16-0132-cv

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

PREVEZON HOLDINGS LTD., PREVEZON ALEXANDER, LLC, PREVEZON SOHO USA, LLC, PREVEZON SEVEN USA, LLC, PREVEZON PINE USA, LLC, PREVEZON 1711 USA, LLC, PREVEZON 1810 LLC, PREVEZON 2009 USA, LLC, PREVEZON 2011 USA, LLC,

Defendants-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MOVANT-APPELLANT (REDACTED)

SUSMAN GODFREY LLP
Attorneys for Movant-Appellant
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New York, New York 10022
(212) 336-8342

FERENCOI INVESTMENTS, LTD., KOLEVINS, LTD., ANY AND ALL ASSETS OF PREVEZON HOLDINGS, LTD., ANY AND ALL ASSETS OF PREVEZON ALEXANDER, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS ALEXANDER CONDOMINIUM, 250 EAST 49TH STREET, NY NY 10017, UNIT COMM3, AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCT #483044568293, HELD, ANY AND ALL ASSETS OF PREVEZON SEVEN USA, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS 127 SEVENTH AVE. AKA 166 WEST 18TH STREET RETAIL UNIT #2, NY NY AND ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCT#483041746021 HELD IN THE NAME OF PREVEZON SEVEN USA L.L.C., THE PREVEZON SEVEN ACCOUNT, ANY AND ALL ASSETS OF PREVEZON PINE USA, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET, NY NY 10005, UNIT 2308 (20 PINE STREET, UNIT 2308), ANY AND ALL ASSETS OF PREVEZON 1711 USA, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET CONDOMINIUM, 20 PINE STREET, ANY AND ALL ASSETS OF PREVEZON 1810, LLC, ANY AND ALL ASSETS OF PREVEZON 2009 USA, LLC, INCLUDING BUT NOT LIMITED TO ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET, NY NY 10005, UNIT 1816, ANY AND ALL ASSETS OF FERENCOI INVESTMENTS, LTD., ANY AND ALL ASSETS OF KOLEVINS, LTD., AND ALL PROPERTY

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TRACEABLE THERETO, 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, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 8293 HELD IN THE NAME OF PREVEZON ALEXANDER, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 8084 HELD IN THE NAME OF PREVEZON SOHO USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 6021 HELD IN THE NAME OF PREVEZON SEVEN USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 8349 HELD IN THE NAME OF PREVEZON 1711 USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 9102 HELD IN THE NAME OF PREVEZON 2009 USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 8242 HELD IN THE NAME OF PREVEZON PINE USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 5882 HELD IN THE NAME OF PREVEZON 2011 USA, LLC, ANY AND ALL FUNDS ON DEPOSIT IN BANK OF AMERICA ACCOUNT NUMBER 9128 HELD IN THE NAME OF PREVEZON 1810 USA, LLC, APPROXIMATELY $1,379,518.90 HELD BY THE UNITED STATES AS A SUBSTITUTE RES FOR ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET CONDOMINIUM, 20 PINE, APPROXIMATELY $4,429,019.44 HELD BY THE UNITED STATES AS A SUBSTITUTE RES FOR ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS ALEXANDER CONDOMINIUM, 250 EAST 49TH STREET,

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APPROXIMATELY $1,046,530.04 HELD BY THE UNITED STATES AS A SUBSTITUTE RES FOR ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET CONDOMINIUM, 20 PINE, APPROXIMATELY $894,026.21 HELD BY THE UNITED STATES AS A SUBSTITUTE RES FOR ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES KNOWN AS THE 20 PINE STREET CONDOMINIUM, 20 PINE S, A DEBT OF 3,068,946 EUROS OWED BY AFI EUROPE N.V. TO PREVEZON HOLDINGS RESTRAINED BY THE GOVERNMENT OF THE NETHERLANDS ON OR ABOUT JANUARY 22, 2014, AND ALL PROPERTY TRACEABLE THERETO,

Defendants,

– v. –

HERMITAGE CAPITAL MANAGEMENT LTD.,

Movant-Appellant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Hermitage Capital Management Ltd. discloses that its parent company is Starcliff & Partners LP, which is majority owned by Starcliff SA, which has no corporate parent. No publicly held entity owns 10% or more of the stock of any of these entities.

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Statement of Subject Matter and Appellate Jurisdiction

Hermitage Capital Management, Ltd. ("Hermitage") appeals from the January 8, 2016 Order by the Honorable Thomas P. Griesa, United States District Judge, reversing *sua sponte* his December 18, 2015 Order disqualifying Hermitage's former counsel, Baker Hostetler, from representing Defendants, and instead denying Hermitage's disqualification motion. Hermitage filed a timely notice of appeal on January 13, 2016.

The District Court had subject-matter jurisdiction over the underlying civil forfeiture action pursuant to Title 28, United States Code, Section 1345, because the lawsuit was commenced by the United States. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1291, on the grounds that the January 8, 2016 Order is immediately reviewable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the alternative, Hermitage seeks a writ of mandamus reinstating Judge Griesa's December 18, 2015 Order.

Statement of Issue Presented

Whether the District Court erred by permitting Baker Hostetler to accuse its former client of criminal conduct in the course of representing Defendants in this case, where (a) Hermitage previously hired Baker Hostetler to defend it against false accusations that Hermitage had committed a $230 million fraud on the Russian treasury (the "Russian Treasury Fraud"); (b) the prior representation is substantially related to this case, in that the Government has alleged that

Defendants laundered the proceeds of the same Russian Treasury Fraud; and (c) Baker Hostetler is now adverse to Hermitage, because in the course of representing Defendants, Baker Hostetler is falsely accusing its former client Hermitage of committing the Russian Treasury Fraud.

Statement of the Case

In 2008, Hermitage hired John Moscow and Baker Hostetler to defend it against false accusations that it was responsible for an elaborate scheme to use forged contracts, sham litigation, and fraudulent tax filings to obtain $230 million in improper tax refunds in Russia (the "Russian Treasury Fraud"). Hermitage paid Baker Hostetler approximately $200,000 for legal work conducted over the course of approximately nine months in 2008 and 2009. On Hermitage's behalf, Baker Hostetler conducted a factual investigation of the crime and prepared draft discovery requests of financial institutions designed to trace the illicit proceeds. John Moscow made a presentation to the United States Attorney's Office for the Southern District of New York in an attempt to interest federal prosecutors in prosecuting those responsible for (or those who benefited from) the Russian Treasury Fraud.

In 2013, the United States filed this civil forfeiture action alleging that Defendants (various real estate holding companies owned by the son of a Russian government official) were complicit in laundering the proceeds of the Russian Treasury Fraud. Defendants hired John Moscow and Baker Hostetler to defend them against the Government's civil charges. In light of this conflict, Hermitage filed a motion in 2014 seeking to disqualify Baker Hostetler as defense

counsel. In the course of opposing that motion, Baker Hostetler told the District Court that Hermitage was "innocent" and "had nothing to do with" the Russian Treasury Fraud, and that the history of the Russian Treasury Fraud was "irrelevant" to its representation of Defendants. Based in substantial part on those representations, the District Court denied Hermitage's 2014 motion—but warned Baker Hostetler that "if Mr. Moscow was now turning on the former client and attacking the former client, I mean, that wouldn't even be a hard case. Obviously he could not do that."

In late 2015, however, John Moscow and Baker Hostetler did *exactly* that—they turned on their former client and its principal, William Browder. In opposition to the Government's summary judgment motion seeking to establish the Russian Treasury Fraud as an undisputed specified unlawful activity underlying the money laundering allegations against Defendants, Baker Hostetler took the position that the facts surrounding the Russian Treasury Fraud were "an essential element" to the case and "every step of the alleged fraud" was disputed. Baker Hostetler told the Court that "the case has changed," and that "Hermitage is central to everything." In its brief, Baker Hostetler described its plan to defend its new client by attacking its former client:

- ". . . Browder had a motive to commit the [Russian] Treasury Fraud, which was to steal back the money his companies paid in taxes to the Russian Federation for the 2006 tax year."

- "[Browder] had the opportunity to commit the [Russian] Treasury Fraud, as he had been expelled from Russia, had nothing to lose and had all the information he needed about the three Hermitage Companies and their tax payments."
- "Defendants have proven that Browder and his agents engaged in a series of misrepresentations to execute the fraud [and] to distance themselves from it . . . ."

At oral argument, Baker Hostetler placed its accusations against Hermitage at the very center of its trial strategy: "what it comes down to, Judge, is, the government alleges there was an organization, unnamed, mysterious organization that did all this, and **the evidence points that Hermitage and Mr. Browder did it. That is the heart of the dispute**."

Stunned by the disloyalty of its former counsel making these false allegations, Hermitage renewed its motion to disqualify in December 2015. On December 18, 2015, after a lengthy hearing, Judge Griesa issued a written opinion disqualifying Baker Hostetler, stating as follows:

> It is now clear that one of BakerHostetler's primary defense strategies in the present case involves asserting that Hermitage had substantial responsibility for what is well known as the Russian Treasury Fraud. This is significant because the level of Hermitage's involvement in fraudulent activity may make the difference between proving or not proving the commission of certain alleged specified unlawful activities as a foundation for showing money

> laundering, which is at the heart of the present case. Hermitage's involvement was not previously an issue. Indeed, Moscow, who formerly represented Hermitage, took the position that Hermitage had "nothing to do" with the Russian Treasury Fraud. The case has now changed, in that it appears that BakerHostetler, and thus Moscow, is asserting that "the evidence points that Hermitage" was substantially involved in the Russian Treasury Fraud.
>
> BakerHostetler's change in defense strategy now makes the subjects of its former and current representation "substantially related." There is now a very real possibility that BakerHostetler will be in a position where it would be trying to show that its current clients (the Prevezon defendants) are not liable and showing this by attacking its former client (Hermitage) on the very subject of BakerHostetler's representation of that former client.

SPA-1-2. In these seven sentences, the District Court accurately set forth the facts underlying this appeal, and its logic supporting disqualification is unassailable. Inexplicably, however, the District Court withdrew this opinion *sua sponte* less than two weeks later and invited defense counsel to submit an additional brief. On January 8, 2016, the District Court issued a new written opinion that entirely ignored the facts stated above and denied Hermitage's disqualification motion.

Facing the imminent prospect of a public trial at which it would be falsely attacked by its former counsel—while Russian authorities continue what INTERPOL has found to be a politically motivated

campaign against it—Hermitage immediately pursued this appeal and a stay of the proceedings in the trial court. On January 22, 2016, a panel of this Court heard argument and, three days later, the panel granted Hermitage's motion for a stay. Hermitage consented to an expedited briefing schedule, and this appeal followed. Unless it is reversed by this Court, the ruling below will sanction behavior that has never previously been permitted by any court in any jurisdiction: a lawyer trying to prove to a jury that its former client committed the very crime that the client had previously retained the lawyer to refute.

Statement of Facts

A. Factual Background

1. The Russian Treasury Fraud

In 2007, an organized group of corrupt Russian officials and criminals working together (the "Organization"[1]) engaged in an elaborate, fraudulent tax refund scheme resulting in the theft of approximately $230 million from the Russian treasury (the "Russian Treasury Fraud"). A-309. After Hermitage complained to the Russian government that it had fallen victim to this crime, the Organization attempted to frame Hermitage, Hermitage's founder and CEO William Browder, and Hermitage's Russian lawyer, Sergei Magnitsky, for perpetrating the fraud themselves.

The Russian Treasury Fraud unfolded in multiple steps:

- First, in June 2007, the Organization, led by corrupt government officials, raided Hermitage's Moscow office and the office of Hermitage's local law firm, seizing confidential corporate documents including the records and official seals of portfolio companies of the Hermitage Fund, the investment vehicle advised by Hermitage (the "Hermitage Companies"). A-312.

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[1] We use the word "Organization" because the Government employs that term in its money laundering complaint in this case. The Government's complaint refers to the Russian Treasury Fraud as the "$230 Million Fraud Scheme." See A-309.

- Second, without Hermitage's knowledge, the Organization used the seized documents to obtain fraudulent court orders transferring the Hermitage Companies to members of the Organization. A-313-316.
- Third, the Organization forged back-dated contracts to create nearly $1 billion in non-existent liabilities of the Hermitage Companies, and instituted sham lawsuits based on these contracts to obtain fraudulent judgments totaling $973 million. A-316-317.
- Fourth, the Organization used the forged contracts and judgments procured in the sham lawsuits to apply for a $230 million tax refund on the false ground that these new liabilities wiped out the profits the Hermitage Companies had earned in 2006. A-317-320.

In late December 2007, within a single business day, corrupt Russian tax officials approved the fraudulent refund applications, and the Russian treasury deposited the entire $230 million into bank accounts controlled by the Organization in two small Russian banks. A-328-329. Some of the money was converted into United States dollars and wired to a number of bank accounts, including accounts in New York. A-339.

While Hermitage was aware of the June 2007 raids shortly after they occurred, it was not until mid-October 2007 that a call from a bailiff in a St. Petersburg court led Hermitage and its lawyers to discover that Hermitage was a victim of fraud. A-322. Hermitage quickly took steps to protect its interests,

and by early December 2007—even before the Organization had taken the final step of obtaining fraudulent tax refunds—Hermitage had notified Russian law enforcement of the theft of the Hermitage Companies and had filed six criminal complaints with Russian law enforcement identifying members of the Organization as responsible for the fraud. A-322.

In retaliation for Hermitage's investigation and criminal complaints, the Organization set out to frame Hermitage, Browder, and other Hermitage employees and attorneys for orchestrating the fraud that had victimized Hermitage. A-323-325. Criminal proceedings were instituted in Russia against Browder, Hermitage, and others to harass and intimidate them. One of Hermitage's lawyers in particular, Sergei Magnitsky, repeatedly gave testimony against corrupt public officials who were members of the Organization. A-323. In November 2008, as a direct response, Magnitsky was arrested and imprisoned in conditions designed to coerce him to falsely incriminate himself and Hermitage in the fraud. After 358 days of punitive confinement, Magnitsky died while in Russian police custody; he was just 37 years old. A-324. Russia's own Human Rights Council concluded that Magnitsky's arrest and detention were illegal; that he had been investigated by the very officials he had publicly accused of wrongdoing; that he was beaten and denied medical care; and that the paramedics called to his cell while he lay dying were deliberately denied entry until after his death. A-324-325.

2. Hermitage Retains Moscow and Baker Hostetler to Avoid Being Framed for The Russian Treasury Fraud

In September 2008, two months before Sergei Magnitsky's arrest, Hermitage hired John Moscow and Baker Hostetler to help defend Hermitage and its personnel and agents against any potential false claims that they had participated in the Russian Treasury Fraud, to seek evidence about those truly responsible, and to cause prosecutions in other jurisdictions against them. Hermitage sought counsel outside of Russia because of the danger to counsel in Russia and the need for access to foreign discovery to help defend it against false charges. Baker Hostetler did exactly what Hermitage hired it to do. As Baker Hostetler candidly admitted during one hearing before the District Court, the purpose of the representation was "to defend [Hermitage] from charges in Russia"; to meet with U.S. prosecutors to encourage the prosecution of those responsible for the Russian Treasury Fraud and to seek forfeiture of the assets of those who benefited from it; and to "get bank records and other records" from banks through which the stolen funds were routed to aid the defense. A-191; A-201-202. The stakes could not have been higher—the vast majority of Baker Hostetler's work occurred during Magnitsky's false imprisonment under inhumane conditions.

Baker Hostetler set forth the broad scope of its activities in a signed retention agreement with Hermitage. The "scope of the engagement" describes how

> [i]n this engagement, we expect to perform the following: extensive analysis of the factual and legal background of the events in question; examination and analysis of evidence in both testimonial and documentary form, including the testimony of expert witnesses; preparation and presentation of prosecution memoranda, if appropriate, to the United States Department of Justice (or other law enforcement agency); and cooperation and support to the United States Department of Justice if an investigation is pursued by them.

A-107. In a prior letter, Mr. Moscow had given Hermitage additional details about how Baker Hostetler would approach its presentation to prosecutors:

> You have asked us to structure a presentation of evidence on these potential frauds that will be more easily understood by prosecutors in this country, and to discuss the same with one or more prosecution agencies to suggest their taking action against the fraudsters. One of the possibilities which I see is seeking to have the proceeds of the frauds, to the extent that they are trading through New York, subject to forfeiture by the Department of Justice. . . .
>
> Given all that, I anticipate that it should take us approximately 200 hours of work to put this case together for an initial presentation. At the rates specified below, that would entail a labor cost of approximately $125,000. . . .

A-102-103.

Over the next nine months, Baker Hostetler provided legal assistance to Hermitage designed to accomplish these objectives. During that time, Baker Hostetler billed Hermitage nearly $200,000 (substantially more than its estimate for the entire scope of work proposed) with Mr. Moscow as lead counsel performing the following tasks, among others:

- Analyzing detailed presentations provided to Baker Hostetler by Hermitage and Browder, and reviewing non-public documents and materials from them concerning, among other things, the "Russian tax filings and lawsuits," A-112; A-120; A125-126;
- Creating a "case timeline" and "review[ing] documents, translations, and chronology regarding . . . tax fraud," and building a related "information database," A-117-118;
- Conferring about "potential individuals for depositions in connection with the prosecutions in Russia," A-116;
- Meetings with the U.S. Attorney's Office for the Southern District of New York, including a nearly five-hour meeting on December 3, 2008 with former Assistant U.S. Attorney Marcus Asner, A-117-118, and the Attorney General's office in the British Virgin Islands, A-120, to interest them in prosecuting those responsible for the $230 million tax fraud, A-102; A-107; and
- "[R]eview bank records" and research "proper service agent for" bank involved in routing proceeds of the Russian Treasury Fraud. A-117-118.

Baker Hostetler also began the process of tracing the proceeds of the Russian Treasury Fraud, recognizing that one of the best ways to determine who perpetrated the fraud was to figure out where the money traveled. To that end, Baker Hostetler prepared a seventy-seven paragraph draft declaration (the "Declaration") setting forth the details of the Russian Treasury Fraud in support of a request for a subpoena pursuant to Title 28, United States Code, Section 1782, the provision allowing the federal courts to order discovery "for use in a foreign or international tribunal"—in this case, the Russian proceedings concerning the Russian Treasury Fraud. A Baker Hostetler lawyer emailed the Declaration to Mr. Browder in May 2009, with a copy to Mr. Moscow. The Declaration describes how Baker Hostetler intended to serve it on four American financial institutions and the United States branch of Raiffeissen, described in the Declaration as "the sole holder of correspondent accounts for both USB and Intercommerz," the two small Russian banks into which the proceeds of the Russian Treasury Fraud were directly deposited. CA-27.

Baker Hostetler's retention agreement explicitly describes how it was retained "in connection with certain apparent frauds [plural] committed by and through Renaissance Capital ('Renaissance'), some of which may have been designed to fraudulently create apparent criminal liability on Hermitage Capital Management ('Hermitage')." A-107. The primary fraud committed by and through Renaissance—and the only Renaissance fraud "designed to create apparent criminal liability" for Hermitage—was the Russian Treasury Fraud itself. In fact, the

Declaration prepared by Baker Hostetler sets forth the circumstances of the Russian Treasury Fraud in substantial detail, and it explicitly states that "senior executives of Renaissance Capital Holdings" were members of the "Criminal Group" responsible for the Russian Tax Fraud, described in the Declaration as a $230 million "Tax Rebate Fraud."[2] CA-4-5.

Baker Hostetler's Declaration details the complicity of Renaissance executives in the Russian Treasury Fraud, explaining that Renaissance was the parent company of "RenCap Securities, Inc. ('RenCap'), a registered broker-dealer in New York." CA-5 ¶ 5. The Declaration recounts how the President of Renaissance reached out to Mr. Browder and, mysteriously, was aware of Hermitage's "problems" concerning the Russian Treasury Fraud as early as November 2007 (CA-17 ¶¶ 36-39). The Renaissance executive then offered Renaissance's services to help "liquidate" the Hermitage Companies on Hermitage's behalf. (CA-18-19 ¶¶ 44-45).

The Declaration goes on to say that in the course of investigating the $230 million Treasury Fraud, Hermitage discovered that Renaissance also had been "actively involved" in an earlier tax refund scam

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[2] There is no dispute that the "Criminal Group" defined in the Declaration is intended to describe the same people as the "Organization" defined in the Government's complaint against Defendants, and furthermore there is no dispute that the Declaration's "Tax Rebate Fraud" and the Government's alleged "$230 Million Fraud Scheme" are the same crime as the "Russian Treasury Fraud" discussed in these proceedings.

involving Renaissance's own "Rengaz Subsidiaries." (CA-22 ¶ 56.) The Declaration details a number of striking similarities between the Russian Treasury Fraud and the fraud involving Rengaz (the "Rengaz Fraud"). (CA-25-26 ¶¶ 65, 68, 70).

Baker Hostetler's Declaration unmistakably concluded that the same perpetrators, including certain Renaissance executives, were involved in both the fraud involving the Hermitage Companies and the fraud on the Rengaz Subsidiaries, and that the investigation of the perpetrators of these two tax refund frauds were one and the same.[3] Thus, even though Hermitage was not a victim of the Rengaz fraud—indeed, it had no connection to it—Hermitage and Baker Hostetler were nonetheless interested in that related crime to the extent it could help shed light on those responsible for the Russian Treasury Fraud. The entirety of Baker Hostetler's legal work related to the "frauds committed by and through Renaissance Capital" (as Moscow described them in his initial proposal letter to Hermitage) was therefore legal work regarding the Russian Treasury Fraud.

A comparison of the Declaration prepared by Baker Hostetler to the statements the firm is now making about its former client Hermitage dramatically reveals Baker Hostetler's side-switching. The

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[3] In fact, the Government reached the exact same conclusion; in its complaint in this case, it devoted nine paragraphs to describing the "striking" similarities between the Russian Treasury Fraud and "what appears to have been a fraud scheme carried out by the [same] Organization in 2005 involving two subsidiaries of Rengaz." (A-320-322 ¶¶ 46-54).

Declaration states in Paragraph 3 that "[b]eginning in 2007, Hermitage, its employees, and four Moscow-based law firms became the victims of a major fraud"—now, Baker Hostetler denies that Hermitage is a victim at all. CA-4. The Declaration states in Paragraph 6 that the Organization responsible for the fraud "attempted to conceal its crimes by fabricating criminal cases alleging tax evasion against William F. Browder, the founder and CEO of Hermitage"—now, Baker Hostetler trumpets Mr. Browder's politically-motivated (and in absentia) conviction in Russia as if it were legitimate. CA-5. Indeed, Baker Hostetler has been quoted in the press calling Mr. Browder "a tax-cheat" who "has no credibility and should not be a witness or even a source for the US attorney to rely upon for [this] lawsuit." A-228. Baker Hostetler is now attempting to attack and disprove the very facts it previously presented to the United States Attorney's Office and prepared to submit to a federal court.

As discussed in more detail below, New York case law and rules of professional conduct do not require a former client to publicly disclose the confidences it shared with its lawyer when seeking to have him disqualified. Nevertheless, in 2014, in the face of Baker Hostetler's repeated and unethical demands that Hermitage identify its own confidences, Hermitage submitted under seal to the District Court a small sample of the many privileged communications between Hermitage and Baker Hostetler about the Russian Treasury Fraud. *See* CA-1. These sample communications reflect the detailed work that Moscow and his colleagues did for Hermitage in order to defend them against accusations relating to the Russian Treasury Fraud—

the same accusations that Baker Hostetler itself is now *making*.[4] [redacted]

[redacted]

3. Russian Prosecutors Continue to Persecute Hermitage, its Principal, and its Lawyers in Retaliation for Exposing the Russian Treasury Fraud

The Russian government's persecution and criminal proceedings targeting Hermitage, its personnel, and its lawyers (including posthumous charges against Magnitsky) have intensified since Baker Hostetler began publicly attacking Hermitage and its personnel in the fall of 2015. For example, in November 2015, Russian law enforcement searched the offices of Hermitage's lawyers in Cyprus. A-577. And on December 14, 2015, the Prosecutor General of

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[4] These communications are included in the Confidential Appendix at pages 52 through 159.

Russia wrote an open letter to the public blaming Mr. Browder for the Russian Treasury Fraud and promising that a "powerful investigation group is organized on this case, its activities have been invigorated recently. Investigation is carried out in several countries simultaneously. Its results will doubtlessly be extremely unpleasant to W. Browder—and not to him alone." A-581. Later that month, Russian law enforcement announced that they intend to pursue additional charges against Mr. Browder. A-601.

The connection between what is happening in the trial court and the Russian pursuit of Hermitage and its personnel is unmistakable. Baker Hostetler's access to civil discovery in the United States courts (including the power to subpoena and depose Mr. Browder, which it has sought to do numerous times in this case) is a more powerful tool than any now at the Russian Government's disposal in its ongoing persecution of Hermitage and Mr. Browder, because the Russian Federation's efforts to obtain material about Hermitage from western nations have been rebuffed as "predominantly political in nature." A-603. The Russian Prosecutor General conceded as much by describing this case as "a unique chance to obtain the evidence within the judicial procedures" that Mr. Browder's story is "nothing but the lying PR campaign ran by Browder and the latter's decision to turn everything upside down . . . and avoid[] punishment." A-583.

B. Procedural History

1. The District Court Refuses to Disqualify Counsel on Basis of Representations that Details of Russian Treasury Fraud Are Irrelevant to Forfeiture Action and that Hermitage Is Innocent

In 2013, the Government filed this forfeiture action accusing Defendants of knowingly receiving the proceeds of the Russian Treasury Fraud and seeking forfeiture of the assets traceable to the fraud. Defendants retained Baker Hostetler, and Mr. Moscow specifically, to defend it. In September 2014, Hermitage and Browder moved to disqualify Baker Hostetler and Moscow for violating New York Rule of Professional Responsible 1.9 and "switching sides": from pursuing those who received the proceeds of the Russian Treasury Fraud to defending them.[5] Moscow and Baker Hostetler opposed the motion, arguing that the purpose of their prior representation of Hermitage was to "defend it from prosecution in Russia" and that the focus of that work, the Russian Treasury Fraud, was "irrelevant" to the current dispute. A-191; A-221. Baker Hostetler represented to the District Court that "all that history [of the Russian Treasury Fraud] is irrelevant. . . . And I've stood here and said

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[5] The District Court mistakenly stated that Baker Hostetler notified Hermitage of the potential conflict before accepting the representation, but that was not the case (and Baker Hostetler does not claim otherwise). Rather, Hermitage notified Baker Hostetler of the conflict when Hermitage learned of the representation after Baker Hostetler had appeared in the case. Dkt. 134 at 5.

paragraphs 1 through 100 [of the Complaint, which describes the Russian Treasury Fraud], all that history is irrelevant, your Honor." A-221.

In its attempt to sidestep the obvious ethical conflict, Baker Hostetler told the District Court that the Russian Treasury Fraud was "completely unnecessary" to the case and promised that "what we would do is work the Prevezon piece of it, which is the last 20 paragraphs [of the Complaint, which describe the Russian Treasury Fraud]. Prevezon was unheard of in 2008 and 2009. . . . And we would defend Prevezon that it was not involved in money laundering and didn't have the intent to engage in money laundering, the last 20 paragraphs." A-221-222. In any event, Moscow told the District Court, Hermitage is "not adverse in interest to Prevezon" because both were "wrongly targeted" by authorities; Hermitage was "innocent"; and "had nothing to do with" "the people who had stolen money in Russia." A-189; A-202; A-192. What Moscow told the District Court about his former client in 2014 was entirely correct: Hermitage is an "innocent" victim of the Russian Treasury Fraud. And who would know that better than its former counsel?

The District Court accepted Baker Hostetler's repeated assurances and denied the motion. The District Court found that "the issues in this case are different in all substantial respects from what [Mr. Moscow] dealt with when he represented Hermitage back in 2008 and early 2009." A-298-299. It further found that "There is no indication that [Mr. Moscow] is in any substantial way taking a position which involves an attack upon or an attempt to hold liability with regard to Hermitage." A-297. However, the

District Court explicitly warned Mr. Moscow and Baker Hostetler that, "If Mr. Moscow was now turning on the former client and attacking the former client, I mean, that wouldn't even be a hard case." A-286. But only a year later, Baker Hostetler did exactly that.

2. Defendants Change Their Trial Strategy to Make False Allegations that Hermitage and Browder Committed the Russian Treasury Fraud the "Heart of the Dispute"

Baker Hostetler's about-face resulted from its apparent new strategy challenging an essential element of the Government's money laundering claim: that the money laundered by Defendants was derived from a "specified unlawful activity." 18 U.S.C. § 1956. The Government intends to prove that the Russian Treasury Fraud constituted the specified unlawful activity of fraud on a foreign bank, *id.* § 1956(c)(7)(B)(iii), because control of the Hermitage portfolio companies was fraudulently wrested from HSBC Private Bank (Guernsey) Ltd. (the Hermitage Fund's trustee) and HSBC Management (Guernsey) Ltd. (the Hermitage Fund's manager), and because the conduct harmed HSBC Private Bank (Suisse) S.A., a proprietary investor in the Hermitage Fund. A-388-89.

In November 2015, Defendants revealed their plan to contest this essential element at trial. Put simply, the crux of their new strategy is to blame Hermitage and Browder for the Russian Treasury Fraud in order to negate the government's theory of fraud on a foreign bank. Defendants intend to argue that the HSBC entities never lost control of the Hermitage portfolio companies, because no corrupt Organization ever took them. Instead, they claim "Browder and his

agents engaged in a series of misrepresentations to execute the fraud, to distance themselves from it, and to pin it on the Russian officials investigating Browder for a separate tax fraud his companies committed." A-449-450. Baker Hostetler explained:

> And what it comes down to, Judge, is, the government alleges there was an organization, unnamed, mysterious organization that did all this, and **the evidence points that Hermitage and Mr. Browder did it. That is the heart of the dispute**."

A-516:20-24. Describing the prominence of the firm's former client in its trial strategy even more succinctly, the same Baker Hostetler lawyer said: "So Hermitage is central to everything, and the case has changed." A-406:7-8.

3. The District Court Disqualifies Baker Hostetler Following Its Decision to Accuse Hermitage of the Russian Treasury Fraud

Upon learning of Baker Hostetler's strategy, which directly violated the District Court's admonition against "attacking" a former client, Hermitage renewed its motion to disqualify. On December 18, 2015, after an extended argument, the District Court granted Hermitage's motion and disqualified Moscow and Baker Hostetler. SPA-3. In a written Opinion, the District Court correctly concluded that Baker Hostetler's change in strategy rendered the two representations "substantially related":

> It is now clear that one of BakerHostetler's primary defense strategies in the present case involves asserting that Hermitage had substantial responsibility for what is well known

> as the Russian Treasury Fraud. This is significant because the level of Hermitage's involvement in fraudulent activity may make the difference between proving or not proving the commission of certain alleged specified unlawful activities as a foundation for showing money laundering, which is at the heart of the present case. Hermitage's involvement was not previously at issue. Indeed, Moscow, who formerly represented Hermitage, took the position that Hermitage had "nothing to do" with the Russian Treasury Fraud. The case has now changed, in that BakerHostetler, and thus Moscow, is asserting that "the evidence points that Hermitage" was substantially involved in the Russian Treasury Fraud.
>
> BakerHostetler's change in defense strategy now makes the subjects of its former and current representation "substantially related." There is now a very real possibility that BakerHostetler will be in a position where it would be trying to show that its current clients (the Prevezon defendants) are not liable and showing this by attacking its former client (Hermitage) on the very subject of BakerHostetler's representation of that former client.

SPA-1-2 (citations omitted). The previously unimaginable spectacle of Baker Hostetler accusing its former client of the crime it had been hired to defend it against is more than a "very real possibility"; Baker Hostetler has already done it and intends to do so repeatedly at trial.

On December 21, Defendants moved for a stay and an order certifying the District Court's

disqualification order for interlocutory appeal. A-530. Less than twenty-four hours later, and before giving Hermitage or the government an opportunity to respond, the District Court entered an order satying the case and certifying an appeal pursuant to 28 U.S.C. § 1292(b), finding that the order presented "controlling questions of law as to which there is substantial ground for difference of opinion." A-531. It described the "controlling question of law" as "Should Defendants' counsel be disqualified from representing Defendants in this case based on a conflict of interest." *Id.*

4. The District Court *Sua Sponte* Vacates its Decision, Orders More Briefing from Defendants Only, and Reverses Itself

Less than one week later—just after midnight on Christmas Eve—the District Court directed the parties to appear for a telephone conference at noon that day where it *sua sponte* announced it was reconsidering its disqualification order and asked the parties to reconvene for another telephone conference the following Monday. At that conference, the District Court announced that it was withdrawing its December 18 Opinion and directed Baker Hostetler to make another submission a week later as to why it should not be disqualified.

On January 8, 2016—just three weeks after it had disqualified Baker Hostetler—the District Court reversed itself and issued a written Opinion denying Hermitage's disqualification motion. Ignoring entirely Baker Hostetler's shift in trial strategy and attacks on its former client, the District Court ruled that Baker Hostetler's representation of Defendants was permissible because the "Russian [Treasury] Fraud is

merely background information." SPA-12-13. In stark contrast to its December 18, 2015 Opinion, the District Court made no attempt to address the change in trial strategy by Baker Hostetler or the attacks made by it on Hermitage. The January 8 Opinion ignores these issues as if they had ceased to exist.

The District Court brushed aside Hermitage's interest in enforcing Baker Hostetler's ethical obligations: "Not only is the Russian Fraud a side issue in this matter, but Hermitage is also a mere spectator to this litigation. Hermitage is not a party to this suit and its rights are not directly at stake." SPA-13. Curiously, the District Court concluded that even if Moscow had gained confidential knowledge about Hermitage's defense to the Russian accusations, "this type of knowledge is irrelevant here, where Hermitage is not a party." SPA-14. It further found "no legal support" for the idea that it should consider the Russian legal action against Hermitage—the same action Moscow and Baker Hostetler had been hired to defend against—in weighing the motion to disqualify Hermitage's prior counsel. SPA-15.

On January 11, Hermitage asked the District Court to grant a stay and to certify its new order for immediate appeal—the same opportunity for appellate review that it already had given to Defendants. The Court denied Hermitage's motion, this time finding that its disqualification decision raised no controlling questions of law, because "law in the attorney disqualification context" is "fairly well-settled." [Dkt. No. 529.]

On January 12, 2016, the District Court scheduled jury selection to begin on January 27. On January 13, Hermitage filed an emergency motion in this Court to

stay the proceedings in District Court pending an appeal of the denial of its disqualification motion. On January 22, this Court heard oral argument on Hermitage's motion, and counsel for Defendants was unable to provide satisfactory answers to such fundamental questions as (1) how Baker Hostetler could accuse its former client Hermitage of committing the very crime at issue in its previous defense of Hermitage, and (2) how Baker Hostetler could claim that it received no confidential information from its client over the course of a nine-month representation. In an Order dated January 25, this Court granted Hermitage's motion for a stay pending this appeal.

Summary of Argument

In this case, Baker Hostetler is attempting to defend its current clients accused of laundering the proceeds of the Russian Treasury Fraud by accusing its former client of committing the very crime it was previously engaged to refute. No attorneys have ever been permitted by any court to switch sides in so blatant a fashion. Baker Hostetler should not be the first.

This Court has developed a three-part test to determine whether counsel should be disqualified. First, the moving party must be a former client of the counsel subject to the motion; this factor was not in dispute below. Second, there must be a "substantial relationship" between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; even a cursory side-by-side comparison of Baker Hostetler's work product and the Government's complaint in this case demonstrate that the two cases involve the exact same

criminal conduct: the Russian Treasury Fraud. Third, the attorney whose disqualification is sought must (or have been likely to) have had access to relevant privileged information in the course of his prior representation of the client; where the same attorney (and not just the same firm) was involved in both representations, as is the case here, this part of the test is conclusively presumed to have been satisfied. In this case, each of the three factors is present and Baker Hostetler's aggressive attacks on its former client require disqualification.

Although the District Court initially recognized this and disqualified Baker Hostetler, three weeks later it committed legal error in reaching the opposite conclusion. It improperly placed the burden on Hermitage to make a showing of what privileged communications its former counsel was misusing in the course of the current case, even though the law expressly forbids that inquiry. Moreover, the District Court misconstrued the test seemingly to require a fourth factor—an independent showing of trial "taint" resulting from the representation—even though the potential for misuse of privileged information learned from a prior client is *itself* the taint identified by this Court's precedent. In addition, the District Court clearly erred in finding that Baker Hostetler's prior efforts to defend Hermitage against false accusations that it was guilty of the Russian Treasury Fraud and identify beneficiaries of the stolen proceeds were unrelated to the Government's charges that Baker Hostetler's current clients laundered the proceeds of the same fraud.

After briefing and argument on Hermitage's emergency motion to stay the proceedings below, this

Court properly issued a stay pending appeal. But so long as Baker Hostetler remains counsel to Defendants, Hermitage's confidences remain at risk. Baker Hostetler must not be permitted to continue falsely to accuse its former client Hermitage of committing the Russian Treasury Fraud; these are the very false accusations that led Hermitage to hire Baker Hostetler in 2008. Disqualification of counsel in this case will enforce the duties of confidentiality and loyalty that Baker Hostetler continues to owe to Hermitage, and it will serve to uphold both the dignity and the reputation of the legal profession.

ARGUMENT

A. The Court Has Jurisdiction Pursuant to 28 U.S.C. § 1291

This Court has jurisdiction over Hermitage's direct appeal pursuant to 28 U.S.C. § 1291, as the order denying its motion to disqualify is a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under *Cohen*, a district court's order is appealable before judgment if it satisfies the following three-prong test: "(1) it is conclusive; (2) it resolves important questions separate from the merits; and (3) it is effectively unreviewable on appeal from the final judgment in the underlying action." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 103 (2d Cir. 2013).

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-76 (1981), the Supreme Court found or assumed that orders denying disqualification would meet the first two of the three prongs of the *Cohen* test. Here, Hermitage also satisfies the third prong—that the order is "effectively unreviewable on appeal

from a final judgment"—because, as a non-party, Hermitage does not have standing to appeal a final judgment. *See Marino v. Ortiz*, 484 U.S. 301, 303 (1988).

Defendants argue that *Firestone* precludes jurisdiction here because decisions about applicability of the collateral order doctrine apply to the "'entire category to which a claim belongs.'" Defs.' Opp. to Stay at 17 (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009)). But the category at issue in *Firestone* was unsuccessful motions for disqualification made by parties, not non-parties. Courts repeatedly distinguish between parties and non-parties who are otherwise similarly situated for purposes of the collateral order doctrine. *See, e.g.*, *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 462 F.3d 87, 92 (2d Cir. 2006) (noting that the interlocutory nature of a civil contempt order is "no longer present" when issued against a non-party); *Conticommodity Servs., Inc. v. Ragan*, 826 F.2d 600, 601 (7th Cir. 1987) (Posner, J.) (explaining that *Firestone* is distinguishable from a situation in which the appellant is a non-party on the grounds that *Firestone* "involved an appeal by a party" such that an incorrect order "could be rectified upon the losing party's appeal," whereas "appealing from the final judgment would not be a remedy for [the] nonparty"); *see also* 15B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.31 (2d ed.) ("[A] nonparty may be able to take a final decision appeal from an order that would not be final if made against a party."). Hermitage's status is, as the District Court correctly recognized, akin to a non-party whose motion to intervene has been denied.

(Docket No. 529 ("Hermitage had, in effect, been allowed to intervene for [a] limited purpose.")).

If this Court concludes that it lacks jurisdiction to hear an appeal under Section 1291, Hermitage respectfully requests the Court consider this appeal as a petition for a writ of mandamus. *See SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010) (issuing writ of mandamus where collateral order doctrine did not apply).

B. The District Court Disregarded Settled Second Circuit Law In Order to Keep Baker Hostetler in the Case

Second Circuit law and New York's Rules of Professional Responsibility impose duties of loyalty and confidentiality on attorneys that are owed to clients even after the representation is terminated. In the case of successive representations, an attorney may be disqualified if:

> (1) the moving party is a former client of the adverse party's counsel;
>
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
>
> (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 133 (2d Cir. 2005); *accord* N.Y. Rule of Professional Responsibility 1.9(a). As in this case, if the same attorney handled both matters and a former

client establishes the first two elements—adversity and substantial relationship—an irrefutable presumption arises that the attorney obtained relevant privileged information in the prior representation. *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 164-65 (E.D.N.Y. 2006) (collecting cases).

Because there should not be "even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case," *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973), "in the disqualification situation, any doubt is to be resolved in favor of disqualification." *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975).

The District Court correctly found that Hermitage was a former client of Baker Hostetler, which has now taken materially adverse positions against it. SPA-12. This Court reviews issues of law *de novo* and factual findings under the clearly erroneous standard. *See GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010).

1. The District Court Misapplied Well-Settled Law When it Determined There is No Substantial Relationship Between the Representations

A substantial relationship exists between successive representations where the same "facts and circumstances" are relevant to both. *Red Ball Interior Demolition Corp. v. Palmadessa*, 908 F. Supp. 1226, 1244 (S.D.N.Y. 1995); *accord U.S. Football League v. Nat'l Football League*, 605 F. Supp. 1448, 1459 (S.D.N.Y. 1985) ("*USFL*"). A substantial relationship can exist even if the "questions of law and fact [a]re somewhat different," especially when "the witnesses,

testimony, and other evidence germane to one action are likely to be similar to the other." *Palmadessa*, 908 F. Supp. at 1244. Matters frequently are substantially related even when the "ultimate issue is not identical" in the two representations. *See Blue Planet Software, Inc. v. Games Int'l, LLC*, 331 F. Supp. 2d 273, 277 (S.D.N.Y. 2004).

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), is directly on point. In *Emle*, the attorney filed a complaint on behalf of his client Burlington against a patent holder seeking a declaratory judgment of invalidity. The defendant asserted a counterclaim against Burlington asserting that it had misused its control over a subsidiary, Patentex, to harm the defendant. 478 F.2d at 566-67. The degree of control exercised by Burlington over Patentex therefore became an issue for that case. *Id.* In a later case, the same lawyer represented competitors suing his former client Burlington and Patentex and asserting, among other things, that patents were invalid because Burlington had misused its control of Patentex to fix prices in the industry. *Id.* The Court explained:

> In the [first] case, Kayser-Roth argued that Burlington's control was used to destroy the *Supp-hose* patent and, also, that this control justified imputing to Burlington an admission made by Patentex. In the present suits, plaintiffs alleged that such control permitted Burlington, through Patentex, to fix prices within an industry in which Burlington is the dominant factor.

Id. at 571. Even though the ultimate issues were different, the issue of Burlington's control over Patentex was a disputed issue in each case, and

therefore the two matters were substantially related. *Id.* at 274.

The District Court's December 18, 2015 Opinion faithfully applied the substantially related test and concluded that Prevezon's trial strategy of making the Russian Treasury Fraud and Hermitage a "central" issue of the case rendered the representations substantially related:

> It is now clear that one of BakerHostetler's primary defense strategies in the present case involves asserting that Hermitage had substantial responsibility for what is well known as the Russian Treasury Fraud. . . .
>
> BakerHostetler's change in defense strategy now makes the subjects of its former and current representation "substantially related." There is now a very real possibility that BakerHostetler will be in a position where it would be trying to show that its current clients (the Prevezon defendants) are not liable and showing this by attacking its former client (Hermitage) on the very subject of BakerHostetler's representation of that former client.

SPA-1-2. The record allows for no other reasonable conclusion. Baker Hostetler repeatedly has described the centrality of the Russian Treasury Fraud in filings and in Court. When successfully opposing the government's motion for partial summary judgment on the specified unlawful activity element, Baker Hostetler told the court:

> [E]very step of the alleged fraud against HSBC has been disputed with very specific facts. And what it comes down to, Judge, is, the government

> alleges there was an organization, unnamed, mysterious organization that did all this, and **the evidence points that Hermitage and Mr. Browder did it. That is the heart of the dispute.**

A516:19-24 (emphasis added). Elsewhere, Baker Hostetler represented that "the manner in which the [Russian] Treasury Fraud was carried out . . . is an essential element of the Government's claims" and that, as a result of Baker Hostetler's new trial strategy to negate that element, "**Hermitage is central to everything, and the case has changed.**" A-445; A-406:7-8 (emphasis added).

The District Court's January 8, 2016 Opinion, denying the disqualification motion, misapplied the proper legal standard. The court reasoned that the matters were not substantially related because: (1) "Hermitage was never the target of a U.S. investigation for the Russian Fraud": (2) "The Russian Fraud is merely background information and Hermitage cannot be held liable as a result of this lawsuit"; and (3) "Hermitage is also a mere spectator in this litigation . . . and its rights are not directly at stake." SPA-12-13.

The first and third reasons stated above are irrelevant to whether the two representations implicate the same "facts and circumstances." *Palmadessa*, 908 F. Supp. at 1244. The proper inquiry focuses on whether the manner in which the Russian Treasury Fraud was executed is a meaningful component of the upcoming trial. Baker Hostetler has conclusively conceded the answer to this question in its own papers by labeling the circumstances of the Russian Treasury Fraud an "essential element" of the

case that it insists be a centerpiece of the trial. The Court's finding that this critical defense strategy is "mere background" ignores the proper question of whether a substantial relationship exists, as the District Court itself recognized in its December 18 Opinion just a few weeks earlier. The District Court's January 8 Opinion makes no attempt to address those factors that it deemed crucial in its December 18 Opinion: Defendants' "strategic decision" to make the trial about the Russian Treasury Fraud and to accuse Hermitage and Browder of perpetrating it. Far from addressing them, the opinion does not even mention these facts, as if they disappeared from the record in the interval between its decisions.

The purpose of the "substantial relationship" inquiry is to determine if a "reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." N.Y. Rule of Professional Responsibility 1.9 cmt. 3. Here, there can be no doubt: Mr. Moscow and Baker Hostetler worked closely with Hermitage to defend it against false accusations that it committed the Russian Treasury Fraud. Any "reasonable lawyer"—or even a casual observer—would understand that this representation entailed detailed factual information about the underlying conduct, witnesses, and what strategies and facts Hermitage feared would be misused to try to frame it. The same reasonable lawyer would fear that such information "would materially advance" Baker Hostetler's publicly stated goal at trial of proving (falsely) that "Hermitage and Browder did it."

2. The District Court Misapplied Well-Settled Law by Requiring Hermitage to Disclose the Confidential Information It Shared with Baker Hostetler

Second Circuit law and New York's ethical rules are unequivocally clear that where matters are substantially related "there is an irrefutable presumption that the attorney had access to confidential information." *Tiuman v. Canant*, 1994 WL 198690, at *2 (S.D.N.Y. May 19, 1994).[6] The entire purpose this presumption is to "forestall a direct inquiry into whether confidential information was in fact transmitted by the client." *USFL*, 605 F. Supp. at 1457 n.20. Ignoring this binding precedent, the trial court erred by reasoning that "the presumption does not relieve the movant from having to make some showing that confidences were shared" and that "the movant must show that the specific, privileged information was allegedly divulged." Dkt. 521 at 8. Had the court instead properly applied the substantial relationship test and found it satisfied, that would be the end of the inquiry, and Baker Hostetler should have been disqualified—precisely as the District Court ruled on December 18.

But even aside from the District Court's improper attempt to inquire into Hermitage's confidences, it applied the wrong legal standard in determining whether any confidences were shared. Confidential

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[6] The presumption is rebuttable in situations where different lawyers were involved. Here, because Moscow was involved in both cases, Baker Hostetler cannot refute the presumption. *See* Declaration of Bruce Green ¶ 18. A-525.

information is not limited to discrete facts that are unknown to anyone else. The term broadly encompasses any "problems" that a client justifiably expects to discuss "freely and in depth" with his lawyer. *Emle*, 478 F.2d at 571. Put another way, a lawyer who had access to a prior client's "expectations, statements, and conduct" in one matter cannot later represent another adverse client in a related matter. *Ulster Scientific, Inc. v. Guest Elchrom Scientific AG.*, 181 F. Supp. 2d 95, 104 (N.D.N.Y. 2001). Disqualification is merited when such confidential information can be exploited by the former lawyer by "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, [and] what lines of attack to abandon and what lines to pursue." *Mitchell v. Metropolitan Life Ins. Co.*, 2002 WL 441194, at *8 (S.D.N.Y. Mar. 21, 2002).

New York's ethics rules and Second Circuit law squarely reject the narrow definition of "confidential information" peddled by Baker Hostetler and implicitly relied upon by the District Court. Confidential information is not limited to that which would be shielded by the attorney-client privilege, but instead generally extends to all "information gained during or relating to the representation of a client, whatever its source . . . that the client has requested be kept confidential." N.Y. Rule of Prof. Resp. 1.6. Even if Mr. Moscow and Baker Hostetler had been able to recreate from public sources much of the information they learned in the course of representing Hermitage (which they could never do without the risk of misusing Hermitage's confidences already in their possession), disqualification still would be required. The protection afforded to Hermitage's

confidential information "is not nullified by the fact that the circumstances to be disclosed are part of the public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources." *Emle*, 478 F.2d at 572-73.

The record contains voluminous documentary evidence of Baker Hostetler's discussions with Hermitage about the Russian Treasury Fraud. This evidence includes Baker Hostetler's billing records, which describe Baker Hostetler's factual investigation into the fraud, identifying potential witnesses, tracing the proceeds, and making a pitch to federal prosecutors about the Russian Treasury Fraud. A-191, A-117-118. Furthermore, it includes the Declaration prepared by Baker Hostetler after months of working with Hermitage and obtaining its confidential information that describes the Russian Treasury Fraud, and the laundering of proceeds through U.S. financial institutions, in intricate detail. That Declaration overlaps in substantial part with the Government's factual allegations in the Second Amended Complaint—the veracity of which Baker Hostetler has promised to make "central" to the trial. A-406-410.

Finally, [redacted]

There can be no serious dispute that Baker Hostetler received "confidential information" from Hermitage about the Russian Treasury Fraud.

3. The District Court Misapplied Well-Settled Law by Finding There Would Be No Trial Taint From Baker Hostetler's Ongoing Representation of Defendants

The District Court also committed legal error when it determined that Hermitage could not show "trial taint" because it was not a party. SPA-14-15. One of the two paradigmatic examples of "trial taint" is "if the attorney is actually or potentially in a position to use privileged information gained from a former client to the advantage of a current client." *Medical Diagnostic Imaging, PLLC v. CareCore Nat., LLC*, 542 F. Supp. 2d 296, 306 (S.D.N.Y. 2008). This is precisely the situation here. Baker Hostetler possesses confidential information from Hermitage about the Russian Treasury Fraud, and the only way to prevent the firm from exploiting that information for the benefit of its current client is disqualification. *See id.* at 315; *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1st Cir. 1984).

The District Court's conclusion that misuse of a non-party's confidential information cannot taint a trial is wrong, and there is no legal authority to support it. To the contrary, in *Kevlik v. Goldstein*, for example, a law firm briefly had represented one of several co-defendants against criminal charges stemming from their arrest and indictment in the town of Derry, all of which ended in acquittal. *Id.* A lawyer from the same firm subsequently sought to defend the town from a civil rights action brought by a different defendant stemming from the same set of arrests. Even though the former client was neither a party nor a victim of the civil action, the First Circuit found disqualification was the only appropriate remedy that could protect the confidences shared by the former client with the law firm:

> The conclusion is inescapable that there exists not only the appearance of impropriety, as the district court found, but a conflict of interest based on the actual or potential use of privileged information. The only way the conflict of interest can be resolved is by termination of [the firm's] role as attorney for the Town of Derry.

Id. at 851. The fact that the former client was a non-party was irrelevant.

The District Court's conclusion on January 8 is also inconsistent with the line of cases in which courts disqualify lawyers from cross-examining former clients in substantially related matters. *See United States v. James*, 708 F.2d 40, 45-46 (2d Cir. 1983); *United States v. Esposito*, 816 F.2d 674 (4th Cir. 1987) (per curiam); *Lorber v. Winston*, 2012 WL 5904522, at *10 (E.D.N.Y. Nov. 26, 2012); *see also Scantek Medical, Inc. v. Sabella*, 693 F. Supp. 2d 235, 239

(S.D.N.Y. 2008) ("Disqualification of counsel based on his prior representation of a witness is analyzed on the same basis as a motion for disqualification based on prior representation of an adverse party.").[7] In fact, in *United States v. James*, 708 F.2d at 45, this Court found a criminal defendant's Sixth Amendment right to counsel outweighed by the interests of a non-party former client in disqualifying the defense attorney; there, the Court found it significant that, like here, the non-party witness himself brought the motion to disqualify. These cases recognize that the potential misuse of a former client's confidences for the strategic advantage of a new client, even in a trial in which the former client is not a party, requires disqualification. Judge Weinfeld's decision in *Lund v. Chemical Bank*, 107 F.R.D. 374 (S.D.N.Y. 1985), is also instructive. In that case, the court granted a non-

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[7] Hermitage is fairly described as a witness to this case under this line of reasoning. Defendants already have deposed Hermitage's principal about its affairs—whom Baker Hostetler refers to as a "key witness," A-546—and they have been given permission to do so again. Baker Hostetler's public accusations against Hermitage make clear that the primary purpose of the deposition is to attempt to establish Hermitage's responsibility for the Russian Treasury Fraud, directly contrary to the objective of their prior engagement. Hermitage is certainly entitled to expect that its former lawyers who defended it from being falsely accused by Russia of the Russian Treasury Fraud will not now depose its principal in a manner that will aid Russian prosecutors in building the same sham case.

party's motion for a protective order to prevent a deposition by its former counsel because the deposition could result in evidence used to the disadvantage of the former client. *Id.* at 377.

Moreover, the District Court misconstrued the concept of trial taint that was articulated in *Board of Education of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). That case holds that disqualification is generally not appropriate to correct "the mere appearance of impropriety," but only when an attorney's conduct "taints the underlying trial." *Id.* at 1247 (leaving open the possibility that even the "mere appearance of impropriety" could require disqualification in a "rare" case).[8] But *Nyquist* did not purport to alter or overrule the three-factor test for disqualification that continues to be articulated in cases such as *Hempstead Video*; on the contrary, in *Nyquist*, that test simply wasn't met.

This Court has never had the opportunity to consider whether a case where counsel is adverse to a non-party former client's interests could result in trial

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[8] Only a year later, the Second Circuit indicated that, while the case before it required disqualification because of the risk of misuse of confidences, it also presented an "unacceptable appearance of impropriety" that required disqualification and quoted approvingly of *Emle*'s rationale that "where public confidence in Bar would be undermined, 'even an appearance of impropriety requires prompt remedial action by the court.'" *Cheng v. GAF Corp.*, 631 F.2d 1980, 1059 (2d Cir. 1980) (quoting *Emle*, 478 F.2d at 565), *vacated on other grounds* 450 U.S. 903 (1981).

taint or an appearance of impropriety serious enough to warrant disqualification. Other Circuits, which have faced such situations, have found that, where the past client faces identifiable harm, disqualification is an appropriate remedy. For example, in *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928 (8th Cir. 2014), a law firm represented the City of Greenwood in a case against a local quarry. *Id.* at 929-30. As part of settlement negotiations, the City obtained its desired routing of truck traffic along a specific throughway, and the City agreed that such traffic would not create a nuisance. The City's lawyers later sued the same quarry on behalf of a number of property owners along the agreed truck route who complained that it *was* a nuisance—a suit to which the City was not a party. The Court succinctly explained why Rule 1.9 prohibited such side-switching and required disqualification without reference to confidential information:

> Not only do plaintiffs have an interest in collecting substantial damages, they also naturally have an interest in otherwise disrupting [the quarry's] use of Second Avenue, even if they have not sought an injunction. . . . . **Greenwood may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling Greenwood in protracted litigation.**

Id. at 934 (footnote omitted) (emphasis added).

The same analysis applies in this case, where Baker Hostetler has gathered evidence through civil discovery (including through a deposition of Hermitage's principal, Mr. Browder, whom it has sought to depose a second time on the issue of whether

Hermitage participated in the Russian Treasury Fraud) and has declared its intent to use it to try to falsely persuade a jury that Hermitage and its personnel committed the Russian Treasury Fraud. Such conduct is not only "side-switching," but threatens imminent harm to Hermitage and its personnel in the ongoing persecution and prosecution abroad. Baker Hostetler's access to U.S. civil discovery and the power to subpoena Mr. Browder is a boon to the Russian Government's illegitimate campaign against Hermitage, because its own efforts to obtain material about Hermitage from western nations have been officially rebuffed as "predominantly political in nature." A-603. The Prosecutor General of Russia has described this case as "a unique chance to obtain the evidence within the judicial procedures" that Mr. Browder's story is "nothing but the lying PR campaign ran by Browder and the latter's decision to turn everything upside down . . . and avoid[] punishment." A-583.

The District Court's restrictive application of the concept of trial taint is also inconsistent with a long line of cases disqualifying lawyers that switch sides from representing a crime victim to representing the perpetrator. *See, e.g.*, *United States v. Gordon*, 334 F. Supp. 2d 581, 597 (D. Del. 2004); *United States v. Falwell*, 2002 WL 1284388 (N.D. Ill. 2002); *United States v. Alex*, 788 F. Supp. 359, 365 (N.D. Ill. 1992). As the government repeatedly has recognized—and as Baker Hostetler's draft Declaration acknowledged back in 2009 (CA-4)—Hermitage is a victim here, because companies owned by the Hermitage Fund (which Hermitage advised) were misappropriated in the Russian Treasury Fraud. A-162-163; A-570.

It would be a perverse result if *Nyquist* were extended to foreclose relief to a non-party who faced concrete and identifiable harm from his former lawyer's unethical conduct in a case before a federal court. The prospect of potential disciplinary proceedings are not only too delayed to offer any relief, they also are limited to imposing specified penalties on the lawyer, such as censure, suspension, or disbarment, and do not afford adequate relief to the former client. *See* S.D.N.Y. Local Rule 1.5(c)(1). The trial court's misconception of *Nyquist* would foreclose relief to a former client in such a situation.

4. The District Court Misapplied Well-Settled Law When it Gave Decisive Weight to Defendants' Choice of Counsel in a Civil Matter

The District Court also erred by giving decisive weight to Defendants' choice of counsel. This is a civil matter, and Prevezon's right to counsel of its choice is therefore substantially less weighty than it would be in a criminal case where the Sixth Amendment applies. In civil cases, parties do not enjoy any constitutional right to counsel, and thus a party's right to counsel of choice is merely a consideration to be balanced against a former client's right "to be free from the risk of even inadvertent disclosures of confidential information" as well as "the public's interest in the scrupulous administration of justice." *Pastor v. TWA, Inc.*, 951 F. Supp. 27, 31 (E.D.N.Y. 1996) (internal quotation marks omitted); *accord Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975) ("The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. Recognizably

important are Hull's right to counsel of her choice . . . . These considerations must yield, however, to considerations of ethics which run to the very integrity of our judicial process."). Accordingly, this Court has observed that "where the conflict of interests exposes a former client to prejudice and this taints the trial, we have not hesitated to order disqualification." *Armstrong v. McAlpin*, 625 F.2d 433, 449 n.4 (2d Cir. 1980), *vacated on other grounds* 449 U.S. 1106 (1981).

Neither the District Court nor Defendants have cited—nor has Hermitage found—any case in which a court found a risk of trial taint but declined to disqualify counsel owing to the party's "right" to counsel of choice. This is unsurprising, because the law presumes that confidences about the subject matter were shared, and "[t]he only way the conflict of interest can be resolved is by termination of [the firm's] role as attorney." *Kevlik v. Goldstein*, 724 F.2d at 851.

5. The District Court Misapplied Well-Settled Law by Using Hermitage's Non-Party Status to Deny the Motion

No court in this Circuit ever has denied a disqualification motion because the movant was not a party. And other circuit courts have expressly granted motions to disqualify to protect the duties owed to non-party, former clients. *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 935 (8th Cir. 2014); *Kevlik v. Goldstein*, 724 F.2d 844, 846 (1st Cir. 1984). The Eighth Circuit recently noted that motions by non-parties should be given even more weight than motions by parties, because they are less likely to be undertaken merely for tactical gain in the litigation:

> It is one thing to have an opposing party use a motion to disqualify as an abusive tactic, but it is a problem of a different dimension when a former, non-party client is forced to enter a dispute through a motion designed to protect its interests because its previous counsel proved to be unwilling to police themselves.

Zerger & Mauer, 751 F.3d at 935. It is true that when the movant is not a party, and therefore not directly bound by the outcome of trial, a court must inquire into "whether the current representation may cause legal, financial, or other identifiable determent the former client." *Id.* at 933. In every other respect, however, a non-party's motion must be treated equally. *See Scantek Med., Inc. v. Sabella*, 693 F. Supp. 2d 235, 239 (S.D.N.Y. 2008).

The District Court properly recognized that it must entertain Hermitage's motion. SPA-7. Nevertheless, its analysis effectively foreclosed ever granting a non-party relief in the face of the adverse party's decisive "choice of counsel." In analyzing each aspect of the motion, the District Court simply dismissed Hermitage's position because it was "not a party," even when that distinction made no sense. For example, the District Court:

- Relied on the fact that Hermitage was not a party in concluding that the matters were not substantially related, SPA-13;
- Concluded that Moscow's knowledge of Hermitage's confidences about its defense to accusations it was responsible for the Russian Treasury Fraud "is irrelevant"

because Hermitage is not a party, SPA-14; and

- Concluded that there could be no "trial taint" because Hermitage was not a party, and thus could not be disadvantaged at the trial before it, but only by prosecution in Russia, SPA-14.

Each of these applications of the law to the facts is independently wrong, as discussed *supra*. But the cumulative effect of the trial court placing a heavy thumb on the scale against a disqualification motion brought by a non-party is that it effectively precludes a non-party from obtaining disqualification of counsel, even where the continued representation will result in (a) the misuse of the former client's confidences to the unfair advantage of the current client, or (b) grievous harm to the non-party. This outcome is inconsistent with the numerous decisions cited herein in which courts disqualify counsel to protect the interests of non-parties, witnesses, and crime victims alike.

6. The District Court Misapplied Well-Settled Law When it Discounted Baker Hostetler's Work for Hermitage as "Preparatory and Minimal"

The District Court discounted the conflict presented by Baker Hostetler's side-switching by labeling its work for Hermitage as "preparatory and minimal." SPA-13. Even if this were an accurate characterization of Baker Hostetler's efforts on Hermitage's behalf—and it is not[9]—New York's

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[9] This is not a factual dispute. The District Court did not and could not find that Baker Hostetler had not met with prosecutors, prepared the draft Declaration,

ethical rules (and those of this Circuit) do not lead to different results based on how many hours a lawyer spent working with a client.[10] Indeed, motions for disqualification are often granted based on consultations or brief representations of hours or days, let alone the months-long, $200,000 relationship at issue here. *See, e.g., Decora, Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 134 (S.D.N.Y. 1995) (disqualifying lawyer and his present firm from matter where lawyer had previously spent 1.5 hours working on substantially related matter at prior firm); *Miroglio, s.p.a v. Morgan Fabrics Corp.*, 340 F. Supp. 2d 510 (S.D.N.Y. 2004) (disqualifying lawyer whose prior representation of movant only resulted in "a few thousand dollars in billings"); *Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426, 437 (N.D.N.Y. 2012) (disqualifying attorney where he and

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or engaged in extensive communications with Hermitage personnel, which are conclusively demonstrated by Baker Hostetler's own bills, in-court admissions, and the draft Declaration.

[10] The Second Circuit has recognized an exception where a lawyer from a large firm only deals with discrete legal issues on the case and can prove that he or she did not receive confidential information in the course of that discrete legal task and has since left the firm. *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd* 518 F.2d 751 (2d Cir. 1975). Obviously, Mr. Moscow, who oversaw the matter for Baker Hostetler, served as the primary client contact, billed nearly 100 hours to it, and remains at Baker Hostetler, cannot squeeze into this narrow exception.

prospective client spoke over the phone and met in person for under two hours); *Liu v. Real Estate Inv. Grp., Inc.*, 771 F. Supp. 83, 85 (S.D.N.Y. 1991) (disqualifying attorney where movant consulted but did not ultimately retain lawyer).

C. In the Alternative, the Court Should Issue a Writ of Mandamus

If this Court finds that it does not have jurisdiction over this appeal pursuant to Section 1291, Hermitage respectfully requests that the Court treat this appeal as a petition for a writ of mandamus. Under the All Writs Act, this Court has the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). There are three requirements for a writ of mandamus: "(1) the party seeking issuance of the writ must have no other adequate means to attain the relief it desires; (2) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances; and (3) the petitioner must demonstrate that the right to issuance of the writ is clear and indisputable." *In re The City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (internal quotation marks omitted).

1. Hermitage Has No Other Adequate Means to Attain Relief

Should an appeal under Section 1291 not be permitted, Hermitage will have no other adequate means to attain the relief it seeks. Even if Hermitage had standing to bring a post-trial appeal, which it does not, a post-trial appeal would not be an adequate remedy. The District Court was required to presume

that Baker Hostetler is in possession of Hermitage's confidences with respect to its defenses to the Russian Treasury Fraud, and that Baker Hostetler will use these in its attempt to frame Hermitage for that very crime at the impending trial. In fact, Baker Hostetler has made clear that, at the trial, it will attempt to prove "that Browder and his agents engaged in a series of misrepresentations to execute the fraud, to distance themselves from it, and to pin it on the Russian officials investigating Browder for a separate tax fraud his companies committed." A-449-450. Once trial begins and Baker Hostetler advances that defense, confidential information will be misused and will provide additional fodder for the Russian authorities persecuting Browder and Hermitage. *See Unified Sewerage Agency of Wash. Cnty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1344 (9th Cir. 1981) ("[Petitioner] could suffer irremediable damage if forced to wait until after trial to appeal. Any advantage [law firm that previously represented petitioner] possesses as a result of its representation of [petitioner] could be put to use at trial. Information once used or exposed would not be forgotten and could be used against [petitioner] on retrial."). No post-trial appeal could undo that damage.

The Supreme Court has long recognized that where "a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel," a writ of mandamus is proper. *Firestone*, 449 U.S. at 378 n.13. Following the Supreme Court's instructions, Courts of Appeals have granted writs of mandamus to vacate disqualification orders where irreparable harm would

otherwise ensue. *See, e.g.*, *In re American Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992) ("American claims that immediate review of its disqualification motion is appropriate because it will otherwise suffer irreparable harm . . . We agree."); *Christensen v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 844 F.2d 694, 697 (9th Cir. 1988) (noting that the effect of the challenged order "is irreversible"); *see also In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992).

As for alternative remedies, Hermitage cannot obtain relief through 28 U.S.C. § 1292(b) because the District Court denied its request for an immediate appeal. (Docket No. 529).

2. The Writ is Appropriate Under the Circumstances

Issuance of the writ is appropriate for two reasons. First, as explained above, the District Court flagrantly misapplied several areas of well-settled law in rendering its opinion. Second, issuance of the writ will aid the administration of justice by preventing a spectacle that will cast uncertainty on the duties owed to clients by attorneys, threaten the rights of crime victims, and generally undermine the integrity of the profession.

The writ is warranted by the trial court's disregard for the settled law of attorney disqualification alone. *See In re City of New York*, 607 F.3d 923, 940 n. 17 ("The writ of mandamus could be appropriate, for example, if a district court ruling flagrantly misapplies a well-settled principle of law."); *see also Linde v. Arab Bank, PLC*, 706 F.3d 92, 120 (2d Cir. 2013). As explained more fully above, the District Court's opinion directly or indirectly reached

conclusions at odds with the governing legal standard on (a) what constitutes a substantial relationship between successive representations, (b) the standing of third-parties and crime victims to enforce their prior counsel's obligation not to "switch sides," and (c) generally, the settled expectation that a lawyer cannot defend a client from accusations of wrongdoing one day, and the next day level the same accusations at the former client when it suits the needs of his next client.

Independently, issuance of the writ is warranted because it will aid in the administration of justice. A lawyer's obligation to preserve the confidences of his client "touch[es] upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice." *Emle Indus. v. Patentex, Inc.*, 478 F.2d at 564. Where a client fears that information he provides to his attorney in confidence not only might be disclosed to others, but could be used to implicate him in the very crimes for which he hired that attorney to defend him, that relationship, and the adversarial process, is severely undermined. This Court has confirmed that the use of mandamus in such a situation would be warranted. *See In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987) ("[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.") (internal quotation marks omitted); *see also In re American Airlines, Inc.*, 972 F.2d 605, 619 (5th Cir. 1992) ("This court bars attorneys from appearing in substantially related

matters not only to protect individual parties against the adverse use of information but also to aid the frank exchange between attorney and client . . . The substantial relationship test aims to protect the adversary process but also, or as part of this concern, seeks to provide conditions for the attorney-client relationship.") (internal quotation marks omitted).

In addition, were the District Court's ruling to stand, it would impair the government's ability to procure assistance from crime victims when conducting investigations. Indeed, one of the reasons Mr. Browder and Hermitage initially hired Baker Hostetler was so that they could provide assistance to western governments in pursuing the perpetrators and beneficiaries of the Russian Treasury Fraud—assistance that has been used by the United States Attorneys' Offices in bringing this case. If crime victims like Mr. Browder and Hermitage fear that the attorneys they hire may turn against them, they will be far less likely to hire attorneys and assist the government in its investigations. *See In re City of New York*, 607 F.3d 923, 942 (2d Cir. 2010) ("If we were to decline to grant this petition, we would risk discouraging law enforcement agencies from conducting undercover investigations."); *United States v. Alex*, 788 F. Supp. 359, 365 (N.D. Ill. 1992) ("By switching sides during a pending investigation, [the disqualified attorney's] conduct challenges the very integrity of our adversary system. In addition, such actions might very well have a chilling effect on obtaining victims' assistance in prosecuting organized crime.").

Finally, Baker Hostetler's conduct will reflect poorly on the reputation of lawyers who practice in

this district, and on the profession writ large. *See United States v. Stout*, 723 F. Supp. 297, 309 (E.D. Pa. 1989) ("[A]n ordinary layperson would find it both troublesome and reproachful if I were to condone the representation of the alleged 'victimizer' by the attorney who, little more than a year ago, enjoyed the status and financial rewards associated with his position as trusted advisor to the purported 'victim.'"). This consideration on its own justifies the issuance of the writ. *See Unified Sewerage Agency of Wash. Cnty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1344 (9th Cir. 1981) (granting petition for mandamus on denial of motion to disqualify counsel where if it did not do so, "the public perception of the profession could be damaged").

3. Hermitage's Right to Relief is Clear and Indisputable

Finally, for the reasons explained above, Hermitage's right to relief is clear and indisputable.

CONCLUSION

The problem presented by Baker Hostetler's actions in this case was best described by Judge Griesa in his December 18 Opinion:

> BakerHostetler's change in defense strategy now makes the subjects of its former and current representation "substantially related." There is now a very real possibility that BakerHostetler will be in a position where it would be trying to show that its current clients (the Prevezon defendants) are not liable and showing this by attacking its former client (Hermitage) on the very subject of BakerHostetler's representation of that former client.

SPA-1-2. We respectfully request that this Court reverse the decision below, reinstate the District Court's December 18 Opinion, and prevent this spectacle from ever coming to pass.

Dated: New York, New York
February 12, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,494 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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