UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.	13 Civ. 6326 (WHP)

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

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INTRODUCTION

Defendants' efforts to dispute the authenticity of the contents of the Russian Criminal Case File and related documents, and to exclude certain bank records as hearsay, are marked by a preponderance of rhetoric over legal argument. Though intimating—contrary to the explicit text of the Federal Rules—that custodial witness testimony is the only means of authenticating such documents and admitting bank records, Mem. at 1,[1] defendants do little to dispute the substantial authority cited in the Government's motion showing that these materials are authentic and, in the case of the bank records, fully admissible. Contrary to defendants' claims that there is "no authority" to support admission, Mem. at 1, this case is indistinguishable from those that have admitted materials based on similar foundation.

ARGUMENT

I. DEFENDANTS DO NOT SERIOUSLY DISPUTE THE SUFFICIENCY OF THE EVIDENCE OF AUTHENTICITY

Defendants all but acknowledge that the Government has sufficient evidence to authenticate the contents of the Russian Criminal Case File as such, but seem to claim that there is no basis to allow a belief that the materials such as court filings, court orders, corporate registry extracts, tax refund filings and orders, and investigative reports contained within are what they appear to be. On the contrary, this is a paradigm method of authentication.

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[1] Citations to "D.I." refer to docket items in this case. Citations to "Mem." refer to the defendants' memorandum of law in opposition to the Government's motion *in limine* number 1, D.I. 639. Citations to "La Morte Decl." refer to the Declaration of Tara La Morte, filed in connection with the Government's motion *in limine* number 1, D.I. 595. Citations to "GX" refer to proposed Government exhibits submitted together with the Declaration of Paul M. Monteleoni filed herewith, unless they are specifically cited as contained on the disk attached as Exhibit 10 to the La Morte Declaration.

There is little dispute that the testimony of Nikolai Gorokhov authenticates the contents of the Criminal Case File as such.[2] The fact that the Criminal Case File is authentic, in turn, provides a basis for believing that the materials contained within—all of which are the type of documents it would be logical to find in a criminal prosecution case file—are what they appear to be. This is of course distinct from asserting that the *content* of the documents is all accurate—the file contains a number of forged documents used to effectuate the fraud—but the law permits the jury to find that such documents exist and were collected in the file. Rule 901 specifically authorizes the authentication of a putative public record based on evidence that "a purported public record or statement is from the office where items of this kind are kept." *See* Fed. R. Evid. 901(b)(7).[3] Moreover, the file is replete with descriptions of the relevant items and their reasons for appearing in the file. *See* GXs 120-1 to 120-94 (indexes for each of the 94 volumes of the Criminal Case File); GXs 109-20 to 109-25 (copying portions of arbitration case files into the Criminal Case File); La Morte Decl. Ex. 10 (GX 201-12a) (accepting portions of Bank Krainiy Sever investigation file). Any challenge to the genuineness of the documents contained in the file is thus plainly a matter to be addressed to the jury.

Indeed, the two cases on which defendants place almost exclusive reliance in raising

[2] Defendants' reference to Mr. Gorokhov's inability at his deposition to recognize printouts of certain of the pictures he took is unavailing. First, at his deposition he was shown poor quality printouts of the higher-quality images that he took. *See* D.I. 652 at 1. Second, it is hardly surprising that Mr. Gorokhov would not recognize by sight every one of the over 34,000 pictures he took, and the Government's chain of custody evidence does not rely on him doing so. *See id.*

[3] Defendants seem to overlook Rule 901 altogether, instead presenting Rule 902—which governs *self*-authenticating documents—as the exclusive means of authentication of foreign records, Mem. at 3-4, or public records, Mem. at 9-10. While Rule 902 is incorporated into the hearsay exception for certified business records, it is not required for authentication. Instead, Rule 901—including all of its enumerated means, as well as unenumerated means—provides a fully sufficient basis for authentication.

hearsay challenges to the bank records described herein each find similar authentication evidence *sufficient* to establish authenticity. *See United States* v. *Doyle*, 130 F.3d 523, 545 (2d Cir. 1997) (authenticating privately-generated documents as having been found in government files); *Lakah* v. *UBS A.G.*, No. 07 Civ. 2799 (MGC), 2014 WL 1100142, at *2 (S.D.N.Y. Mar. 20, 2014) (authenticating documents by inspecting the letterhead or finding them to bear the address and fax number of a bank). That these showings were sufficient, even for cases that would ultimately exclude foreign records on hearsay grounds, shows how amply authenticity is demonstrated here.

Defendants fare no better in objecting to the authenticity of the Compared Records. Unable to dispute that documents can be authenticated by comparison with documents already authenticated, they principally maintain that the contents of the Criminal Case File are themselves not authenticated. Mem. 19. Since, as explained above, the Criminal Case File materials are authenticated, this whole objection is misconceived.

II. THE BANK RECORDS AND INVESTIGATIVE REPORTS ARE RELIABLE AND ADMISSIBLE TO PROVE ACCOUNT ACTIVITY

Defendants train most of their fire on the admission, for their truth, of bank records showing how the fraud's proceeds laundered by Russian shell companies. Their argument, however, collapses on inspection, as they have no answer to the cases admitting records under very similar circumstances to those present here.

A. The Attested Records Are Business Records

Defendants give short shrift to the authority that holds that "[a] foundation for admissibility [under Rule 803(6)] may at times be predicated on judicial notice of the nature of the business and 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). This is particularly

appropriate in the case of documents such as bank records, which—unlike many other documents generated by businesses—reflect data banks rely on in order to perform day-to-day operations. *See, e.g.*, *United States* v. *Johnson*, 971 F.2d 562, 571 (10th Cir. 1992) ("bank records are particularly suitable for admission under Rule 803(6) in light of the fastidious nature of record keeping in financial institutions"); *St. Paul Mercury Ins. Co.* v. *FDIC*, No. 08 Civ. 21192, 2011 WL 4055396, at *4 (S.D. Fla. Sept. 13, 2011) (citing *id.* as to foreign bank records).

In highly similar circumstances, the court in *Chevron Corp.* v. *Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), found that uncertified foreign bank statements met the business records exception through judicial notice of basic uncontested facts about the nature of such records. *Id.* at 691 ("The Court takes judicial notice that banks routinely produce periodic statements for their customers and that those periodic statements reflect any and all deposits, withdrawals, debits and credits during stated periods of time. This is done in the regular course of business by bank employees with knowledge of the computer systems used to track customers' account activity."). Defendants try to distinguish this case on the thin reed that the bank statements in that case were obtained from the bank by the accountholder, instead of from the bank by law enforcement. Mem. at 8. But this distinction makes no difference—the accountholder in *Chevron* did not offer any testimony about the internal practices of the bank, and there is no reason that banks would provide more accurate records to their private citizen customers than to law enforcement. Indeed, the thinness of this distinction shows how squarely the rule in *Chevron* applies here.[4]

[4] Similarly, defendants are wrong to fault the transmittals because they do not explicitly set out that the bank statements were produced in the ordinary course of business; given the context of bank operations the Court can notice, there is simply no way to read a transmittal of requested bank statements to law enforcement that does not imply the regularity of their production.

B. Defendants Give No Reason to Doubt the Trustworthiness of the Public Investigation Report Findings of the Seized Records and Attested Records' Accuracy

Each of the Seized Records and the Attested Records was referenced as genuine by one or more public investigation reports. The Seized Records were each specifically identified and accepted into the Russian Criminal Case as bearing evidentiary significance.[5] The Attested Records, likewise, were each identified and extensively analyzed by two Russian investigative reports that undertook a partial tracing of the proceeds of the Russian Treasury Fraud.[6] The findings of evidentiary significance as to the Seized Records, and the findings of specific flows of funds based on analysis of the Attested Records, would make no sense absent the more basic finding that these records accurately reflect the account activity. Contrary to defendants' claim, such a basic predicate finding is encompassed in Rule 803(8)(C) even if not set out in full, where it is implicit within the findings that are set out. *See Apollo Fuel Oil* v. *United States*, 73 F. Supp. 2d 254, 261 (E.D.N.Y. 1999) (relying based on explicit findings of IRS report that "plaintiff has failed to refute the IRS's implicit finding that one of Apollo's employees or agents

[5] *See* GX 201-2d (accepting Parfenion bank statement, GX 201-2a, 2b, and 2c, into case); GX 201-12a at 2, 18 (seizing PromTorg, Omega, StarMiks, Trial, and Kareras bank statements, GX 201-12b, 12c, 12d, 12e, 12f, 12g, 12h, 12i, 12j, into case).

[6] *See* GX 202-11 at 15-16 (referencing provision by archives of Rilend, Makhaon, and Yauza-Region payment orders, GXs 3a, 3b, 3c, analyzing them); *id.* at 22 (referencing Mezhbusinessbank liquidator's provision of Lanitime account statement, GX 201-8a, 8b, 8c, 8d, analyzing it); *id.* at 29 (referencing Sberbank's provision of Candy account statement, GX 201-10a, 10b, 10c, 10d, analyzing it); *id.* at 31 (referencing Sberbank's provision of DalProm account statement, GX 201-11a, 11b, 11c, 11d, analyzing it); *id.* at 145 (referencing Ocean Bank's provision of Anika account statement, GX 201-5b, 5c, 5d, analyzing it); *id.* at 180 (referencing Sberbank's provision of ZhK account statement, GX 201-6a, 6b, 6c, 6d, analyzing it); *id.* at 212-13 (referencing Mosstroieconombank provision of Komino and Univers account statements, GX 201-7a, 7b, 7c, 7d, analyzing them); *id.* at 216 (referencing Sberbank provision of Sofit account statement, GX 201-9a, 9b, 9c, analyzing them); *id.* at 219 (referencing Intercommerz bank's provision of Fausta account statement, GX 201-3a, 3b, 3c, analyzing it).

intentionally introduced dyed fuel into he propulsion tank of truck four"); *cf. Chesler* v. *Trinity Industries, Inc.*, No. 99 Civ. 3234, 2002 WL 1822918, at *2 (E.D. Mich. Aug. 8, 2002) ("the entry of code '1' into the box 'major contributing human factor' is likewise admissible").

There is no reason to exclude these public investigation findings, which are presumptively admissible. *See Gentile* v. *County of Suffolk*, 926 F.2d 142, 148 (2d Cir. 1991) (public investigative reports "are presumed to be admissible in the first instance"). Besides deriding the very idea that implicit findings can be established by the explicit findings of public records, Mem. at 10; *but see Apollo Fuel Oil*, 73 F. Supp. 2d at 261, defendants' principal objection is that the Government has contended that some statements by the Russian government in this matter are unreliable. Mem. at 10-11. Though there are serious questions about whether the investigators in this matter ignored or actively obfuscated evidence of corruption, this does not affect the reliability of their analysis of the account activity.

Defendants, to begin with, do not carry their burden of demonstrating a lack of trustworthiness, as they themselves do not aver any official misconduct on the part of any Russian government official. *See* Fed. R. Evid. 803(8)(B) (placing the burden on the "opponent" to demonstrate lack of trustworthiness). Instead of actually alleging any unreliability in the Russian proceedings, defendants simply complain that the *Government* has pointed to some irregularities. Mem. 10-11; *id.* at 7 n.4. But the Government never alleged any unreliability in the findings that are discussed here. Instead, defendants try to claim that the Government cannot both criticize any part of the Russian investigation (or, apparently, *any* Russian investigation, *see* Mem. at 10-11 (describing concerns with other Russian proceedings)) and also find any part of the investigation reliable. Mem. at 11.

This all-or-nothing approach is simply not the law. Far from finding an entire investigation tainted, courts will admit portions of reports even if other portions are deemed unreliable in ways suggesting a motive to conceal. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1482-83 (D.C. Cir. 1991) (affirming reliance on Soviet investigative account of air crash despite some concerns about reliability of Soviet investigation).[7]

More fundamentally, the investigative findings as to the facts the Government seeks to admit here—the findings as to the account activity in the accounts referenced in the Seized Records and Attested Records—are demonstrably reliable. The three in-depth investigative reports corroborate each other as to the transactions in the accounts. This is especially significant given that one of those reports, though copied into the Khlebnikov criminal file, was prepared as part of an entirely separate investigation of Bank Krainiy Sever for money laundering violations. *See* La Morte Decl. Ex. 10 (GX 202-1). Moreover, these reports all corroborate the Seized Records and Attested Records themselves, which corroborate one another and also corroborate bank records obtained from multiple other foreign countries. *See* La Morte Decl. Ex. 17. There is thus no reason to doubt the findings the Government seeks to admit here.[8]

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[7] The defendants' approach sounds more in the old "voucher" doctrine, which has been eliminated by the Federal Rules. *See* Fed. R. Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness."); Fed. R. Evid. 806 (allowing declarant to be impeached as if a witness); *United States* v. *Uvino*, 590 F. Supp. 2d 372, 376 (E.D.N.Y. 2008); *see also United States* v. *Alker*, 260 F.2d 135, 147-48 (3d Cir. 1958) (Government, although not bound to accept the entirety of the admitted document, "should be able to employ those portions of the document it desires").

[8] The defendants suggest in passing that the Russian government's plainly litigation-motivated letter purporting to exonerate all Russian government officials and vouching for the Prevezon owner's innocent mental state is evidence of the unreliability of the investigative reports. If defendants offer this patently unreliable document at trial, the Government will move to exclude it. *See* D.I. 645 at 17-18.

C. In Any Event the Records Are Well Within the Residual Hearsay Exception

Defendants simply have no answer to two cases that show the records are admissible under the residual hearsay exception in any event. In *United States* v. *Turner*, 718 F.3d 226, 234-35 (3d Cir. 2013), and *Chevron Corp.* v. *Donziger*, 974 F. Supp. 2d 362, 691 (S.D.N.Y. 2014), courts admitted uncertified foreign bank records that were adequately authenticated, based on the reliability of bank records in general—which, unlike a number of other types of documents generated by businesses, are relied on by banks in their everyday activities—and, in the case of *Turner*, the fact that the records at issue there were partly corroborated. *Turner*, 718 F.3d at 234-35; *Chevron*, 974 F. Supp. 2d at 691-92.

Defendants' only response to these cases comes in a footnote, and is a non sequitur as to each. Defendants attempt to distinguish *Chevron* by noting that there the records were obtained from the bank by the accountholder, instead of by formal law enforcemeint request. Mem. at 14 n.7. This is a bizarre argument—as noted above, to the extent there is any distinction, a bank would be far less likely to provide false records to a law enforcement agency than to a customer—but in any event it sounds principally in authenticity, and does not meaningfully impact the likelihood that the records produced by the bank were somehow unreliable. *See United States* v. *Wilson*, 249 F.3d 366, 375-76 (5th Cir. 2001) (admitting foreign bank records under residual hearsay exception despite "indirect chain of custody from the bank to the court"), *overruled on other grounds by Whitfield* v. *United States*, 543 U.S. 209, 212 (2005). Defendants' attempt to escape *Turner* is even less persuasive. They try to distinguish *Turner* from this case on the ground that the records there were found in the defendant's safe, instead of provided by the bank to law enforcement. Mem. at 14 n. 7. This too is a puzzling argument—records held in the residence of an accountholder are further removed from their source than

records obtained directly from the institution by law enforcement—but it also goes principally to authenticity. *See* Mem. at 14 n. 7 (citing discovery of records as evidence "they were in fact the defendant's bank statements").

Strikingly, defendants do not even briefly address the fact that the bank records here are partly—indeed, overwhelmingly—corroborated. As noted in the motion, of the 152 separate transactions in the flow of funds inside Russia, 116 (approximately 76 percent) appear on two or more sources, only 36 appear on one source only (because the counterparty records were not available),[9] and some of the corroborating records came from the governments of Moldova and Latvia. This corroboration is powerful evidence of the reliability of these records. Indeed, in *Turner* the Third Circuit relied on just this sort of partial corroboration as grounds for finding the residual hearsay exception applicable. 718 F.3d at 233, 235. Moreover, unlike in *Chevron Corp.* or in *Turner*, here the records were actually relied on by a foreign law enforcement agency.[10]

Accordingly, this case is quite similar to *Chevron* and *Turner*, and entirely dissimilar to those defendants cite in which the residual hearsay exception was rejected.[11] Nor are *Chevron* or

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

[10] Defendants' attempt to cast the entire Russian banking system as incapable of producing reliable records, Mem. at 16, is unpersuasive on its face. Leaving aside that some of the banks here are the largest banks in Russia, even the smaller banks could not stay in business without keeping accurate records of their transactions. *See, e.g.*, *Johnson*, 971 F.2d at 571. And any suggestion of unreliability is refuted by the intricate corroboration of transactions between numerous different banks, including institutions in other countries.

[11] In *Doyle*, where there was no evidence of any review by the foreign government of the documents, the Second Circuit still found their admissibility as public records to be an "extremely close" question. 130 F.3d at 546. Here, where the records were relied on in several investigatory reports and are also corroborated by one another and by records from other countries, the case for admission is far stronger. Likewise, in *Lakah*, there was no evidence that these records were specifically analyzed or relied on by the foreign government, and none that

Turner outliers. *See, e.g.*, *Karme* v. *CIR*, 673 F.2d 1062, 1064-65 (9th Cir. 1982) (admitting foreign bank records "[g]iven the circumstantial guarantees of trustworthiness which were present here, the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be"); *Wilson*, 249 F.3d at 375-76 (admitting foreign bank records under residual hearsay exception despite "indirect chain of custody from the bank to the court"); *In re Mendez*, No. 05 Bk. 62634-A-7, 2008 WL 597280, at *9-10 (Bankr. E.D. Ca. Feb. 29, 2008) (admitting uncertified bank records under residual hearsay exception); *In re N.J. Mobile Dental Practice, P.A.*, No. 05 Bk. 17772 (DHS), 2012 WL 3018052, at *8-9 (Bankr. D.N.J. July 24, 2012) (similar); *United States* v. *Peninger*, 456 F. App'x 214, 218 (4th Cir. 2011) (summary order) (similar as to commodities trading logs).

The bank records here are thus plainly admissible to show the movement of funds from the Russian Treasury Fraud out of the country through a network of shell companies. It would disserve the interests of justice to preclude the jury from evaluating these bank records, which Russian law enforcement saw fit to rely on and which are largely corroborated, including by sources in other countries. If the other hearsay exceptions are found not to apply, the residual exception was designed for just such a circumstance.

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they were corroborated by one another. 2014 WL 1100142, at *4.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court grant its motion *in limine* number 1.

Dated: New York, New York
April 21, 2017

Respectfully submitted,

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