

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
UNITED STATES OF AMERICA,	:
	:
Plaintiff,	:
	:
- against -	:
	:
PREVEZON HOLDINGS LTD., et al.,	:
	:
Defendants,	:
	:
- and -	:
	:
ALL RIGHT, TITLE AND INTEREST IN THE REAL	:
PROPERTY AND APPURTENANCES KNOWN AS	:
THE 20 PINE STREET CONDOMINIUM, 20 PINE	:
STREET, NEW YORK, NEW YORK 10005, UNIT 1816,	:
et al.,	:
	:
Defendants in Rem.	:
	:
-----X	

13 Civ. 6326 (WHP)

**MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA
IN SUPPORT OF MOTION *IN LIMINE* NUMBER 1 TO INTRODUCE
CERTAIN DOCUMENTARY EVIDENCE**

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The Government respectfully submits this memorandum in support of its motion *in limine* to introduce certain documentary evidence.

INTRODUCTION

This case revolves around the laundering in New York of a portion of the proceeds of a massive corrupt fraud scheme committed in Russia (the “Russian Treasury Fraud”). As a result of this international scope, a large portion of the evidence the Government will present at trial originated from other countries. In addition to gathering domestic evidence—such as evidence of Prevezon’s activities in New York or of the U.S. banks that processed wire transfers of fraud proceeds through the United States—the Government obtained voluminous evidence by requesting legal assistance from the governments of multiple different countries through which the fraud proceeds flowed.

However, the Russian Federation, where the fraud took place and where the initial money laundering steps were taken, has not honored the United States’s request for legal assistance. Instead, a confidential witness lawfully obtained access to and copied a Russian criminal case file containing numerous relevant documents, which will supply the bulk of the Government’s evidence regarding the fraud in Russia and the transfer of its proceeds abroad through shell companies. This criminal case file contains both documents showing how the Russian Treasury Fraud was committed, and bank records and investigative analyses showing how its proceeds were moved through Russia. The Government will seek to authenticate this copy of the criminal file through the recorded testimony of this confidential witness, and to introduce the bank records and investigative analyses contained therein to show the flow of funds. The Government will also seek to authenticate and introduce files from other Russian court cases, the authenticity of which cannot be established directly through a percipient witness but can be established by

comparison to portions of the criminal case file that will be authenticated by the confidential witness, pursuant to Federal Rules of Evidence 901(b)(3) and (b)(4).

BACKGROUND

As set forth in the Second Amended Complaint in this action, the Government seeks forfeiture of property and the imposition of civil money laundering penalties against the real estate company Prevezon Holdings, Ltd., and several related companies (collectively “Prevezon”) for laundering a portion of the proceeds of an elaborate Russian tax fraud scheme. In 2007, a Russian criminal organization defrauded Russian taxpayers of approximately \$230 million by stealing the corporate identities of three companies (the “Stolen Companies”) held by the Hermitage Fund (the “Fund”), manufacturing false liabilities against them, and claiming tax refunds on that basis. *See* D.I. 381 ¶¶ 18-45.¹ These stolen funds were then moved through an elaborate network of shell companies, and a small portion—approximately \$1.96 million—was ultimately transferred by shell companies to defendant Prevezon Holdings. *See* D.I. 381 ¶¶ 75-128. Prevezon then laundered these funds into European real estate and invested money derived from these funds in various pieces of New York real estate in additional money laundering transactions. *See* D.I. 381 ¶¶ 105-10, 129-42.

There have been some unusual circumstances bearing on the Government’s ability to collect evidence in this investigation. The Russian Treasury Fraud and the initial layers of

¹ Citations to “D.I.” refer to docket items in this case. Citations to “La Morte Decl.” refer to the Declaration of Tara La Morte, filed herewith. Citations to “GX” refer to proposed Government Exhibits at trial, which are available in the disk attached to the Declaration of Tara La Morte as Exhibit 10. Given the unusual safety concerns present in this case, the Government respectfully requests permission to file under seal certain marked portions of this document, together with those supporting documents containing material that is protected under the confidentiality order in this case, D.I. 280.

money laundering transactions took place within the territory of the Russian Federation, which has not cooperated with the Government's request for legal assistance in this matter. The Russian Federation responded to an initial legal assistance request not by providing requested documents but by providing a selection of non-germane documents and a letter purporting to exonerate all Russian officials and Prevezon personnel. *See* D.I. 421-1. In this document, the responding Russian prosecutor claimed to be able to find no evidence of certain fund transfers that in fact were reflected in bank records that had been collected by Russian investigators and were in the Government's possession. *See* D.I. 295 at 1.² Additionally, this case presents certain security concerns that may limit the number of persons to be called as witnesses.³

Accordingly, a substantial number of documents in this case come from foreign sources, many without certifications drafted under the Federal Rules of Evidence, and some of them require somewhat complex means of authentication. In particular, a large volume of the evidence

² Prior counsel for the defendants apparently had notice of the precise timing of the delivery of this letter—i.e., of the delivery of the Russian Federation's response to the U.S.—before the Government did.

³ As Hermitage and HSBC agents uncovered and filed criminal complaints about the Russian Treasury Fraud, they became targeted by retaliatory criminal cases. One of them, a legal adviser named Sergei Magnitsky, was arrested and died in pretrial detention in Moscow in a widely recognized human rights abuse. 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. In addition, persons with knowledge of certain relevant facts have reportedly died in suspicious circumstances. *See generally, e.g.,* Jeffrey E. Stern, *An Enemy of the Kremlin Dies in London: Who Killed Alexander Perepilichny?*, *The Atlantic* (Jan/Feb. 2017 issue), available at <https://www.theatlantic.com/magazine/archive/2017/01/the-poison-flower/508736/>. The Government does not allege that the defendants here were involved in these deaths, but notes it as a circumstance raising security concerns in this case.

[REDACTED] To the extent it becomes relevant, the Government can detail further security concerns related to this case under seal, *ex parte*.

of the Russian Treasury Fraud and the tracing of funds in Russia is found in a certain criminal case file in Russia (the “Criminal Case File”), which will be authenticated by the testimony of a certain individual whose identity is being kept confidential during pretrial proceedings (the “Confidential Witness”).⁴ The Confidential Witness, [REDACTED], has testified via videotaped deposition in this action, and the Government will introduce portions of this deposition under Rule 32(a)(4)(B) as the Confidential Witness’s trial testimony.⁵ This testimony will state the following: The Confidential Witness is a Russian lawyer who, in the course of representing another client,⁶ was granted access to the Criminal Case File, which is the court file of the criminal prosecution of [REDACTED]

⁴ The Confidential Witness’s identity will be revealed to the jury when his testimony is presented at trial. However, due to safety concerns, his identity is being kept confidential pursuant to the confidentiality order entered in this case during pretrial proceedings.

⁵ The Confidential Witness lives in Russia. The Confidential Witness and the Witness’s family stayed in the United States temporarily in advance of the deposition as a safety measure. Following the deposition, Judge Griesa entered a sealed order confirming that the Confidential Witness could return to Russia and the deposition testimony would be usable at trial under Rule 32(a)(4)(B). *See* La Morte Decl. Ex. 18 at 27, 36-37. Defendants sought reconsideration of that order after it was entered, and as a result Judge Griesa ruled that the defendants could take an additional deposition session before the Confidential Witness left the country. The defendants took that additional session on October 23, 2015, and the Confidential Witness subsequently left the United States and is no longer within it. [REDACTED]

⁶ [REDACTED]

[REDACTED]

[REDACTED] . La Morte Decl. Ex. 12 at 199:21-202:3. Having been granted access to the Criminal Case File, the Confidential Witness—in accordance with standard Russian file copying procedures—photographed it in a specially designated room at the courthouse, in the presence of the court clerks, over the course of several days. La Morte Decl. Ex. 12 at 202:4-05:2. The original Criminal Case File consists of a set of bound volumes into which materials from different sources are physically added by Russian judicial and law enforcement authorities. La Morte Decl. Ex 12 at. 209:10-10:14. The photographs of the pages of these bound volumes (somewhat over 30,000 images) were stored on a set of SD cards, which the Confidential Witness then allowed representatives of the Government to copy onto a hard drive in the U.S. Embassy in London. La Morte Decl. Ex. 12 at 218:1-21. As set forth below, the Government will seek to authenticate this hard drive and introduce a number of records from it.

The hard drive contains copious evidence of the Russian Treasury Fraud and the initial portions of the money laundering network used to hide its proceeds. As set forth in more detail below, the fraud was effected in large part through legal filings, and as such, various documents from the tax offices or from arbitration cases that were copied into the Criminal Case File provide evidence of the fraud itself and how it was carried out. Additionally, the Criminal Case File contains bank records from the accounts of multiple Russian shell companies used to launder the proceeds of the fraud, as well as three different investigative reports analyzing aspects of the activity in these shell company bank accounts.

ARGUMENT

“The purpose of an *in limine* motion is to aid the trial process by enabling the Court to

rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (internal quotation marks omitted); *see also Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 467 (S.D.N.Y. 2005); *see generally* Fed. R. Evid. 104. *In limine* motions therefore serve the salutary goal of “streamlin[ing] trials and settl[ing] evidentiary disputes in advance.” *United States v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002).

The Court may rely on the Federal Rules of Evidence (“Rules”) and its own broad discretion in determining whether or not to exclude certain evidence at trial. *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2d Cir. 1984); *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976). Ordinarily, evidence is admissible so long as it is relevant, meaning that it has “any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action,” Fed. R. Evid. 401, and not otherwise barred under the Rules, Fed. R. Evid. 402. The proponent of the evidence, however, bears the burden of proving that it is admissible. *See Evans v. Port Auth. of New York & New Jersey*, 192 F. Supp. 2d 247, 263 n.121 (S.D.N.Y. 2002) (“The burden of establishing admissibility, of course, is with the proponent of the evidence.”).

These issues are suited to pretrial resolution because they revolve in large part around an analysis of documents, and their relevance to the trial is not likely to shift significantly as the evidence comes in. The Russian court documents within the Criminal Case File are relevant to establish that the Russian Treasury Fraud was committed and constituted specified unlawful activity; but more fundamentally the question of authentication does not depend on a detailed

analysis of their relevance. The Russian bank records and investigative reports contained in the Criminal Case File, for their part, are plainly relevant—they are the best evidence of the path of the funds out of Russia.

I. A CONFIDENTIAL WITNESS’S TESTIMONY AUTHENTICATES A RUSSIAN CRIMINAL CASE FILE

As noted above, the Confidential Witness’s deposition testimony will establish to the jury that the Confidential Witness copied the contents of the Criminal Case File onto SD cards, which he then permitted the Government to copy onto a hard drive. *See* La Morte Decl. Ex. 12 at 201:22. A Department of Homeland Security special agent will then—absent a stipulation as to chain of custody—identify the hard drive as that containing the copy of the SD cards, and testify as to its chain of custody. Finally, the Government will offer the hard drive into evidence as an exhibit, though not for the truth of the matters asserted in the Criminal Case File documents which it contains.

The hard drive, when offered into evidence in this fashion, should be received, subject to a limiting instruction that the materials contained therein are not to be considered for their truth unless, and then only to the extent that, the Court rules that a particular document contained on the drive may be so considered. The above-referenced Confidential Witness and U.S. law enforcement testimony is plainly sufficient to allow a reasonable jury to conclude that the hard drive is what it purports to be: a repository for a copy of the Criminal Case File. *See* Fed. R. Evid. 901(7)(B) (evidence that “a purported public record or statement is from the office where items of this kind are kept” is an example of sufficient authentication evidence).⁷ The relevance

⁷ Although not necessary for admissibility, the Government will offer additional evidence corroborating the accuracy of certain of the file’s contents. For example, as discussed in more

of the hard drive's contents—that is, the Criminal Case File—is twofold: first, there are a number of documents that appear in the Criminal Case File that are relevant for reasons other than their truth—indeed, a number of them are forgeries—and their presence in the Criminal Case File is thus highly relevant. Such documents include: (1) a number of filings in the sham arbitration cases that were used to manufacture judgments against the companies; (2) documents evidencing the reregistration of the companies; (3) documents evidencing the requests for refunds and their near-instantaneous approval; (4) documents evidencing the opening of bank accounts by the fraudsters at tiny banks right before receipt of the refunds and closure right after; (5) the filing of criminal complaints by Hermitage and HSBC agents before the refunds were paid; and (6) the institution by Russian authorities of criminal proceedings against the Hermitage and HSBC agents making complaints. These categories of documents are relevant both as verbal acts with legal significance carrying out the fraud (e.g., the reregistration of companies, the filing of lawsuits, the concession of liability, the imposition of judgments, the request for refunds, and the swift approval and payment of refunds, and the filing of complaints by HSBC agents before the refunds), and because they contain numerous telltale errors and irregularities that indicate fraud and corruption, such as errors belying that contracts were backdated, GX 109-1 (backdated contracts), 106-7 (appointment of director after he supposedly signed contracts); typographical errors proving that the fraudsters used electronic files seized by Russian law enforcement, GX 107-1 to 107-6 (same typographical error in clause 6.4 of both original and reregistered charter);

detail below, the bank records present in the criminal case file record outgoing transactions with accounts in countries such as Moldova, Latvia [REDACTED]. The fact that these same transactions—which are not public knowledge—are reflected in bank records obtained from the governments of those three countries further proves the authenticity of the records in the Criminal Case File.

irregularities in the swift approval of the refunds with no due diligence, GX 102-1 to 102-4 (refund applications), GXs 103-1 to 103-5 (refund decisions); and opening of cases against those who reported the fraud.

A second reason for the introduction of the hard drive is that portions of the Criminal Case File contain assertions that are admissible for their truth under various hearsay exceptions. While the Government will not ask for the entire Criminal Case File to be admitted for the truth, it will seek to introduce a number of images from the hard drive, as separate exhibits, for their truth under applicable hearsay exceptions. The Confidential Witness testimony will, as to these documents, provide the basis for their authenticity. It would be premature to rule on each applicable hearsay exception prior to the offer of an exhibit, but most of them fall into two broad categories. First, a number of the documents found within the Criminal Case File are the records of bank accounts used to launder the fraud's proceeds in Russia, which were collected by Russian criminal investigators and, as discussed below, are admissible business records under Federal Rule of Evidence 803(6). Second, a number of the documents in the Criminal Case File contain the investigative findings of public offices that are admissible public records under Rule 803(8).

Accordingly, the Confidential Witness's testimony will lay a foundation for the admissibility of the entire contents of the Criminal Case File, though not (independently) for their truth.

II. DOCUMENTS FROM OTHER CASE FILES ARE AUTHENTICATED BY COMPARISON WITH THE PORTIONS COPIED INTO THE CRIMINAL CASE FILE

Contained within the Criminal Case Files are portions of court files from arbitration cases that were used to perpetrate the fraud. As noted above, a number of these arbitration filings are

highly relevant and admissible not for their truth but for their status as verbal acts perpetrating the fraud or for mistakes or irregularities they reveal indicative of fraud or corruption. The Government has obtained, from other lawyers who—given the unusual circumstances of this case—will not be available to testify at trial, more complete copies of the files from these arbitrations than those which appear in the Criminal Case File, as well as the complete file for another, related arbitration (together, the “Arbitration Files”). The Arbitration Files are highly probative of fraud and corruption.⁸ The Government will be offering the Arbitration Files based on comparison to the Criminal Case File, pursuant to Rules 901(b)(3) and (b)(4). *See* GXs 109-31, 109-32, 109-33, 109-34, 111-11, 111-13. Similarly, two documents derived from another Russian court case—in which materials seized from Russian law firm Firestone Duncan were examined—also bear significant indicia of authenticity when compared with the Criminal Case File. *See* GXs 119-35, 119-36. (Together, these documents and the Arbitration Files are referred to below as the “Compared Records.”)

The Federal Rules offer a great degree of flexibility in the methods of authenticating evidence. Authentication, a relatively minor threshold hurdle, need not be established by the testimony of a witness with knowledge. *See, e.g., Elsevier B.V. v. UnitedHealth Group, Inc.*, 784 F. Supp. 2d 286, 292 (S.D.N.Y. 2011) (“Rule 901 does not erect a particularly high hurdle, and that hurdle may be cleared by circumstantial evidence” (quoting *United States v. Tin Yat Chin*, 371 F.3d 31, 37 (2d Cir. 2004) (internal quotation marks omitted)). Indeed, even though Rule 901 is clear that its enumeration of means of authentication consists of “examples only—

⁸ The arbitration cases continued after the unavailable attorneys made the copies that yielded the Arbitration Files, generating additional pages documenting later proceedings, but the Arbitration Files are complete records as of the time they were copied.

not a complete list,” the rule explicitly provides for two circumstantial means of authentication relevant here. Rule 901(b)(3) allows authentication by “[a] comparison with an authenticated specimen by an expert witness or the trier of fact.” Rule 901(b)(4), even more broadly, allows for authentication by “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”

Here, the Compared Records have numerous distinctive characteristics and contents that will allow the trier of fact to authenticate them by comparison with the Criminal Case File. Each of the Compared Records, as an initial matter, has the appearance of what it purports to be: A set of photographs of a file or bound volume bearing the appropriate caption and docket number, all roughly similar in appearance to the photograph copy of the Criminal Case File (and to each other).⁹ Although this sort of superficial comparison alone often suffices to clear the modest threshold hurdle of authentication, *see, e.g., Luv n Care Ltd. v. Regent Baby Prods. Corp.*, 986 F. Supp. 2d 400, 408 n.40 (S.D.N.Y. 2013) (authenticating third-party catalogs based on their appearance and public contents); *Kaur v. N.Y. City Health & Hospitals Corp.*, 688 F. Supp. 2d 317, 324 (S.D.N.Y. 2010) (authenticating documents that were “identical in form” to those which were acknowledged), there are far more powerful and telling grounds present here. As summarized in a chart attached to this memorandum as Attachment A, all but one of the Arbitration Files contain pages of nonpublic information such as contracts and bank account numbers that also appear in the (authenticated) Criminal Case File. *See* Att. A. And even the lone Arbitration File that does not have its pages actually reproduced in the Criminal Case File

⁹ The Government will introduce testimony from a lawyer familiar with Russian court files that this is their general appearance.

contains nonpublic information that is also found in the nonpublic Criminal Case File—sham contracts that are textually near-identical to authenticated sham contracts, just slightly reformatted. *See id.* (entries for GX 109-33). Moreover, a number of the pages of the Arbitration Files bear the signatures of individuals whose signatures also appear in the Criminal Case File. *See id.* As those witnesses signed those statements, the jury will also be entitled to compare the signatures on the Arbitration Files with the signatures appearing in the Criminal Case File. Similarly, the remaining Compared Records—two documents from a separate investigation—also contain telling marks of authenticity. These two documents describe the inspection of materials seized from Firestone Duncan in the raids at issue in this case. GX 119-35, 119-36. Each of these inspection reports is signed by an officer whose signature appears in the Criminal Case File. Att. A.

These features are amply sufficient to allow a jury to infer that the Compared Records are what they appear to be. While authenticity cannot be based on non-distinctive features, such as a social networking page purporting to be in a person's name but bearing no distinctive information, *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014), the cases are clear that where, as here, the documents to be authenticated contain distinctive features, the small threshold showing is made and a jury is entitled to consider their authenticity. *See, e.g., United States v. Maldonado-Rivera*, 922 F.2d 934, 957 (2d Cir. 1990) (admitting document due to its appearance, non-publicly known content, and other circumstances; noting that a writing can be authenticated under Rule 901(b)(4) if it “deals with a matter sufficiently obscure or particularly within the knowledge of the persons corresponding so that the contents of the writing were not a matter of common knowledge” (quoting 5 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 901(b)(4)

[01], at 901-49 (1990)) (brackets omitted)); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3d Cir. 1985) (finding documents authentic in part because “the information in each of the purported records, although not secret by any means, was not widely held”); *Elsevier, B.V.*, 784 F. Supp. 2d at 292 (finding “more than sufficient” authentication where documents found in a party’s files conformed to template and included unique reference numbers). Indeed, it is particularly common to authenticate documents that—as these do—have an appearance similar to authenticated documents and have information within them that corresponds to information found in authenticated documents. *See, e.g., United States v. Turner*, 718 F.3d 226, 233 (3d Cir. 2013) (finding authenticity established where foreign bank documents had appearance of bank records, were addressed to known addresses, were found in an expected place, and were partly reconciled with authenticated bank records); *United States v. Rue*, 819 F.2d 1488, 1494 (8th Cir. 1987) (agreeing that “authenticity could readily be established under Rule 901(b)(4) by comparing the contents of the patient cards with information from other documents whose authenticity is already established” together with familiarity with blank versions); *United States v. Sideman & Bancroft LLP*, 704 F.3d 1197, 1204 (9th Cir. 2013) (“Indeed, Nolan’s billing and payment records could be verified by comparing those records and Nolan’s bank records.”); *United States v. Greenfield*, 831 F.3d 106, 118 (2d Cir. 2016) (citing *Rue* and *Sideman & Bancroft*, noting that authenticity can be established “by comparison to other related documents”). Similarly, the trier of fact’s ability to compare a signature on a proffered document to one that is already admitted is another standard means of authentication under Rule 901(b)(3). *See, e.g., Stiles Machinery Inc. v. Lestorti*, No. 05 Civ. 397 (JGM), 2007 WL 2099218, at *7 (D.Conn. Jul. 17, 2007).

Accordingly, these distinctive features and comparisons suffice to allow a jury to find the fuller arbitration files, and the document inspection reports, authentic. Any arguments against authenticity are properly made to the jury. *See, e.g., Maldonado-Rivera*, 922 F.2d at 958 (“Defendants’ challenges to the authenticity of the communiqué, such as their argument that the logo could have been constructed by someone outside the Macheteros organization, go more to the weight of the evidence than to its admissibility.” (internal quotation marks and citation omitted)).

III. THE BANK RECORDS CONTAINED WITHIN THE COURT FILES, AND CERTAIN INVESTIGATIVE REPORTS REFERENCING THEM, ARE ADMISSIBLE TO PROVE THE ACCOUNT ACTIVITY

The Criminal Case File contains the records of numerous Russian bank accounts that were collected by Russian criminal investigators from either the banks or—in the case of banks that had been shut down by the time of the investigation—from liquidators for the banks or archive administrators. These records, which form the basis for the tracing of funds out of the Russian Federation, are admissible foreign business records or, alternatively, under the residual hearsay exception, which has often been applied to situations of this kind.

A. The Bank Records Are Admissible as Foreign Business Records or Public Records

Although none of the Russian bank records subject to this motion is accompanied by a certification drafted to comply with the Federal Rules of Evidence of the United States, almost all of them are accompanied by transmittals attesting to their genuineness that fall within the latitude afforded to foreign business records. The other few records not accompanied by transmittals are admissible because they were each seized into the Criminal Case File by specific investigatory resolutions that incorporate investigative factfindings qualifying as admissible

public records.

1. The Attested Records Are Admissible Foreign Business Records

Rule 803(6) allows the admission of business records that are made contemporaneously by persons with knowledge, in the course of regularly conducted activity that included the keeping of such records as a regular practice, if such facts are established by a custodian or appropriate certification, and the opponent does not show a lack of trustworthiness. Fed. R. Evid. 803(6). Significantly here, the above conditions can be shown “by a certification that complies with Rule 902(11) or (12)” as well as a custodian. Rule 902(12), governing certification of foreign records in a civil case, is more permissive than the domestic certifications covered by Rule 902(11). For foreign records, “the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed.” Fed. R. Evid. 902(12).¹⁰

The bank records offered by the Government from the Criminal Case File are not accompanied by formal certifications, but a number of them (the “Attested Records”) are accompanied by transmittal paperwork that meets the flexible standard for foreign records under Rule 902(12). Russian criminal investigators issued orders commanding a series of banks, public

¹⁰ In addition, either domestic or foreign certifications must be accompanied by reasonable written notice and an opportunity to challenge, which is provided by this motion. *See* Fed. R. Evid. 902(11) (“Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so the party has a fair opportunity to challenge them.”); *cf.* *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 692 (S.D.N.Y. 2014) (finding residual hearsay exception notice satisfied by production of documents in discovery and inclusion in pretrial exhibit disclosures).

authorities, liquidators and archives to provide the records for certain bank accounts as part of a criminal investigation, and the responding entities in each case provide the records, accompanied by a transmittal identifying the Attested Records as the records for the specified accounts, and stamped with the respondent's seal. *See* GX 201-1 (request and response from tax authorities as to refund payment); GX 201-3a, 3b, 3c (request and response from archives as to Rilend, Makhaon, and Yauza-Region); GX 201-4a, 4b, 4c (request and response from Intercommerz Bank as to Fausta); GX 201-5b, 5c, 5d (request and response from Ocean Bank as to Anika); GX 201-6a, 6b, 6c, 6d (request and response from Sberbank as to ZhK); GX 201-7a, 7b, 7c, 7d (request and response from Mosstroieconombank as to Univers and Komino); GX 201-8a, 8b, 8c, 8d (request and response from Mezhhbusinessbank liquidator as to Lanitime); GX 201-9a, 9b, 9c (request and response from Sberbank as to Sofit); GX 201-10a, 10b, 10c, 10d (request and response from Sberbank as to Candy); GX 201-11a, 11b, 11c, 11d (request and response from Sberbank as to Dalprom).

In these circumstances, the transmittal letters from respondents to the Russian criminal investigators identifying the Attested Records, though not explicitly referencing the terms of the U.S. Federal Rules, plainly amount to an attestation that the records are in fact business records of the respondent. The jury will easily be able to conclude that intentional false statements in these transmittals—i.e., the intentional provision to Russian criminal investigators, in response to official process, of documents that are represented to be the bank records for the specified accounts but in fact are not—would subject the responding persons to criminal penalties, just as it would in the United States. In these situations, the business records exception is satisfied for the Attested Records notwithstanding the fact that the letters were drafted to meet Russian, not

U.S., evidentiary standards. *Cf. United States v. Strickland*, 935 F.2d 822, 830-31 (7th Cir. 1991) (admitting foreign bank records despite failure to comply with criminal foreign-records certification statute where bank employees would have been criminally liable for transmitting false records).

Indeed, courts recognize that “neither a qualified witness nor a certification is necessary to provide the foundation [for admission of a business record] in all instances.” *Chevron Corp. v. Donziger*, 974 F. Supp. 2d at 691. Rather, “the requirements for qualification as a business record can be met by documentary evidence, affidavits, or admissions of the parties, i.e., by circumstantial evidence, or by a combination of direct and circumstantial evidence.” *Id.* (citing *United States v. Pellulo*, 964 F.2d 193, 201 (3d Cir. 1992)). Indeed, “a foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements.” *FDIC v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986); *see also Donziger*, 974 F. Supp. 2d at 691 (quoting *id.*, taking judicial notice of nature of bank statements and admitting uncertified bank records under Rule 803(6)). Under this doctrine, the Attested Records (as well as the Seized Records described below) can all be found to be business records even in the absence of a certification under the Federal Rules of Evidence, as each was plainly produced by a bank and used in the course of the bank’s business.

2. The Seized Records And the Attested Records Are Incorporated in Investigative Findings Qualifying as Public Records

In addition to the Attested Records, two other sets of bank records from the Criminal Case File which the Government seeks to introduce for their truth (the “Seized Records”) were seized into the Criminal Case File through other means. In each of these cases, they were

admitted as evidence in the Criminal Case File through resolutions by the criminal investigators that implicitly contain the factfinding that these bank records are in fact accurate reflections of the activity in these accounts. A similar factfinding was made by Russian financial investigators who relied on the Seized Records and the Attested Records in their attempt to trace the fraud proceeds through Russia. These factfindings are admissible under Rule 803(8)(A)(iii), and render the contents of the Seized Records admissible for their truth.

The Seized Records entered the Criminal Case File in two different ways. One account—set up by fraudsters in the name of the stolen company Parfenion and thus one of the accounts to receive refunds directly from the Russian Treasury—had its records seized by investigators physically traveling to the bank and seizing the records in the presence of witnesses. *See* GX 201-2a, 2b, 2c. These records were then officially included in the Criminal Case File as evidence through a formal resolution. GX 201-2d. As to another set of accounts—four accounts held at Bank Krainiy Sever, a Russian bank that was used to transfer the fraud proceeds out of Russia—criminal investigators in an entirely separate case shut down the bank itself for money laundering.¹¹ As part of the investigation into Bank Krainiy Sever, the investigators seized the records of four bank accounts involved in sending funds destined to Prevezon. These records were then deemed by the investigators of the criminal case [REDACTED] [REDACTED] to have “evidential significance” and seized into the Criminal Case File. *See* GX 201-12a; *see also* GX 201-12b, 12c, 12d, 12e, 12f, 12g, 12h, 12i, 12j.

¹¹ Indeed, the correspondent account through which Bank Krainiy Sever was sending funds out of Russia was frozen while conducting the transfers at issue in this case—the funds that reached Prevezon derived from funds that escaped Russia through Bank Krainiy Sever just days before the authorities froze its accounts.

Moreover, two separate expert analyses were performed by Russian financial investigators, in each case treating the materials seized into the Criminal Case File—i.e., including the Seized Records and the Attested Records—as evidence for the purpose of answering certain questions regarding the flows of funds from the Russian Treasury Fraud. GX 202-2 (Expert Report No. 459), GX 202-11 (Expert Report No. 354). Each of these expert reports addressed questions of the source or destination of funds in the accounts of various of the Russian shell companies, though neither of them reconstructed the entire flow of funds. .Though these reports thus answered slightly different questions from what the Government will be seeking to prove in this case, each of them is consistent with, and largely corroborates, the Government’s tracing analysis. More importantly for the purposes of this motion in limine, each analysis, by relying on the Seized Records and the Attested Records to assess the flow of funds from the Russian Treasury, necessarily incorporates a factfinding that the Seized Records and the Attested Records accurately reflect the movement of funds in those bank accounts. Similarly, in addition to the financial analyses in the criminal case [REDACTED], the investigators in the Bank Krainiy Sever case conducted a forensic audit of Bank Krainiy Sever, specifically focused on these Bank Krainiy Sever accounts. GX 202-1 (Bank Krainiy Sever audit). The results of that audit, which also corroborate the Government’s tracing analysis, also amount to findings supporting the authenticity of the Seized Records.¹²

In all of these cases, the orders accepting the Seized Records into evidence in the criminal case, GX 201-2d and 201-12a; the audit corroborating the Seized Records, GX 202-1; and the

¹² Indeed, the Bank Krainiy Sever audit noted that the transfers of funds out of Russia—i.e., including the transfers destined for Prevezon—bore suspicious indicia suggestive of money laundering under Russian Central Bank guidance. GX 201-1 at 40-41.

financial analyses relying on the Seized Records and the Attested Records, GX 202-2, GX 202-11; qualify as findings of a public office or agency, and are admissible for their truth under Rule 803(8)(A)(iii). Rule 803(8) allows the admission of “A record or statement of a public office if: (A) it sets out . . . (iii) in a civil case . . . factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” Fed. R. Evid. 803(8); *see Bridgeway v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (document presumptively admissible if it contains factual findings of an authorized investigation). Notably, Rule 803 does not require any certification. Each of the orders—entering the Seized Records into evidence in the criminal case and relying on the Seized Records and Attested Records—would be inexplicable without the finding that these bank records did in fact reflect the activity in the bank accounts at issue. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988) (rule includes not just formal findings but also “factually based conclusions or opinions”).¹³

The basic finding of the accuracy of the bank records is trustworthy and admissible. There are areas on which to doubt the trustworthiness of the Russian authorities’ criminal investigation [REDACTED]—there will, for example, be evidence at trial that the authorities conducting this investigation overlooked obvious evidence of corruption¹⁴—but they

¹³ This case is thus unlike one in which documents are simply “found in the possession of a government agency,” without more. *Lakah v. UBS AG*, No. 07 Civ. 2799 (MGC), 2014 WL 1100142, at *4 (S.D.N.Y. Mar. 20, 2014); *see also United States v. Doyle*, 130 F.3d 523, 547 (2d Cir. 1997) (“Were there any other evidence that documents recorded with the Customs Agency of Malta were verified or otherwise reliable, the argument for admitting them as government records would be stronger.”).

¹⁴ These reasons for concern do not apply to the Bank Krainiy Sever investigation, which started independently and does not appear to have been as politically sensitive as the Russian Treasury Fraud investigation.

do not pertain to the basic question of whether the bank records they gathered were real bank records that accurately reflected the account activity. As to that limited finding, not only is there no evidence of untrustworthiness, there is abundant evidence of accuracy. The Seized Records and the Attested Records come from multiple different institutions, public and private, and are each marked with the seal of the providing institution. Moreover, the Seized Records and the Attested Records strongly corroborate one another. Each bank statement in the Seized Records and Attested Records reflects at least some transactions that appear on at least one other bank statement.¹⁵ Indeed the particular transactions in these statements the Government relies on are overwhelmingly corroborated—of the 152 separate transactions in the flow of funds inside Russia, 116 (iapproximately 76 percent) appear on two or more sources, and only 36 appear on one source only (because the counterparty records were not available).¹⁶ Further supporting the authenticity of the records, for those records that involved the sending of funds abroad, a number of transactions were corroborated by sources in different countries. Bank accounts located in Latvia, and Moldova contained entries for transactions in the flow of funds, which further proves the reliability of the Russian authorities' finding that these were in fact records of the account activity. *See* LaMorte Decl. Ex. 17.¹⁷

Accordingly, the truth of the entries of account activity in all of the Seized Records and

¹⁵ The reason not all of the transactions on any given bank statement are corroborated is that not all of the counterparties' bank records were obtained by the Russian investigators.

¹⁶ Indeed, because some records are available for correspondent accounts processing the transactions, 58 of the transactions appear on three or more separate sources.

¹⁷ This entire analysis leaves aside transactions that appear on the Seized Records or Attested Records but were not in the flow of funds. These transactions do not result in funds being traced to Prevezon, but a number of them were corroborated as well, including by bank records located in other countries.

Attested Records is incorporated in the factfinding of the orders seizing the Seized Records and the two forensic financial examinations conducted by Russian law enforcement, further supported by the factfinding of the Bank Krainiy Sever audit as to some of the Seized Records.

B. All of the Bank Records Are Admissible Under the Residual Hearsay Exception

In any event, even if the business records or public records exception were both ruled not to apply, all of the Russian bank records the Government offers—the Attested Records and the Seized Records—are admissible under the residual hearsay exception, which is routinely applied to bank records that are complete but lack certification.

The residual hearsay exception, codified in Federal Rule of Evidence 807, applies where a hearsay statement not covered by another exception “has equivalent circumstantial guarantees of trustworthiness,” is “offered as evidence of a material fact,” and is more probative on that point than “any other evidence that the proponent can obtain through reasonable efforts,” and “admitting it will best serve the purposes of these rules and the interest of justice.” Fed. R. Evid. 807. Although the exception is rarely used as a general matter, one area in which courts routinely find that it applies is in the context of uncertified but authentic bank records. *See, e.g., Turner*, 718 F.3d at 234 (noting “[I]n general, bank records provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business,” citing cases (internal quotation marks omitted)); *United States v. Nivica*, 887 F.2d 1110, 1126-27 (1st Cir. 1989) (admitting authentic foreign bank records under residual hearsay exception in absence of testimony or certification meeting Rule 803(6)). Simply finding documents that look like bank statements in a place one would expect them to be suffices for the application of this exception. *See, e.g., Donziger*, 974 F. Supp. 2d at 692 (uncertified

documents that appeared to be bank statements picked up from a foreign bank). Where—as here—the bank records are partially corroborated, the case for their admissibility is even stronger. *See Turner*, 718 F.3d at 234 (admitting uncertified bank records under residual hearsay exception because they were found in a coconspirator’s house, resembled bank records, and were partially corroborated by other bank records).¹⁸

The context in this case—where the bank records were gathered under Russian law for an official proceeding, and do not contain the certifications under U.S. law because they are not necessary in Russia—presents an overwhelming case for application of the exemption. *See Turner*, 718 F.3d at 234 (partially corroborated bank records found in a logical place qualified for exception). The factors described in Sections III.A.1 and III.A.2, *supra*, all demonstrate the reliability of these records. *See United States v. Bonds*, 608 F.3d 495, 501 (9th Cir. 2010) (“[W]here a statement almost fits into other hearsay exceptions, the circumstance cuts in favor of admissibility under the residual exception.” (internal quotation marks and brackets omitted)). The records are offered on a material issue—the tracing of the funds to Prevezon—and are the most probative evidence that can be obtained of fund transfers taking place in Russia, given that the Russian government has not granted the Government’s legal assistance request.

Refusing to allow the exception here would disserve the interests of justice, as it would

¹⁸ Corroboration can be a basis for the application of the residual hearsay exception even for documents other than bank records. *See In re Columbia Securities Litigation*, 155 F.R.D. 466, 475-77 (S.D.N.Y. 1994) (admitting a news article under the residual exception because it was corroborated by other articles, and thus was “bolstered by supporting evidence that confers some circumstantial guarantees of trustworthiness”); *United States v. Carneglia*, 256 F.R.D. 384, 392 (E.D.N.Y. 2009) (admitting certain police reports of an eyewitness statement because they were consistent with the statements in an earlier police report, finding this corroboration provided guarantees of trustworthiness).

effectively give the foreign government refusing to respond to the U.S.'s treaty requests veto power over proceedings of this kind. Doing so would be contrary not simply to the principles underlying the Federal Rules of Evidence, but also to Congress's intent, in passing 18 U.S.C. § 1956(c)(7)(B)(iv), that the U.S. financial system not be tainted by the criminal introduction of proceeds of foreign corruption. Given that foreign corruption offenses are often politically sensitive, it is clear that Congress did not intend to give foreign sovereigns the ability to effectively immunize laundering the proceeds of such offenses in the United States, let alone by such a roundabout means as withholding a certification page for records the foreign nation is perfectly satisfied to rely on itself. In these circumstances, admitting these records would serve the interests of justice and the purposes of the Federal Rules. *See* Fed. R. Evid. 102 (Rules to be construed "to the end of ascertaining the truth and securing a just determination").

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court rule that the Criminal Case File is admissible, though not for the truth of all matters contained within it, that the Seized Records, the Attested Records, and the investigative orders and reports referencing them are admissible for the truth of their descriptions of the activity in the bank accounts described, and that the Compared Records are authentic and admissible, though not for the truth of the matters asserted therein.

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