UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PREVEZON HOLDINGS LTD., et al., Defendants.	Civil Action No. 13-cv-06326 (TPG)

MEMORANDUM OF LAW OF NON-PARTIES WILLIAM BROWDER AND HERMITAGE CAPITAL MANAGEMENT LTD. IN SUPPORT OF THEIR MOTION TO DISQUALIFY DEFENDANTS' COUNSEL BAKER & HOSTETLER LLP AND BAKER BOTTS L.L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Non-parties William Browder ("Browder") and Hermitage Capital Management Ltd. ("Hermitage") respectfully submit this memorandum of law in support of their motion to disqualify: 1) Defendants' counsel John W. Moscow, Esq. ("Moscow") and the law firm Baker & Hostetler LLP ("BakerHostetler") due to their prior representation of Browder and Hermitage in a matter substantially related to this civil forfeiture action, and 2) their co-counsel Baker Botts L.L.P. ("Baker Botts") because under the facts and circumstances set forth below, including their joint representation of Defendants since at least October 11, 2013, without any ethical screens, BakerHostetler's conflict must be imputed to Baker Botts.[1]

PRELIMINARY STATEMENT

This case presents about as clear a disqualifying conflict for a lawyer as could be imagined. A lawyer who has represented a client can never represent a different client in any other matter substantially related to the first representation in which the clients' interests are adverse, absent disclosure and informed consent from both clients. This rule goes to the very heart of the attorney-client relationship: A client is entitled to know that his confidential information will not be used for any purpose other than to serve his interests—and to rest assured that there is not even the potential for his confidences to be misused or exploited—whether or not he remains a client of that lawyer or law firm.

Here, there has been a blatant breach of that fundamental rule, and disqualification is required. John Moscow and BakerHostetler formerly represented Hermitage and Browder in matters relating to remedying the gross abuses and misappropriation they and their now-deceased

[1] As foreign non-parties to this action, Browder and Hermitage submit this motion under the terms of this Court's September 17, 2014 order and the record of the September 18, 2014 status conference, without waiver of and with full preservation of any and all jurisdictional defenses available to them in this District or any other U.S. venue. *See* Ex. 1 at 6:16–20 ("[T]he fair thing to do – and I think I entered an order to this effect going part way – is to allow Hermitage to make a special appearance for the purpose of raising the issue.").

Russian counsel suffered at the hands of a Russian criminal enterprise. Now, in this case, Moscow and BakerHostetler represent Defendants accused of knowingly profiting and laundering the proceeds from the corporate theft of Hermitage portfolio companies and the resulting $230 million tax fraud—the *exact same subject matter* as their former representation of Hermitage and Browder. There was no disclosure to, or consent by, Hermitage or Browder to BakerHostetler's current representation, nor any evidence that firm made any attempt to protect its prior clients' confidences. Yet the same lawyer in charge of BakerHostetler's representation of Hermitage and Browder—Moscow—is now leading Defendants' charge against his and his firm's former clients.

That Moscow and BakerHostetler's new Russian clients have interests adverse to Hermitage and Browder could not be more obvious. Indeed, the Government's civil forfeiture case here not only seeks to recover from these Defendants assets misappropriated through the theft of Hermitage's investment companies, but in the course of the current representation, Moscow and BakerHostetler repeatedly have taken actions hostile to their former clients. Moscow personally has taken testimony from a government investigator concerning his dealings with and opinions of Browder, and, most recently, initiated, through co-counsel, eight sweeping non-party subpoenas seeking irrelevant, invasive information from and about Browder and Hermitage—and betraying confidences learned from BakerHostetler's prior representation, including with respect to Hermitage and Browder's security arrangements and transcripts and tape recordings in their possession. At the same time, Moscow and BakerHostetler have aggressively attacked the client they once defended against sham Russian tax evasion charges, now labeling him a "criminal tax cheat" after his fraudulent conviction on those same charges. They also have misrepresented the scope of their prior representation of Hermitage and Browder

to this Court and misstated the law applicable to the conflict-of-interest issues present in this case. Baker Botts, as co-counsel to BakerHostetler, is now tainted by this same ethical breach and is therefore an equal partner in it.

The law of this Circuit requires disqualification of both BakerHostetler and Baker Botts from any further representation of Defendants.

First, Defendants' counsel do not dispute that Browder and Hermitage are former clients of BakerHostetler. And, even without any examination of the confidential information Browder and Hermitage shared with Moscow and his colleagues—which the law plainly holds is not required—the substantial relationship between the facts and circumstances of this civil forfeiture action and the prior representation is crystal clear.

Second, this Circuit's courts have squarely held that where, as here, the same individual lawyer represents one client and subsequently represents another in a substantially related matter, the former client is entitled to an irrefutable presumption that that same individual lawyer received relevant confidential information. On that basis alone, the lawyer, and in the absence of any ethical screens, his entire firm, must be disqualified.

Third, while BakerHostetler has repeatedly insisted that Hermitage and Browder cannot prevail on this motion unless and until they identify the confidential information they supplied to Moscow and his BakerHostetler colleagues and demonstrate that their clients are directly adverse to one another as opposing parties in litigation, that misstates the law. Browder and Hermitage need not reveal the confidences they shared with Moscow and his firm, much less delineate the specific topics discussed. The Second Circuit consistently has warned against forcing this type of disclosure through disqualification motions because it reveals the very information at risk. Similarly, BakerHostetler's conception of adversity finds no support in the law. The test for

when a successive representation justifies disqualification does not change when the former client is a witness rather than a party in the second engagement. The possibility that Moscow and his colleagues could exploit confidences of Hermitage and Browder through discovery is enough to warrant their disqualification under well-established Second Circuit law.

Fourth, having acted in concert with Moscow and BakerHostetler to represent Defendants for nearly a year, if not longer—and apparently without imposing any ethical screens—Baker Botts must also now be disqualified. The two firms have worked together with no differentiation between the parties they represent or the scope of the issues they handle. Given the substantial relationship between this case and BakerHostetler's prior representation of Hermitage and Browder, the sharing of confidential information with Baker Botts must be presumed.

For all of these reasons, the Court should disqualify both of Defendants' counsel—BakerHostetler and Baker Botts—from continuing to represent the Defendants in this case. Moreover, both firms should be barred from communicating with any successor counsel in any way that would compromise, reveal, or misuse confidences of Hermitage and Browder.

FACTUAL BACKGROUND

I. The $230 Million Tax Fraud Against Hermitage

The Government's civil forfeiture case seeks to recover money laundered in and through the United States from a complex and massive Russian tax fraud that began in 2007. As alleged in the Government's complaint, that vast fraud—devised and implemented by Russian criminal interests and corrupt Russian government officials and bureaucrats working in tandem ("the Criminal Enterprise")—began with the theft of critical corporate documents from, and subsequently, the actual corporate theft of three portfolio companies controlled by the Hermitage Fund, an investment fund advised by Hermitage. Dkt. 1 ¶¶ 1, 14, 18–20, 147–53. After

Hermitage complained to the Russian government about the fraud, the masterminds tried to frame Browder, Hermitage, and their Russian tax lawyer, Sergei Magnitsky, for perpetrating the fraud themselves, and accused them of a series of other fabricated crimes. *See id.* ¶¶ 56–63, 72; *see also* Ex. 2 ¶ 66.

The $230 million tax fraud "unfolded in multiple steps." Ex. 2 ¶ 7.

- First, in June 2007, the Criminal Enterprise, including Russian government officials, "raid[ed]" Hermitage's Moscow office and the office of Hermitage's local law firm, Firestone Duncan, and seized confidential corporate documents including records of the Hermitage Fund portfolio companies. *Id.* ¶¶ 7, 28.

- Second, without Browder's or Hermitage's knowledge, the Criminal Enterprise then used the seized documents "to fraudulently re-register" the portfolio companies to "members of the Criminal Enterprise" and forge contracts dating back to 2005 to create $1 billion in "fictitious financial liabilities against the stolen Hermitage Companies." *Id.* ¶¶ 7–8. These fraudulent changes of control could not have been accomplished "without access to the corporate records and financial documentation seized" during the June 2007 raids. *Id.*

- Third, the Criminal Enterprise instigated sham lawsuits in Russia against the three entities, and had lawyers purportedly representing the Hermitage Companies confess to judgments in the sham lawsuits totaling $973 million. *Id.* ¶¶ 30–31, 41–45.

- Fourth, the Criminal Enterprise then used the judgments from the sham lawsuits to apply for a $230 million tax refund on the ground that these judgments offset the profits of the holding companies in 2006. *Id.* ¶¶ 58–59. The refund was submitted and approved on a single day, and the Russian treasury deposited the entire $230 million into bank accounts opened by the Criminal Enterprise at two small Russian banks—Universal Savings Bank and Intercommerz Bank. *Id.* ¶¶ 9, 56, 58–59.

The Criminal Enterprise then laundered the fraudulently obtained funds through financial institutions around the globe, including through banks located in New York. *Id.* ¶¶ 127–30. At the time, neither Browder—who, after being barred from entering Russia in November 2005, had returned to London—nor any other Hermitage personnel had any idea that the fraud had been achieved, much less planned, nor by whom. *Id.* ¶¶ 35–39.

II. Hermitage Discovers The Fraud—And The Criminal Enterprise Instigates Criminal Proceedings Against Browder, Hermitage, And Others Connected With Them

Browder and other Hermitage personnel knew of the June 2007 raid at or shortly after its occurrence but they did not understand its broader implications until months later, when a chance phone call from a bailiff of the St. Petersburg court led them and their lawyers at Firestone Duncan to discover the fraud and report it to Russian law enforcement. *Id.* ¶¶ 36–40; 71–80.

By November 29, 2007, Hermitage notified Russia's Interior Ministry of the theft of its portfolio companies and indicated that it intended to file criminal complaints against those responsible. *Id.* ¶ 71. The next day, Hermitage received a call from Igor Sagiryan, the President of Renaissance Capital, a Russian investment bank, who, in subsequent meetings, claimed that the Russian Federal Security Service, the successor to the KGB, "control[led] the Hermitage investigation." *Id.* ¶¶ 71–72, 74. He pressured Hermitage to allow Renaissance to "facilitate the liquidation of the stolen Hermitage Companies" to eliminate their records and prevent further investigations. *Id.* ¶¶ 74, 80. About two weeks later, the $230 million tax refund was approved and deposited. *Id.* ¶ 81. As Hermitage's investigation "to identify the perpetrators of the fraud" and defend itself from related sham criminal actions continued, Hermitage also unearthed a "strikingly similar tax refund fraud" involving Renaissance and perpetrated by "some of the same individuals and banks" involved in the $230 million fraud. *Id.* ¶¶ 18, 101.

With Browder and Hermitage pursuing an investigation of the fraud, the Criminal Enterprise set out to intimidate them by (1) filing criminal cases against Browder, Hermitage, and other Hermitage employees and agents to "frame" them "for orchestrating the [$230 million tax] fraud that was the subject of Hermitage's own criminal complaints," *id.* ¶¶ 12–13, 66; and (2) instigating other retaliatory criminal actions against Browder, Hermitage, and others,

including Magnitsky, to harass and pressure them to stop their "investigation into the tax refund fraud and to prevent the public disclosure of the results of that investigation," *id.* ¶ 53.

Faced with multiple corrupt lawsuits and investigations against his firm, his employees, and himself, in 2008, Browder sought counsel in the U.K. and U.S. to determine how best to investigate the $230 million tax fraud and the Criminal Enterprise behind it; how to vindicate himself, his firm, and his associates from the nightmarish investigations and lawsuits that were beginning to consume them; and how to "bring the perpetrators [of the $230 million tax fraud] to justice." *See id.* ¶¶ 1, 4–5, 15–18, 21.

III. Hermitage And Browder Retain John Moscow And His Firm, BakerHostetler, In Connection With The Fraud Against Hermitage

On or around September 4, 2008, Browder first met with Moscow, a BakerHostetler partner and former Manhattan Assistant District Attorney who claims expertise in the investigation of money laundering schemes and complex international frauds. *See* Exs. 3–4. From the start of their relationship, the investigation of the tax fraud involving Hermitage was within the scope of the BakerHostetler engagement. The "summary of proposed work," signed by Moscow and incorporated into BakerHostetler's September 23, 2008 engagement letter, *see* Exs. 4–6, recounts a "detailed briefing" that Browder and Hermitage provided to Moscow on September 4, 2008, Ex. 4 at 1. That briefing encompassed "*certain apparent frauds* committed by and through Renaissance Capital," including the $230 million tax fraud. *Id.* (emphasis added). Moscow and BakerHostetler stated that they would "analyze the behavior at issue with a view to causing criminal prosecutions where appropriate in New York . . . or elsewhere" and "structure a presentation of evidence on those potential frauds" for U.S. prosecutors to "suggest their taking action against the fraudsters." *Id.* Chief among Moscow's suggested actions was "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." *Id.* Moscow further stated that the engagement by Browder and Hermitage would entail:

- "[I]dentifying proof through legally sufficient, competent evidence of the facts in question," *id.*;
- "Locating competent and honest witnesses . . . to prove the facts at issue," including "people with whom you have worked in the past who have personal knowledge of the events insofar as they were present," *id.* at 1–2; and
- Developing, for "the background of the presentation," an "understanding [of] the corrupt use of Russian government power for the benefit of private interests," with the help of Browder and his colleagues, who had already shared their "sound and clear understanding of what appears to have happened," *id.* at 2.

Moscow and BakerHostetler's engagement letter with Hermitage confirms the scope of the engagement as both the lawyers and clients understood it: representation "in connection with certain apparent *frauds* committed by and through Renaissance Capital, . . . *some of which may have been designed to fraudulently create apparent criminal liability on Hermitage*," a reference to the $230 million tax fraud, and not just the prior, similar tax fraud with which Renaissance also had been involved. Ex. 6 at 1 (emphasis added).

BakerHostetler's invoices to Hermitage for the period between September 2008 and May 2009 show it performed work commensurate with the scope of the engagement. Under Moscow's "supervis[ion] and direct[ion]," *id.* at 2, BakerHostetler:

- Analyzed detailed presentations provided to it by Hermitage and Browder, and reviewed non-public documents and materials from them concerning, among other things, the "Russian tax filings and lawsuits," Ex. 7 at 3–8, 10; *see also* Ex. 8 at 3–4.
- Created their own "case timeline" and "chronology [of the] criminal complaints and tax fraud," and built a related "information database," Ex. 7 at 8–9;
- "[R]eview[ed] bank records" and "research[ed] proper service agent for Reiffeisen Bank," *id.* at 8, a bank believed to have processed the "fraudulent tax refunds . . . paid to the Criminal Enterprise" through its "U.S. dollar correspondent accounts" at two "New York Banks," Ex. 2 ¶¶ 127–28;

- Conferred about and brainstormed "potential individuals for depositions in connection with the prosecutions in Russia," Ex. 7 at 7; and

- Met with the U.S. Attorney's Office for the Southern District of New York, including through a nearly five-hour meeting on December 3, 2008 with former Assistant U.S. Attorney Marcus Asner, *id.* at 8–9, and the Attorney General's office in the British Virgin Islands, *id.* at 11, to interest them in prosecuting those responsible for the $230 million tax fraud, *see* Exs. 4 at 1; 6 at 1.

To trace the proceeds of the $230 million tax fraud, assist in the "defense of Russian [criminal] actions," and hold the perpetrators of the fraud accountable, *see, e.g.*, Ex. 7 at 7, BakerHostetler lawyers also drafted documents to obtain discovery pursuant to 28 U.S.C. § 1782, *id.* at 6–10. That work—performed over five months—included drafting and revising, with input from Browder and other Hermitage personnel, multiple document subpoenas to financial institutions, a petition for permission to serve that discovery, and detailed declarations on behalf of Browder and Moscow describing why the discovery was necessary for Browder's and Hermitage's defense in various criminal proceedings in Russia. *See id.*; *see also* Exs. 9 at 3; 10 at 3; 11 at 3.

In April and May 2009, BakerHostetler prepared an extensive draft declaration for Hermitage's former general counsel, Grant Felgenhauer, *see* Ex. 12; *see also* Exs. 10 at 3; 11 at 3, which foreshadows the attorney declaration that was ultimately filed in this District less than three months later in connection with Hermitage's § 1782 petition,[2] *see* Ex. 2. That draft declaration extensively discusses Hermitage's victimization through the $230 million tax fraud—and its need for discovery tracing the proceeds of that fraud—and contains lengthy passages that later appear in the as-filed attorney declaration, in some cases verbatim. *Compare* Ex. 12, *and* Ex. 2, *with* [redacted]

[2] The Section 1782 proceedings were initiated by different outside law firms after Browder and Hermitage became disillusioned with BakerHostetler's service.

[redacted] In particular, both the draft declaration prepared by BakerHostetler and the as-filed declaration state that the discovery sought from particular banks would "show the origin and destination of the illicit proceeds of *the two frauds* and would ultimately lead to the identification of the members of the Criminal [Group/Enterprise] who benefited from *the fraud against Hermitage*." Exs. 12 ¶ 76; 2 ¶ 130 (emphasis added). Together, the declarations confirm that BakerHostetler's prior representation, like the § 1782 proceeding itself, concerns the same $230 million tax fraud on which this case rests.

IV. The Civil Forfeiture Complaint Pleads The Same Facts And Circumstances That Gave Rise To Moscow And BakerHostetler's Prior Representation Of Hermitage And Browder

As previously noted, the "elaborate [$230 million] tax refund fraud scheme" involving "a Russian criminal organization including corrupt Russian government officials" is at the root of the Government's civil forfeiture case. Dkt. 1 ¶ 2. Most directly, in seeking "the forfeiture of certain property involved in laundering the proceeds" of that fraud, *id.* ¶ 1, the Complaint asserts that Defendants in this case "knowingly engaged" in "financial transactions that involved the proceeds of the $230 Million Fraud Scheme," including with an intent "to promote the Organization's underlying acts of mail fraud, wire fraud, corruption, and money laundering," *id.* ¶¶ 143, 148. Specific allegations further demonstrate the relationship between this case and the subject matter that Browder and Hermitage engaged BakerHostetler to investigate. The Complaint details how the Criminal Enterprise, which the Complaint refers to as "the Organization": "stole the corporate identities" of the three Hermitage Fund portfolio companies, and then "fraudulently transferred" their ownership to a company controlled by criminals, *id.* ¶¶ 18, 26; *see also id.* ¶¶ 19–21, 24–28; used the stolen documents to conduct sham lawsuits against the Hermitage companies, *id.* ¶ 29; *see also id.* ¶¶ 30–33, 35–37; and won approval of—

and received just two days after the applications were made—$230 million in tax refunds through deposits in bank accounts "established in the name of the Hermitage Companies . . . and then laundered into a number of accounts and pieces of real property around the world by members and associates of the Organization," *id.* ¶ 45; *see also id.* ¶¶ 38–44.[3]

V. BakerHostetler And Moscow Exacerbate And Misrepresent The Conflict Inherent In Their Prior Representation Of Browder And Hermitage

On October 11, 2013, BakerHostetler and Moscow entered their Notice of Appearance for all Defendants in this case. Roughly two weeks later, Hermitage's outside counsel first contacted BakerHostetler to request that the firm, including Moscow, withdraw from representing Defendants in this case. *See* Ex. 14 at 1. Specifically, Hermitage explained that Moscow and BakerHostetler's prior representation of Hermitage included their involvement "in the preparation of the filing in [this District] which detailed the US$230 million theft and the related frauds," that their possession of material "information and knowledge" of "direct relevance" to this case has a "direct bearing on our clients' interests and the frauds perpetrated against them in Russia," and that Defendants' receipt of proceeds from the fraud made their interests necessarily adverse to those of Hermitage. *Id.* at 1–2.

BakerHostetler's terse response—from Mark Cymrot ("Cymrot"), a partner representing Defendants alongside Moscow in this litigation—refused Hermitage's request and took the position that the prior representation was "limited" to "several weeks of legal work" in "obtain[ing] records under 28 U.S.C. § 1782 from a broker-dealer in aid of the defense of a

[3] The Complaint also describes how the $230 million tax fraud scheme was "strikingly similar" to what BakerHostetler claims was the sole subject matter of the prior engagement: "a fraud scheme carried out by the Organization in 2006 involving two subsidiaries of Rengaz Holdings Limited . . . , an offshore investment fund." *Id.* ¶ 46; *compare also id.* ¶¶ 47–54, *with* [redacted] The Complaint further alleges how the Organization retaliated against Hermitage, Magnitsky, and others after Hermitage and the trustee of the three stolen portfolio companies, HSBC Guernsey, filed multiple criminal complaints with Russian law enforcement in December 2007. Dkt. 1 ¶ 56; *see also id.* ¶¶ 55–68.

Russian criminal proceeding" and that BakerHostetler never filed the § 1782 petition. *See* Ex. 15 at 1. Without denying that it had received confidential information from Hermitage or Browder, Cymrot also maintained that BakerHostetler "*do[es] not believe* we possess confidential information from your client," and in any event, that Hermitage's interests are not adverse to those of Defendants because Hermitage is neither a party to this case nor a claimant with respect to the "disputed property." *Id*. at 1–2 (emphasis added). BakerHostetler's response tried to shift the burden to Hermitage to "identify confidential information in our possession or an interest of Hermitage adverse to those of the Prevezon defendants." *Id.* at 2.

[redacted] Moscow and BakerHostetler have continued their representation of Defendants. On March 3, 2014, Moscow deposed a special agent involved in the Government's investigation of this case, and his questioning aimed at the interests of BakerHostetler and Moscow's former clients. For example, Moscow asked the agent how Browder obtained the documents he shared with the Government—questions arguably premised on BakerHostetler's research and preparation for Hermitage's § 1782 proceeding—and insinuated that the Government should have looked skeptically at Browder's claims given his 2013 conviction, in Russia and in absentia, for tax evasion. *See* Dkt. 106-1 at 6 n.3. The next day, in a detailed letter, the Government urged this Court to investigate BakerHostetler and Moscow's conflict. *Id.* at 6. BakerHostetler defended its conduct at a status conference by characterizing the earlier representation as follows:

> They are now saying that we, Mr. Moscow and our firm, are involved in tracing the funds from the Russian treasury. That's simply not true. And we have investigated our files. That was not our retention and we didn't do it.

Dkt. 77 at 28:15–19.

BakerHostetler did not reconcile that characterization with the language of its engagement letter, its billing records, or its actual work. To the contrary, [redacted] *see also* Dkt. 77 at 24:6–7 (stating, when asked by the Court about Defendants' discovery plans, that "there is no discovery we can take of a fraud that occurred in Russia"). Nonetheless, within weeks, BakerHostetler apparently authorized wildly overbroad, non-party discovery to and about Browder, *see, e.g.*, Ex. 17, and told the press that they intend to ask Browder "difficult questions regarding his own tax evasions in Russia," the very accusations they helped defend him against, "and additional aspects of his activity, to show his unreliability and prove he doesn't need to be a witness or even a source on which the prosecution can base its case," Ex. 18.

VI. BakerHostetler's Co-Counsel, Baker Botts, Is Infected With BakerHostetler's Conflict

Moscow and BakerHostetler are the primary focus of this motion, but their co-counsel, Baker Botts, must be examined as well. Both firms have jointly represented Defendants since at least October 11, 2013, when Defendants first made a filing in this action. *See* Dkt. 3–6, 12. Since then, the two firms have jointly represented Defendants in this matter, including with respect to the abusive and overbroad discovery campaign that Defendants have waged against Browder, a foreign non-party. Both firms appear on almost every filing submitted to this Court on behalf of Defendants, *see generally* Dkt., and have appeared on behalf of Defendants at each and every status conference before this Court, *see, e.g.*, Dkt. 62, 77, 83. Baker Botts also has participated in the same public attacks on the clients BakerHostetler once vowed to defend, jointly accusing Browder of being a "criminal tax cheat" "in full evasion mode," Dkt. 107 at 4–5, and independently taunting him with "punishment up to and including arrest" for seeking relief from the non-party subpoenas issued to him. Ex. 19.

Neither firm has presented any evidence, much less claimed, that any sort of an ethical screen has been imposed between BakerHostetler and Baker Botts. Nor could they; their representation of Defendants here has been coextensive and has not been limited in any way.

ARGUMENT

I. The Law Requires Disqualification Of BakerHostetler And Moscow From Representing Defendants In This Case

The law of this Circuit is clear: Disqualification of counsel is warranted "'when the facts concerning the lawyer's conduct poses a significant risk of trial taint,' particularly when the 'attorney is *at least potentially* in a position to use privileged information concerning [a former client] through prior representation . . . thus giving his present client an unfair advantage.'" *Lorber v. Winston*, No. 12 Civ. 3571 (ADS) (ETB), 2012 WL 5904522, at *7 (E.D.N.Y. Nov. 26,

2012) (emphasis added) (quoting *Mitchell v. Metro. Life Ins. Co.*, No. 01 Civ. 2112 (WHP), 2002 WL 441194, at *4 (S.D.N.Y. Mar. 21, 2002)). Indeed, "[s]uccessive representation on substantially related matters is the paradigmatic case for disqualification, because the attorney is in a position to use the confidences gained through prior conferences with a former client." *Madison 92nd St. Assocs., LLC v. Marriott Int'l, Inc.*, No. 13 Civ. 291 (CM), 2013 WL 5913382, at *11 (S.D.N.Y. Oct. 31, 2013) (citation and internal quotations omitted).

The Second Circuit employs a three-factor test to determine whether counsel should be disqualified where, as here, the conflict at issue arises from a successive representation. A party seeking disqualification must establish the following elements:

> (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.

E.g., Lorber, 2012 WL 5904522, at *8 (quoting *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005)). This test is no different when the former client is a witness to the present action, rather than a party. *Scantek Med., Inc. v. Sabella*, 693 F. Supp. 2d 235, 239 (S.D.N.Y. 2008). 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).

A. There Is A Substantial Relationship Between This Case And BakerHostetler's Prior Representation Of Browder And Hermitage

For nearly a year, BakerHostetler has insisted that there is no conflict of interest arising from Moscow's prior representation of Browder and Hermitage, on the one hand, and his later

appearance for Defendants in this civil forfeiture matter because the two representations are not meaningfully related. *See, e.g.*, Ex. 15 at 1 (prior representation was "a limited matter to obtain records under 28 U.S.C. § 1782 from a broker-dealer in aid of the defense of a Russian criminal proceeding"); Dkt. 77 at 27:8–14 (similar description of prior matter as a limited § 1782 proceeding "to get information about a prior tax fraud related to . . . Renaissance"); [redacted] Ex. 20 ("BakerHostetler said Mr. Moscow was retained specifically to obtain subpoenas for documents regarding 'a company that has no relationship to the $230 million fraud.'"). BakerHostetler's position has no support in either the law or the facts.

A "substantial relationship" exists between two attorney-client representations where they involve the same "facts and circumstances." *Red Ball Interior Demolition Corp. v. Palmadessa*, 908 F. Supp. 1226, 1244 (S.D.N.Y. 1995); *see 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" between the two cases, 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 (holding that facts and circumstances related to illegal dumping at a particular site and liability for related clean-up costs showed substantial relationship between a prior criminal case and subsequent private litigation). For example, in *Emle Industries*, the successive lawsuits at issue arose from different facts and presented different legal claims, but each "involve[d] a claim that [one company] control[ed] [a second company] and use[d] this control for an illegal purpose," thereby constituting an "identity of issues between the two cases." 478 F.2d at 571. More than four decades later, in *Blue Planet Software, Inc. v. Games International, LLC*, a Southern District

court similarly held that even though "the ultimate issue [was] not identical," there was a substantial relationship between the successive representations at issue because the ownership rights to a particular video game would "be traced in careful detail" in the current case, "just as in the [prior] litigation," therefore ensuring that "many of the issues that [would] arise in this case [would] be essentially the same as in the earlier case." 331 F. Supp. 2d 273, 277 (S.D.N.Y. 2004).

In the instant situation, Moscow and BakerHostetler's prior representation of Hermitage and Browder revolved around the same core facts and circumstances that underlie this civil forfeiture case: the theft of the Hermitage-controlled portfolio companies and the ensuing $230 million tax fraud. How these events occurred, with whose knowledge and involvement, and what happened to the proceeds are critical issues in both representations. Even a casual review of BakerHostetler's documents reflecting the engagement and the firm's work shows that the prior representation encompassed far more than preparing § 1782-related documents concerning a separate Russian tax fraud, and instead, arose from and encompassed:

- **Helping to investigate and defend Hermitage and Browder from sham criminal charges relating to and in retaliation for their refusal to quietly accept the $230 million tax fraud**, *see, e.g.*, Exs. 4 at 1; 7 at 6–7, 9;
- **Persuading law enforcement agencies to punish the *real* perpetrators of that fraud**, *see, e.g.*, Exs. 4 at 1–2; 7 at 6, 8, 11; and
- **Seeking far-reaching discovery concerning the proceeds of that fraud**, *see, e.g.*, Exs. 7 at 7, 9; 10 at 3; 11 at 3.

See also supra pp. 7–10. Similarly, despite BakerHostetler's insistence that the prior engagement never extended to "tracing the funds from the Russian treasury," Dkt. 77 at 28:16–17, the draft declaration that it prepared for former Hermitage in-house counsel Felgenhauer

clearly establishes the firm's efforts to "show the origin and destination of the illicit proceeds of *the two frauds*," including "*the fraud against Hermitage*," Ex. 12 ¶ 76 (emphasis added).

BakerHostetler's attempts to deny the breadth of their prior representation—and its overlap with issues in this case—fall flat. For example, [redacted]

Yet a Southern District court [redacted] in sanctioning Boies, Schiller & Flexner LLP in *Marriott International*, 2013 WL 5913382, at *7. There, although Boies Schiller conducted a "key word search" of its electronic billing records and files, Judge McMahon determined that that search was "doomed before it began, since the terms chosen . . . carved out a very small universe that was reflective of an unduly narrow view of the scope of the prior representation." *Id.* Similarly, [redacted], but two days after Magnitsky's arrest, in November 2008, Moscow scrawled Browder a heartfelt, handwritten note on a cover letter for that month's invoice: "We're thinking of you and your colleagues and hoping for the best while we work." Ex. 21. And by April 2009, as reflected in the invoices, Moscow spoke by phone with Jamison Firestone, Magnitsky's boss and the head of the law firm Firestone Duncan, as BakerHostetler was preparing a draft declaration for Felgenhauer, *see* Ex. 10 at 3, that among other subjects, discusses the Russian government's unlawful treatment of

Magnitsky and other Firestone Duncan lawyers, Ex. 12 at ¶¶ 6, 13. In the end, BakerHostetler and Moscow cannot wish away that "facts pertinent to problems for which the original legal services were sought"—namely, the planning and execution of the $230 million tax fraud—"are relevant to the subsequent litigation," a civil forfeiture action seeking to recover certain proceeds of that fraud. *USFL*, 605 F. Supp. at 1459. Accordingly, this Court should find that there is a substantial relationship between Moscow and BakerHostetler's prior representation of Browder and Hermitage, on the one hand, and their current representation of Defendants in this civil forfeiture action, on the other.

B. BakerHostetler's Access To Browder And Hermitage's Confidential Information Necessarily Makes Their Interests Adverse To Those Of Defendants

In a transparent attempt to distract this Court from their fundamental conflict, BakerHostetler has told this Court that without a sworn "affidavit from Mr. Browder to say what confidential information he supposedly gave our law firm," this Court "do[es] n[o]t have a factual record to decide a motion for disqualification." Ex. 1 at 12:5–6, 12:12–13. So too have they argued [redacted] in private correspondence between the parties—that Hermitage's interests are in no way materially adverse to those of Defendants in this case. *See* Exs. 15 at 2; [redacted] BakerHostetler's position is misguided on both fronts.

First, in this Circuit, "a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case." *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2d Cir. 1978). Nor does the former client have to articulate the subject matter of the confidences he shared with his prior counsel. Rather, the Second Circuit's approach "presume[s] disclosure of confidences once a substantial relationship

is established." *USFL*, 605 F. Supp. at 1457 n.20. As Judge Leisure explained in *USFL*, the whole point of the presumption is to:

> forestall a direct inquiry into whether confidential information was in fact transmitted by the client. Such an inquiry would be improper; it would put the movant to the choice of either revealing its confidences in order to prevail on the motion or else refraining from moving to disqualify, thereby running the risk that its adversary will use its confidences against it in the litigation.

Id. at 1461. Thus, "disqualification is necessary when an attorney's successive representation of adverse interests raises the *possibility* that in the present matter that attorney will improperly use confidences gained in the prior representation to the detriment of the former client." *Palmadessa*, 908 F. Supp. at 1239 (emphasis added).

Significantly, where, as here, "*the same individual lawyer* participated in the prior and current representation, the movant is not required to make a specific showing that confidences were passed to counsel. Instead, the movant is entitled to the benefit of an irrebuttable presumption that confidences were shared." *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 164–65 (E.D.N.Y. 2006) (emphasis added) (collecting cases). Having shown the substantial relationship between the two representations, Browder and Hermitage are entitled to the "irrebuttable presumption" that Moscow and BakerHostetler had access to their confidential information.

In any event, as reflected in BakerHostetler's engagement correspondence and invoices to Hermitage, the firm, including Moscow and several of his colleagues, "had access to many" of Hermitage and Browder's documents, "and conducted [lengthy] communications with [Browder and other Hermitage personnel], the substance of which is presumed confidential." *See Blue Planet Software*, 331 F. Supp. 2d at 277; *see, e.g.*, Exs. 8 at 3–4 (reflecting multiple conversations between Browder and/or Hermitage personnel, on the one hand, and BakerHostetler lawyers, including Moscow, on the other); 7 at 3–6, 9–11 (same); 10 at 3 (same);

11 at 3 (same); 7 at 6–7 (reviewing "summaries," "documents," and other "materials" from client); 4 at 2 (referencing a "power point presentation [Browder] provided" to Moscow).

Second, whether a former client's and current client's interests are adverse is not—as Defendants insinuate—merely a function of the former client's material, financial stake in the outcome of a particular litigation or whether he is a named party in that case. Rather, a witness's interests can be adverse to those of its former counsel's new client where, as here, there is even the risk that such counsel will use the witness's confidential information adversely, including by "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, . . . and innumerable other uses." *Ullrich v. Hearst Corp*., 809 F. Supp. 229, 236 (S.D.N.Y. 1992).

A recent Eastern District case, *Lorber v. Winston*, is instructive in this regard. 2012 WL 5904522, at *1. In *Lorber*, prominent defense lawyer Ira Lee Sorkin, who had previously represented Winston in proceedings before the National Association of Securities Dealers and also consulted with him concerning a prior criminal indictment for securities fraud, later represented Winston's former mother-in-law in a civil action alleging that Winston, among others, defrauded her in furtherance of a fraudulent real estate scheme. *Id.* In disqualifying Sorkin, the court not only agreed that the two matters were substantially related because issues relating to Winston's past criminal conduct were integral to both, even in light of the temporal gap between them, but also held that Sorkin "obtained useful information from his prior representation of Winston that he [could] now use to the Plaintiff's advantage," thereby "establish[ing] . . . a real risk of trial taint." *Id.* at *9. The court was most concerned about Sorkin's ability to exploit his former client's confidences through discovery because "Sorkin [would] undoubtedly question Winston about [the prior] allegations during cross-examination in

this case" to establish that Winston was a recidivist and destroy his credibility. *Id.* at *10; *see also Mitchell*, 2002 WL 441194, at *7 (finding "dispositive" that the at-issue attorney "would be privy to confidential information that could serve to challenge credibility, [and] to prepare cross-examinations based on the attorney's prior representation of defendant, thereby "pos[ing] a significant risk of trial taint").

Here, too, the risk of trial taint from BakerHostetler and Moscow's continued representation of Defendants is very real. Indeed, through submissions in this case as well as their statements to the media, BakerHostetler and Moscow have boasted that the overriding goal of their non-party discovery campaign is to interrogate "the credibility, motive, and bias of . . . Mr. Browder and the Hermitage entities." Ex. 22 at 7, 15, 17. As Cymrot told the *Jerusalem Post* last month, BakerHostetler intends to ask Browder "difficult questions regarding his own tax evasions in Russia and additional aspects of his activity, to show his unreliability." Ex. 18. Once trusted members of Hermitage's worldwide defense team, Moscow and his BakerHostetler colleagues now relentlessly press for Browder's cross-examination, vowing to "expose the many discrepancies in [Browder's] concocted story." Ex. 23.

The invasive, vastly overbroad subpoenas that Defendants have issued to and about Browder, and by extension Hermitage, also reflect the meaningful risks of trial taint through Moscow and BakerHostetler's continued representation of Defendants here. The document requests to Browder, for example, call for documents concerning Browder and Hermitage's security arrangements, including with respect to five named individuals and a specific company, dating back to 1998, *see* Ex. 17 at Request Nos. 31–32, as well as transcripts and recordings concerning Browder and Hermitage's tracing of the proceeds of the $230 million tax fraud, *id.* at Request Nos. 1, 25. Without compromising the content of their confidences, Browder and

Hermitage submit that these requests—which endanger Browder's safety and security—could not have been formulated but for privileged, confidential communications between them and their former counsel.

Finally, through this litigation, BakerHostetler and Moscow have already advanced an interpretation of past events that they know to be contrary—and indeed, adverse—to Browder and Hermitage's interests, including with respect to Russian criminal proceedings against them. For example, in pending motion practice on Defendants' behalf, BakerHostetler and Moscow have insisted that certain tax-related documents sought from Browder are "necessary" to ascertain whether the June 2007 raid on Hermitage's Moscow office—an event Moscow and his firm understood as integral to the $230 million tax fraud during their prior representation, *see* Ex. 12 at ¶ 76—"was actually part of the Russian Federation investigation into certain Hermitage entities for their fraud." Ex. 22. In other words, BakerHostetler and Moscow now seek to legitimize the inception of the same fraud that they once told prosecutors must be punished, and to suggest that the raid and resulting identity theft against Hermitage's portfolio companies was instead a remedial response to Hermitage's own alleged misconduct.

While a party's preference for its own counsel is normally respected, this Court cannot allow that preference to undermine the fairness and integrity of these proceedings, especially where, as here, that counsel has had unfettered access to a witness's confidences and could consciously or unconsciously "manipulat[e] a confidence acquired in the earlier representation and transform[] it into a telling advantage in the subsequent litigation." *Emle Indus.*, 478 F.2d at 571. Browder and Hermitage have not only established that BakerHostetler had access to their confidential information, they have already shown how that information has been and could be misused in Moscow and BakerHostetler's hands should they remain Defendants' counsel here.

II. Imputation Of BakerHostetler's Conflict To Baker Botts Requires Disqualification Of Baker Botts

Imputation of Moscow and BakerHostetler's conflict to Baker Botts depends upon "whether [Baker Botts], through [its] relationship with [BakerHostetler], was in a position to receive relevant confidences regarding [Browder and Hermitage]," BakerHostetler's former clients. *See Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977). Browder and Hermitage do not have any burden to show that their former counsel in fact "possessed [their] explicit confidences" or that they were then conveyed to co-counsel; rather, a conflicted lawyer's co-counsel should also be "disqualified where some evidence exists of the possibility that disclosures were made . . . of which [initially untainted co-counsel] cannot dispossess itself." *NCK Org., Ltd. v. Bregman*, 542 F.2d 128, 134 (2d Cir. 1976) (disqualifying counsel based on consultation with conflicted lawyer).

BakerHostetler and Baker Botts have been "working closely to represent a common client" for almost one year. *Id.* There is no evidence that any ethical screen has ever been imposed between the two firms, or that Baker Botts' representation of Defendants has been limited. *See generally* Dkt. Rather, the two firms have been jointly involved in every aspect of this case—from Defendants' court filings, to status conferences, press articles, and the abusive non-party discovery efforts. *See, e.g.*, *id.*; Dkt. 107 at 4 (criticizing Browder for challenging invalid non-party discovery); Exs. 19; 18; 24; 17 & 25–31 (eight non-party subpoenas).

Moreover, there is more than a mere "possibility" that Defendants' tainted counsel, Moscow and BakerHostetler, "'consciously or unconsciously' transmitted some confidence to the theretofore untainted firm," of which Baker Botts "cannot dispossess itself" now. *See NCK*, 542 F.2d at 134 (quoting *Hull*, 513 F.2d at 570); *see also Fund of Funds*, 567 F.2d at 233 (concluding that co-counsel was "so intimately related to [prior counsel] that confidences

disclosed by [the former client] could have been revealed"). The specific document requests made to Browder through the latest subpoena issued to him, while signed only by Baker Botts, appear on their face to reflect confidences Browder shared with BakerHostetler (such as information about his security arrangements and the existence of certain transcripts and tape recordings). Indeed, that those subpoenas were signed only by Baker Botts, rather than by both co-counsel, reflects both firms' conscious awareness of—and futile attempts to bypass—co-counsel's conflict. Given the circumstances of the firms' co-counsel relationship, Second Circuit law compels the conclusion that Baker Botts is not just an "understudy" but has been irreconcilably tainted by BakerHostetler's conflict and should therefore be disqualified.

CONCLUSION

For the foregoing reasons, Browder and Hermitage request that this Court disqualify Defendants' counsel, BakerHostetler and Baker Botts, based on their irresolvable conflict of interest arising from BakerHostetler's successive representation of Browder and Hermitage, on the one hand, and now of Defendants, on the other hand, in a substantially related matter.

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