over collateral orders that (1) "conclusively determine the disputed question," (2) "resolve an important issue

completely separate from the merits of the action," and (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Assessment of whether an order is an appealable collateral order are made on a categorical basis. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009).

Orders denying motions to disqualify are not subject to interlocutory appeals by parties, *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 369 (1981), but may be appealable collateral orders for nonparties who cannot appeal after final judgment, *see Conticommodity Servs., Inc.* v. *Ragan*, 826 F.2d 600, 601-02 (7th Cir. 1987). The Supreme Court has held that orders granting motions to disqualify, at least as to parties, are typically intertwined with the merits of the case. *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439-40 (1985). However, the Supreme Court has, to protect the rights of nonparties, allowed them to raise subject matter jurisdiction, which implicates the merits of the action, on interlocutory appeals of civil contempt orders. *U.S. Catholic Conf.* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988).

The writ of mandamus is available in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (internal quotation marks omitted). For the writ to issue, (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief it desires"; (2) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under

the circumstances"; and (3) "the petitioner must demonstrate that the right to the writ is clear and indisputable." *Id.* at 932-33 (internal quotation marks omitted). The writ of mandamus is appropriate where the order presents a "novel and significant question of law" and "a legal issue whose resolution will aid in the administration of justice," *id.* at 939. Mandamus has been held appropriate to reverse the denial of a disqualification motion where "the public perception of the profession could be damaged" by allowing the conflicted counsel to continue. *Unified Sewerage Agency of Wash. County* v. *Jelco, Inc.*, 646 F.2d 1339, 1344 (9th Cir. 1981).

B. Discussion

This Court should review the flawed decision denying Hermitage's motion to disqualify Baker & Hostetler, either through an interlocutory appeal as a collateral order, or through construing Hermitage's appeal as a petition for the writ of mandamus.

Hermitage's status as a nonparty likely provides a basis for an interlocutory appeal. There is no question that Judge Griesa's order is final as to Hermitage, and as a nonparty it would not be able to appeal from final judgment. *See Marino* v. *Ortiz*, 484 U.S. 301, 303 (1988). The only real question is whether disqualification decisions adverse to nonparties resolve issues separable from the merits. While the Supreme Court, in *Richardson-Merrell, Inc.* v. *Koller,* has held that such orders are not, as a class, separable as to parties, 472 U.S. at 439-40, the analysis may be different as to a nonparty, whose injury will necessarily

be separate from the final judgment. And indeed, even after *Richardson-Merrell*, the Supreme Court permitted a nonparty to raise an issue wholly decisive of the merits—the district court's subject matter jurisdiction—even when a party would not have been able to do so on an interlocutory basis. *U.S. Catholic Conf.* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. at 76. *Richardson-Merrell* is thus properly viewed as taking a "functional" approach to separability, *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986), under which nonparty appeals raise quite different issues from party appeals. *See* Fed. Prac. & Proc. § 3911.2 ("Appeals by nonparties or parties whose role in the litigation seems subordinate or collateral to the main issues involve calculations that are similar in part to calculations of separability.").

But even if the Court concludes Hermitage cannot take an interlocutory appeal, it should grant Hermitage's alternative request for the writ of mandamus. Absent the possibility of a collateral-order appeal, the District Court having rejected Hermitage's request for certification under 28 U.S.C. § 1292(b), and without the ability to appeal from a final judgment, Hermitage has no other adequate means of obtaining relief. Hermitage's right to the writ of mandamus is clear and indisputable. As discussed thoroughly above in Point I, Judge Griesa's refusal to disqualify Baker & Hostetler is a clear abuse of discretion, resting on a clearly erroneous characterization of an essential element of the Government's case as "mere background," and infected by legal error as to (a) the interests of crime victims in later enforcement proceedings, (b) the interests of nonparty clients in

their former attorneys' loyalty, (c) the availability of disqualification to a nonparty, and (d) the presumption that a client shared confidences with its former counsel.

Finally, the writ is appropriate. The District Court's legal errors involving the rights of crime victims and nonparty clients contravene principles that are well established generally but have not been explicitly addressed by this Court. These questions of law are significant and will aid in the administration of justice, especially given the extreme nature of this conflict, which should not be condoned by this Court. These circumstances resemble those in *In re City of New York*, where the writ was appropriate as an occasion to expand on the Court's articulation of the law enforcement privilege and provide clarity to courts and litigants. *See* 607 F.3d at 940-43.

Indeed, also like in *In re City of New York*, mandamus is appropriate because of the impact of the ruling below on law enforcement interests. In that case, an order for the disclosure of privileged materials that "would likely undermine the ability of a law enforcement agency to conduct future investigations," 607 F.3d 923 (internal quotation marks omitted), was appropriately corrected by the writ. Here, the District Court's order condones the previously unheard-of possibility that an attorney hired by a crime victim to investigate an offense would not only subsequently advocate for the beneficiaries of the offense but accuse the victim of committing it. In so doing, it threatens a "chilling effect on obtaining victims' assistance" in future criminal investigations, rendering

the writ appropriate to correct this outcome. *See Alex*, 788 F. Supp. at 365.[35]

Finally, given the seriousness of the conflict, the writ is appropriate to correct a decision that harms the public reputation of the bar and the courts. *See Unified Sewerage Agency of Wash. County, Or.* v. *Jelco, Inc.*, 646 F.2d 1339, 1344 (9th Cir. 1981); *Stout*, 723 F. Supp. at 309.

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[35] The impact of the order below on crime victim interests also renders the writ appropriate. The Crime Victims Rights Act, 18 U.S.C. § 3771, enumerates certain victim rights and explicitly provides that these rights may be enforced by expedited mandamus proceedings. *See* 18 U.S.C. § 3771(d)(3). Although the District Court's order did not implicate these enumerated rights, Congress' judgment that mandamus is an appropriate remedy in analogous circumstances is instructive.

CONCLUSION

This Court should reverse the January 8 order and remand to the District Court with instructions to disqualify Baker & Hostetler from representation of Prevezon.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,343 words in this brief.

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