

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Russian Intrigue Meets The Hearsay Rule

On May 12, 2017, the United States settled its asset forfeiture and money-laundering case against Prevezon Holdings just days before that case was scheduled to go to trial, with both sides claiming the \$5.9 million settlement as a victory. The facts behind *United States v. Prevezon Holdings*, 319 F.R.D. 459 (S.D.N.Y. 2017), were the stuff of spy novels, involving an alleged elaborate Russian tax fraud, a web of supposed money laundering involving multiple shell companies and international bank accounts, and the death in prison of Sergei Magnitsky (after alleged mistreatment), a Russian lawyer investigating the facts surrounding the tax fraud. Indeed, efforts of Prevezon's Russian lawyer, Natalia Veselnitskaya, during last year's Presidential campaign to have sanctions named for Magnitsky lifted, in part through a meeting with members of the Trump campaign, only added to the drama surrounding this case. Just days before the case settled, Judge William H. Pauley III, who was to preside over the trial, issued a decision

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on a motion in limine filed by the government, addressing interesting, albeit far from headline-grabbing questions concerning application of the hearsay rule to foreign records the government intended to introduce at trial. Although that trial now will not take place, the hearsay analysis is worthy of note, and we discuss Judge Pauley's decision below.

'U.S. v. Prevezon'

The government's case against Prevezon turned to a substantial extent on the government's ability to trace funds linked to the alleged Russian tax fraud into the accounts of Prevezon and the other defendants. The government needed various bank records to establish the movement of funds between the accounts in question, but the Russian Federation declined to provide those records, leaving the U.S. government lawyers with a series of evidentiary hurdles to overcome. The

government had access to copies of those records which were contained in two sets of files: a Russian criminal case file generated during prosecution of the Russian tax fraud, and a file from a Russian arbitration proceeding that was also connected to that scheme. The bank records in the criminal case file consisted of records produced by certain banks accompanied by transmittal letters identifying the documents as bank records and bearing the banks'

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official seals (the Attested Records), and records seized by Russian officials during raids of certain financial institutions (the Seized Records). The motion in limine sought to overcome the hearsay obstacles posed by trying to admit copies of bank records contained in the criminal and arbitration case files,

none of which could be authenticated by traditional means.

As a threshold matter, Judge Pauley accepted the government's argument that the criminal case file could be admitted for non-hearsay reasons, because some of its contents constituted "verbal acts with legal significance," or contained "telltale errors and irregularities that indicate fraud and corruption." 319 F.R.D. at 462. He concluded that the government could authenticate the Russian criminal case file through the videotaped testimony of a Russian lawyer that he had photographed those records in a Russian courthouse under supervision of court clerks, and through the testimony of an agent from the Department of Homeland Security who could establish that the hard drive to be used to present the file at trial contained accurate copies of the photographed records. *Id.* at 463. Judge Pauley went on to hold that the arbitration file could be authenticated under Federal Rules of Evidence 901(b)(3)¹ or (4)² through comparison with the criminal case file, with which it shared certain distinctive characteristics.

Admission of the bank records contained in the two case files posed greater evidentiary challenges, because the government sought to admit them for the truth of their contents—as "accurate depictions of relevant bank account activity" reflected in those records. On its motion in limine the government relied on three exceptions to the hearsay rule in support of their admission: the foreign business records exception contained in Rule 803(6) for admission of the Attested Records; the public records exception in Rule 803(8) for admission of the Seized Records; and the residual hearsay exception under Rule 807 for admission of both sets of records.

Looking first to the foreign business records exception as a basis for admitting the Attested Records, Judge Pauley found the government could not satisfy the requirements of Rule 803(6), which requires that:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business [or] organization ...; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Specifically, Judge Pauley found that the government could not meet requirement (D) which requires that the conditions for admission be established through the testimony of a custodian or certification consistent with Rules 902(11) or (12), both of which in turn require that a foreign certification 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." The government sought to rely on the transmittal paperwork accompanying the Attested Records to satisfy the certification requirement, but Judge Pauley concluded that no authority supported that the bank attestations were made under threat of criminal sanction in Russia. He observed that "[t]he risk of criminal penalties for making a

false statement effectively serves as a guarantee that an out-of-court statement—especially the foreign records here—is trustworthy and reliable," 319 F.R.D. at 464, and central to the Rule 803(6) exception. In the absence of any indication that the bank attestations were made under threat of criminal punishment, he rejected the government's "expansive reading" of the certification requirement.

Judge Pauley also rejected the government's argument that the Seized Records could be admitted as public records under Rule 803(8), which provides an exception to the hearsay rule for the record or statement of a public official that sets out "factual findings from a legally authorized investigation." The government contended that the Seized Records fell within this exception because Russian officials investigating the Russian tax fraud had authored reports incorporating the Seized Records. Judge Pauley rejected this argument under Rule 803(8). He found that even if the investigative reports at issue qualified as public records (a question he did not reach), admission of records contained in those reports would present double-hearsay issues, and that the government was improperly conflating the admissibility of the investigative reports with the admissibility of the records cited in those reports. *Id.*

Ultimately, Judge Pauley concluded that both the Attested Records and the Seized Records were admissible under the residual exception to the hearsay rule. Rule 807 permits the admission of evidence that otherwise would qualify as hearsay where (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered in evidence of a material fact; (3) it

is more probative on that point than any other evidence that could reasonably be obtained; and (4) its admission would serve the purposes of the rules of evidence and the interests of justice.

Because the bank records were fundamental to the government's tracing analysis, Judge Pauley found that they easily satisfied the materiality requirement and were the most probative evidence that could reasonably be obtained of the monetary transfers that allegedly facilitated the laundering of the Russian tax fraud proceeds. Judge Pauley relied heavily for this conclusion on the fact that the Russian Federation had spurned the government's efforts to obtain the bank records through ordinary channels. The more difficult questions for Judge Pauley were whether the records contained sufficient "circumstantial guarantees of trustworthiness" and whether their admission served the purposes of the rules and the interests of justice.

Judge Pauley noted that analysis of trustworthiness indicia is highly fact-specific and requires that the evidence be viewed in context. He reasoned that bank records in general are reliable because banks and their customers rely on them for their accuracy, and that in this case, the inclusion of these records in the criminal case file added to their trustworthiness. He noted that notwithstanding the fact that the government questioned the legitimacy of the outcome of the Russian criminal case, this did not undermine the reliability or accuracy of the documents relied on in those proceedings. Additionally, Judge Pauley found persuasive the fact that the bank records from the criminal case file could be corroborated both by reference to one another (meaning that they were internally consistent),

and by reference to documents having nothing to do with the Russian criminal case, such as from non-Russian banks involved in some of the transfers. Finally, although Judge Pauley rejected the bank attestations as sufficient to satisfy the certification requirement for the Rule 803(6) business record exception, he found, for purposes of the residual

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exception, that the "intricate" manner in which the records were presented to the Russian authorities—bound together with twine and sealed—underscored their trustworthiness.

In concluding that these factors weighed in favor of admissibility, Judge Pauley distinguished *Lakah v. UBS AG*, 996 F. Supp. 2d 250 (2014) (Cedarbaum, J.), where the court ruled against admitting bank records that were, like the records in this case, contained in an official file obtained by public agency investigators under legal compulsion. In contrast to *Lakah* however, where without corroborating evidence the court found these indicia of trustworthiness "underwhelming," Judge Pauley concluded that the government in this case had pointed to enough corroborating evidence to substantially diminish the chances that the records were forged.

With respect to whether admitting the bank records would further the interests of justice, Judge Pauley focused on the "highly unusual and atypical circumstances" of the case. He noted the government's difficulty in obtaining certifications, the lack of qualified, willing custodial witnesses and the absence of other well-accepted forms of assurances regarding authenticity in a case involving the records of foreign entities alleged to have participated in a massive fraudulent scheme. "Against this backdrop" he concluded, "the purposes of the rules of evidence and the interests of justice are served where, as here, the Russian Federation ... refused to produce them; ... many of the records can be corroborated from multiple sources; and these records are highly probative, if not indispensable" to proving allegations that purportedly "threatened the integrity of the American financial system."

Conclusion

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1. Rule 901 (b)(3) provides for authentication through a comparison with an authenticated specimen by an expert witness or the trier of fact.

2. Rule 901 (b)(4) provides for authentication through "Distinctive Characteristics and the Like [such as] the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."