UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	No. 13-cv-6326 (WHP)
v.	:	OPINION & ORDER
PREVEZON HOLDINGS, LTD., *et al.*,	:	
Defendants.	:	

WILLIAM H. PAULEY III, United States District Judge:

Prevezon Holdings Ltd. and affiliated entities ("Prevezon") move for summary judgment.[1] For the following reasons, Prevezon's motion is denied.

BACKGROUND

This civil forfeiture action arises from the laundering of proceeds derived from a $230 million fraud in Russia, a portion of which was used to purchase real estate in Manhattan. Beginning in 2007, a Russian criminal organization (the "Organization") orchestrated an elaborate hoax designed to defraud the Russian Treasury into issuing tax refunds totaling $230 million (the "Russian Treasury Fraud"). The opening act of the Russian Treasury Fraud involved a raid on the Moscow offices of Hermitage Capital Management ("Hermitage") and its law firm, Firestone Duncan. The purpose of that illegal raid was to obtain corporate documents and seals belonging to Hermitage's portfolio companies—OOO Rilend, OOO Parfenion, and OOO Makhaon (the "Portfolio Companies"). In the aftermath of the raid, the Russian

[1] This Opinion and Order also addresses the arguments set forth in the Government's Motion In Limine No. 2 (ECF No. 596), which raises substantially similar issues.

Federation's Interior Ministry rebuffed Hermitage and its trustee HSBC Guernsey's attempt to recover the corporate documents.

In the meantime, the Organization used the corporate documents to transfer ownership of the Portfolio Companies from HSBC Guernsey's shareholding vehicles—held in trust for Hermitage—to a Russian company owned by a member of the Organization. The Organization then orchestrated a series of sham lawsuits against the Portfolio Companies, claiming that those companies had breached contracts that were forged and backdated. Those litigations resulted in default judgments against the Portfolio Companies totaling $973 million.

Then, the Organization used those default judgments to apply for tax refunds claiming that such judgments were equal to the profits the Portfolio Companies had realized in the tax year. Members of the Organization who worked at the Russian Federation tax offices approved the Organization's applications and granted refunds totaling $230 million. In its closing act, the Organization laundered the proceeds through a Byzantine web of conduit accounts. Eventually, approximately $1.9 million made its way into Prevezon's account, and was used to purchase apartments in Manhattan.

This action has a rather convoluted history that includes a year-long trip to the Second Circuit, re-assignment to another district judge, and the disqualification of Prevezon's prior counsel on the eve of trial. With the trial date looming, Prevezon re-asserts its earlier claims that the Government lacks any evidence giving rise to a genuine issue of material fact.

DISCUSSION

I. Standard

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material "if it might affect the outcome of the suit under the governing law." Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears "the initial burden of establishing the absence of any genuine issue of material fact, after which the burden shifts to the nonmoving party to establish the existence of a factual question that must be resolved at trial." United States v. U.S. Currency in Amount of Two Hundred Forty Eight Thousand Four Hundred Thirty Dollars, 2004 WL 958010, at *2 (E.D.N.Y. Apr. 14, 2004). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), and "may not rely on conclusory allegations or unsubstantiated speculation." Scotto v. Alemenas, 143 F.3d 105, 114 (2d Cir. 1998). If there is any evidence in the record "from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994).

II. Specified Unlawful Activities

To prove its money laundering claim, the Government must demonstrate "(1) that the defendant conducted a financial transaction; (2) that the transaction in fact involved the proceeds of specified unlawful activity as defined in § 1956(c)(7); and (3) that the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity." Tymoshenko v. Firtash, 57 F. Supp. 3d 311, 322 (S.D.N.Y. 2014)

(alterations omitted). The Government offers evidence of four specified unlawful activities ("SUAs"): (1) fraud against a foreign bank; (2) transportation of stolen property; (3) bribery of a public official; and (4) successive money laundering transactions.[2]

A. Fraud Against a Foreign Bank[3]

Prevezon principally contends that the fraud alleged by the Government is not a fraud against HSBC, but rather a fraud against the Russian Treasury. (Mot. at 7.) "The well established elements of the crime of bank fraud are that the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." United States v. Barrett, 178 F.3d 643, 647–48 (2d Cir. 1999). A scheme to defraud, while "not capable of precise definition" is commonly known as "wronging one in his property rights by dishonest methods or schemes, and usually signif[ies] the deprivation of something of value by trick, deceit, chicanery or overreaching." United States v. Stavroulakis, 952 F.2d 686, 694 (2d Cir. 1992).

According to Prevezon, if HSBC was the victim of any crime arising from the raid, it was not fraud, but theft of its Portfolio Companies. Prevezon maintains that there is no evidence to prove any of the elements of bank fraud—no deceptive conduct was directed at

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[2] The Government acknowledges that without independently proving some other SUA, the original money laundering offense giving rise to subsequent money laundering transactions would not exist. (See Prevezon Memo. of Law in Support of Summary Judgment ("Mot."), at ECF No. 575, at 6, n.6.)

[3] Prevezon claims that HSBC is not a "foreign bank" under the SUA because "the HSBC Entities, in their roles as trustee, manager and investor, were not engaged in the core functions of a banking system." (Mot. at 11 n.8 (internal quotation marks and citations omitted).) But under the relevant provision's definition, HSBC qualifies as a "foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)," including "any subsidiary or affiliate" of any foreign company "which engages in the business of banking." 18 U.S.C. § 1956(c)(7)(B)(iii) (citing 12 U.S.C. § 3107(7)). The HSBC entities at issue here—HSBC Private Bank (Guernsey) Limited (as trustee); HSBC Management (Guernsey) Ltd. (as manager); and HSBC Private Bank (Suisse) S.A. (as investor)—are subsidiaries or affiliates controlled by the HSBC Group, which is engaged in the business of banking.

HSBC; HSBC was not induced to rely on any misrepresentations; and none of the perpetrators knew that HSBC would be harmed as a result of their actions.

The scheme "to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a financial institution, at least where . . . the defendant knew that the bank held the [property], the [property] came from the [customer's account], and the defendant misled the bank in order to obtain" such property. United States v. Shaw, 137 S. Ct. 462, 466 (2016). The bank itself need not be harmed as a result of the fraudulent scheme. Shaw, 137 S. Ct. at 467. Nor is the Government required to prove that the defendant engaged in the fraud with actual knowledge that the bank has an interest in the fraudulently obtained property, Shaw, 137 S. Ct. at 467 ("[t]o require more, i.e., to require actual knowledge of those bank-related property-law niceties, would free (or convict) equally culpable defendants"), or that the purpose of the fraud was to harm the bank. Shaw, 137 S. Ct. at 464–65 ("no relevant authority supporting the view that the bank fraud statute criminalizing the 'knowing execution of a scheme to defraud' requires something more than knowledge") (alterations omitted).

Here, understanding HSBC's distinct role as trustee (among others) of Hermitage and its companies is critical to determining whether it was the victim of bank fraud. HSBC Guernsey served as the trustee to Hermitage. (Statement of Undisputed Material Facts ("SUF"), ECF No. 574, at ¶¶ 3–4, 6).) As trustee, HSBC Guernsey owned the Portfolio Companies through two shareholding vehicles, whose ownership interests were fraudulently re-registered to members of the Organization following the raid. (Counter Statement of Undisputed Material Facts ("Counter SUF"), ECF No. 613, at ¶ 7.) Therefore, while Hermitage certainly had an interest in protecting the Portfolio Companies from the Organization, HSBC Guernsey, in its

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