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

fiduciary capacity as trustee to Hermitage, and as the legal owner of the Portfolio Companies, had a vested interest in combating the Organization's fraudulent scheme.

The Government claims that misrepresentations were directed at HSBC in two ways. First, members of the Organization falsely represented to Hermitage and Firestone Duncan that the Russian Federation authorized them to raid Hermitage's offices and seize evidence pertaining to an entity unrelated to the Portfolio Companies. That misrepresentation, according to the Government, formed the basis under which Hermitage and Firestone Duncan consented to the raid. And such misrepresentations were also directed at HSBC by virtue of its agency relationship with Hermitage and Firestone Duncan. (Gov't Memo. of Law in Opposition to Summary Judgment ("Opp."), ECF No. 612, at 4.) Second, following the raid, the Government contends that the Organization deceived HSBC by misrepresenting its ownership interest in the Portfolio Companies, obstructing HSBC's efforts to object to the sham lawsuits, and assuring HSBC that the Portfolio Companies' corporate documents had not been provided to other parties. (Opp. at 5–6.)

Had the Organization's fraud ended with the illegal raid, the Government's contention that HSBC was the victim of a fraud—based solely on HSBC's agency relationship with Hermitage and Firestone Duncan—would be substantially weakened. But the raid was merely the opening act of the fraud. The concatenation of events following the raid precipitated the fraudulent $230 million tax refund. "[A]cts of perpetration" and subsequent "acts of concealment" in wide ranging, complex frauds are often "one and the same." Sec. Exchange Comm'n v. Wyly, 950 F. Supp. 2d 547, 556 (S.D.N.Y. 2013); see also In re Rosenfeld, 543 B.R. 60, 72 (Bankr. S.D.N.Y. 2015) ("concept of false pretenses has been broadly construed by the courts. It typically is found to be the product of multiple events, acts, or representations

undertaken pursuant to a scheme of trickery, deceit, chicanery, or overreaching."). Sham lawsuits, and deflecting Hermitage and HSBC's efforts to stop them, were critical features of the Russian Treasury Fraud. Here, the post-raid deceptive conduct is more direct—the Organization falsely assured HSBC that the Portfolio Companies' documents had not been manipulated or shared with other parties when, in fact, they were used to hijack HSBC's ownership interest. (Counter SUF ¶ 17–18 (citing Declaration of Cristine I. Phillips ("Phillips Decl."), ECF No. 614, Exs. 3, 5; Declaration of Todd Hyman ("Hyman Decl."), ECF No. 615, Exs. 2, 7–8).) These misrepresentations or omissions of fact were directed at HSBC and its representatives as part of a continuing, fraudulent scheme culminating in the diaspora of the $230 million refund in the alleged money laundering network.

Those facts, taken together, suffice to establish that the "scheme [was one] to deceive the bank and deprive it of something of value." Shaw, 137 S. Ct. at 469. While the scheme may have deceived and injured other parties—including, e.g., Hermitage, the Portfolio Companies, the Russian Treasury—HSBC also was deceived. Municipality of Bremanger v. Citigroup Global Mkts. Inc., 2013 WL 1294615, at *19 (S.D.N.Y. Mar. 28, 2013), aff'd sub nom. Mun. Corp. of Bremanger v. Citigroup Global Mkts. Inc., 555 Fed. Appx. 85 (2d Cir. 2014) ("principal may recover for misrepresentations relied on by an agent" so long as reliance is reasonable); Fed. Dep. Ins. Corp. v. Hodge, 50 F. Supp. 3d 327, 337–38 (E.D.N.Y. 2014) ("Atlas, in the normal course of business, did make representations to the agents of banks, if not the banks themselves."); Jay Dees Inc v. Defense Tech. Sys., Inc., 2008 WL 4501652, at *5 (S.D.N.Y. Sept. 30, 2008) ("There is no reason why a misrepresentation to the plaintiff's agent does not suffice."). While Prevezon characterizes the raid as a theft, the Government offers evidence that HSBC and Firestone Duncan only consented to the raid because members of the

Organization misrepresented its purpose. (Counter SUF ¶¶ 17–18.) If true, such misrepresentations could convert an ordinary theft into a fraud.

Prevezon's other arguments fare no better. The Government offers evidence that the Organization attempted to induce HSBC and its agents into relying on misrepresentations about the raid. (Phillips Decl. Exs. 3 at 65:3–69:11, Ex. 4, Ex. 5 at 89:7–90:13.) Other evidence also indicates that the Organization sought to induce reliance on post-raid misrepresentations regarding the use of the Portfolio Companies' documents. (Hyman Decl. Exs. 7–8.) All that Shaw requires for purposes of establishing bank fraud is that the Organization "correctly believe[d] that [its] false statements would lead [HSBC] to release from [its possession property] that ultimately and wrongfully ended up in" the Organization's pockets. Shaw, 137 S. Ct. at 467. Here, HSBC's agents may have been induced—under false pretenses—to allow the Organization to take the Portfolio Companies' documents. Subsequently, HSBC itself may have been induced into acquiescing to the Organization's retention of the documents, or at the very least, lulled into believing that no further action was necessary. But whether HSBC or its agents were actually induced is immaterial—indeed, all that was required is that the Organization made a false representation, "[knew] it to be false, but intending that the other should believe and act upon it." Shaw, 137 S. Ct. at 467 (quoting Oliver Wendell Holmes, THE COMMON LAW 132 (1881)).

Finally, while Prevezon claims that the perpetrators did not "kn[o]w or ha[ve] any reason to know that the HSBC Entities would be harmed," the post-raid events raise a question of material fact regarding their knowledge. While members of the Organization may not have been aware of HSBC's involvement at the time of the raid, they likely were alerted to HSBC's ownership interest when HSBC sought to intervene in the sham proceedings. That the Organization made a series of misrepresentations to hinder HSBC's ability to reclaim ownership,

or to deceive HSBC into believing that its interests were not in jeopardy, presents an issue of material fact central to whether the Organization knew that HSBC would be harmed. (Counter SUF ¶ 17 (citing Phillips Decl. Exs. 3–5; Hyman Decl. Exs. 2, 7–8).) This is a quintessential jury question.

B. Transportation of Stolen Property

The Government alleges that 18 U.S.C. § 2314—a statute criminalizing the transportation of property stolen or taken by fraud—constitutes an SUA in support of its money laundering claim. Four transfers of funds allegedly processed, in part, by U.S. bank accounts comprise the core of this SUA (the "Four Transfers").

Prevezon disputes the domestic nature of the Four Transfers, highlighting the fact that they occurred exclusively among foreign companies using foreign bank accounts. (Mot. at 12.) Although the transfers were processed, in part, by correspondent bank accounts in the United States, Prevezon argues that the incidental use of such accounts does not create the domestic nexus necessary to qualify as transfers under § 2314. (Mot. at 13.) The Government counters that the Four Transfers moved through the United States (Hyman Decl. Exs. 15–18) between their origination and destination accounts, and therefore are domestic conduct sufficient to invoke § 2314's application.

Although the text of § 2314 references transportation of property in interstate or "foreign commerce," that language alone is insufficient to rebut the presumption against extraterritoriality. See Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010). If a statute does not, by its terms, apply to extraterritorial conduct, a court must determine which "territorial events or relationships [are] the focus" of the statute. Mastafa v. Chevron Corp., 770 F.3d 170, 183 (2d Cir. 2014). Section 2314's "focus . . . is the transportation or transfer of property."

United States v. All Assets Held at Bank Julius, 2017 WL 1508608, at *12 (D.D.C. Apr. 27, 2017). In "enacting 18 U.S.C. § 2314, Congress was primarily concerned with the movement of stolen property across state lines." Bank Julius, 2017 WL 1508608, at *12 (citing Dowling v. United States, 473 U.S. 207, 218–20 (1985)).

To "displace[] the presumption" against extraterritoriality, the relevant conduct must have "sufficiently touch[ed] and concern[ed] the territory of the United States." Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 215 (2d Cir. 2016) (internal citations and quotation marks omitted). Whether a "complaint passes jurisdictional muster [] depends upon alleged conduct by anyone—U.S. citizen or not—that took place in the United States," and that conduct must be assessed under the lens of the charging statute. Mastafa, 770 F.3d at 189 ("full 'focus' of the [Alien Tort Statute] was on conduct."); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad.").

The use of correspondent banks in foreign transactions between foreign parties constitutes domestic conduct within § 2314's reach, especially where bank accounts are the principal means through which the relevant conduct arises. Other courts have construed the use of correspondent banks in the United States as "touch[ing] and concern[ing] the United States so as to displace the presumption" against extraterritoriality. Mastafa, 770 F.3d at 186. In Licci, for example, the Second Circuit held a "correspondent banking account in New York [used] to facilitate dozens of international wire transfers," which "totaled several million dollars" and "substantially increased and facilitated [a terrorist organization's] ability to" execute attacks established a "sufficient connection[] with the United States" under the Alien Tort Statute. 834

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