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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

13 CV 6326 (WHP)

5 PREVEZON HOLDINGS, ET AL,

6 Defendants.

ARGUMENT

7 -----x  
8 New York, N.Y.  
9 May 3, 2017  
5:17 p.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 JOON H. KIM,  
15 Acting United States Attorney for the  
16 Southern District of New York

17 PAUL M. MONTELEONI  
18 CRISTINE I. PHILLIPS  
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21 BY: ADAM M. ABENSOHN  
22 FAITH E. GAY  
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24 -AND-  
25 NATALIA VESELNITSKAYA

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1 prejudicing them with the notion that they must avenge  
2 Magnitsky's death through a verdict against Prevezon.

3           Therefore, the evidence regarding Magnitsky's  
4 investigation of the Russian treasury fraud and anything up to  
5 his arrest is admissible. Moreover, Magnitsky's arrest is also  
6 admissible because it's relevant to the government's theory  
7 that Russian officials sought to cover up their alleged crimes  
8 and silence the person who uncovered those crimes. However,  
9 this Court excludes any evidence pertaining to Magnitsky after  
10 his arrest, namely, his prolonged incarceration, death in  
11 prison, and posthumous prosecution, on the basis that its  
12 prejudicial effects substantially outweighs its probative  
13 value.

14           Moreover, the government has noted in its briefing  
15 that it does not intend to introduce any evidence regarding the  
16 international community's reaction to Magnitsky's death,  
17 including the United States' passage of the Magnitsky Act.  
18 This Court agrees that such evidence should not be introduced  
19 at trial.

20           Let's turn to Prevezon's motion *in limine* No. 3,  
21 hearsay reports concerning the Russian treasury fraud, which,  
22 as I understand it, is now narrowed to the report of the  
23 Parliamentary Assembly of the Council of Europe.

24           Does anybody have anything to add to the arguments  
25 they've advanced in their papers?

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1 MR. REED: Thank you, your Honor.

2 May I hand up just one document?

3 THE COURT: Yes. What is it?

4 MR. REED: It's in the record, your Honor, as Exhibit  
5 2. I believe it's a declaration of Andreas Gross. 402-2.

6 Your Honor, in the spirit of being brief, I'll cut  
7 right to the four-factor test.

8 Under this rule, 803(22), there is a four-factor test  
9 that the court looks at to assess whether there is sufficient  
10 trustworthiness, and I just want to quickly tick through them.

11 THE COURT: I really read all of this in the briefs.  
12 I really don't need it.

13 MR. REED: Okay, your Honor.

14 Then let me just highlight the last factor, which is  
15 the risk of an improper motivation or political influence. We  
16 think that weighs heavily and strongly against the admission of  
17 this document. If you look at the very first paragraph of  
18 Mr. Gross's --

19 THE COURT: I agree.

20 MR. REED: Okay.

21 THE COURT: Let me hear from the government.

22 MR. REED: Thank you, your Honor.

23 THE COURT: I don't mean to be curt, but the fact is  
24 that we have to make, as the poet said, concessions to the  
25 mortality of man. And I got your arguments. Let's see if the

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1 government can disabuse me.

2 MR. REED: Sure.

3 The last thing I want is an opportunity to snatch  
4 defeat from the jaws of --

5 THE COURT: Right.

6 MS. PHILLIPS: Your Honor, we believe that the report  
7 does meet the 803(8) test, and that --

8 THE COURT: Even though the author of the report is  
9 unwilling to stand behind it and submit to a deposition because  
10 he'd be humiliated?

11 MS. PHILLIPS: To be clear, your Honor, that was,  
12 first of all, hearsay, in and of itself, based upon a  
13 conversation between counsel. But I can fill out the rest of  
14 that, having spoken with his representatives.

15 THE COURT: But the report is replete, isn't it, with  
16 Gross's opinions and personal evaluations of the witness's  
17 credibility?

18 MS. PHILLIPS: It is, your Honor, but we only seek to  
19 introduce it for very limited purposes.

20 THE COURT: The government always says that. Okay?  
21 They always say that.

22 MS. PHILLIPS: The point is that today it would be  
23 inappropriate to exclude it in its entirety. We're certainly  
24 willing to come to the Court on a limited case-by-case basis.

25 THE COURT: I disagree.

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1 MS. PHILLIPS: Thank you, your Honor.

2 THE COURT: This Court grants Prevezon's motion to  
3 exclude the Gross report primarily on the basis that the  
4 report's principal focus is on a subject that this Court has  
5 already excluded: The circumstances surrounding Magnitsky's  
6 death. And it also, in my judgment, suffers from a lack of  
7 trustworthiness, having read it.

8 These factors, taken together, present the risk that  
9 the jury will be confused by the report's contents and opinions  
10 and distracted from the real claims at issue. Of the four  
11 factors that courts look to to determine the trustworthiness of  
12 a public report, the factors regarding timeliness of the  
13 investigation, whether the assembly or any other of its  
14 subcommittees conducted a hearing, and possible motivational  
15 problems weigh against finding that the report is trustworthy.

16 First, the parliamentary assembly commissioned this  
17 report several years after the events in question. Even if  
18 this Court measured the time from the primary event  
19 investigated, Magnitsky's death in November of 2009, almost  
20 three years elapsed before the assembly's legal affairs  
21 committee passed its resolution appointing Gross as the  
22 reporter in November 2012.

23 Second, there doesn't appear to have ever been an  
24 actual hearing conducted following the dissemination of Gross's  
25 report or any drafts of his report. While the government

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1 claims that members of the legal affairs committee voted to  
2 adopt the draft resolution formed after Gross's investigation  
3 without objection, there's no evidence that an actual hearing  
4 with the appropriate procedural safeguards was actually  
5 conducted.

6 Finally, the inception of this report appears to have  
7 been predicated on a series of events that bring into question  
8 certain motivational problems. The Gross report cites "earlier  
9 work" of the assembly regarding Magnitsky's death. One of the  
10 events that may have colored the investigation from the outset  
11 is William Browder's interference with the assembly's work.

12 In June 2011, it appears that Browder "made an  
13 intervention at a parliamentary seminar" at a meeting of the  
14 committee that ultimately authorized Gross's involvement in  
15 conducting his investigation.

16 Further, the Gross report is replete with statements  
17 from witnesses that are sympathetic to Magnitsky and Browder,  
18 among others. There's several individuals who were paid and  
19 directed by Hermitage to investigate Magnitsky-related events  
20 who were interviewed by Gross.

21 While Gross cites certain conversations he had with  
22 Russian officials and the documents he received from them,  
23 those references are eclipsed by the statements and opinions by  
24 Browder, Hermitage, and other self-interested parties. By  
25 Gross's own admission, he "regrets nevertheless" that he did

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1 not "speak directly with the persons most immediately concerned  
2 by the allegations of criminal conspiracy," despite having  
3 sought them out. That's the Gross report, paragraph 4.

4 That omission brings into doubt that Gross "heard both  
5 sides of the story," a fact that renders his findings and  
6 conclusions unreliable. *In Re Parmalat Securities Litigation*,  
7 477 F. Supp. 2d 637, 641 (S.D.N.Y. 2007).

8 Most troubling is that the report's author, Andreas  
9 Gross, refused to appear for deposition in this action, citing  
10 humiliation as the reason. He appears unable to stand behind  
11 and defend the findings and conclusions of his report, a  
12 decision which only undermines the credibility and  
13 trustworthiness of that report. His position, whatever its  
14 genesis, has undermined the ability of Prevezon to challenge  
15 his conclusions. *See Parmalat Securities*, 477 F. Supp. 2d 641.  
16 In other words, the Gross report is some piece of work, and I  
17 mean that in hyperbole.

18 Accordingly, Prevezon's motion to exclude the report  
19 is granted.

20 Let's turn to Motion No. 4, witness interviews and  
21 summaries.

22 I'll tell you that I don't need to hear argument here.  
23 I think that the hearsay statements that are reflected in the  
24 interview summaries or declarations may be considered by the  
25 Court for appropriate purposes other than proving the truth of