17-3258(L)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: 650 FIFTH AVENUE COMPANY and RELATED PROPERTIES

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

BRIEF FOR CLAIMANTS-APPELLANTS ALAVI FOUNDATION AND 650 FIFTH AVENUE COMPANY

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CORPORATE DISCLOSURE STATEMENT

The Alavi Foundation is a not-for-profit corporation organized under the laws of New York. The Alavi Foundation has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

The 650 Fifth Avenue Company is a partnership organized under the laws of New York. The 650 Fifth Avenue Company has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This is the second appeal in this civil forfeiture action. The first appeal arose when the District Court (Forrest, J.) granted summary judgment in 2013 against the Alavi Foundation, a New York State not-for-profit corporation founded in 1973 ("Alavi" or the "Foundation") and the 650 Fifth Avenue Company (the "Fifth Avenue Company" or "Partnership"), a partnership in which the Foundation holds the majority interest (together with the Foundation, "Claimants"). The judgment forfeited an office tower located in midtown Manhattan (the "Building"); the Foundation's interest in the real estate partnership that holds the Building, *i.e.*, the Fifth Avenue Company itself; portions of other real properties that house schools, health clinics, mosques, and community centers; and Claimants' bank accounts (collectively, the "Defendant Properties"). Finding errors in that judgment, this Court vacated and remanded the action for further proceedings and a jury trial. *In re 650 Fifth Avenue & Related Properties*, 830 F.3d 66 (2d Cir. 2016).

On remand, the District Court repeated several of the errors this Court identified in the first appeal. It again denied Claimants discovery regarding their statute of limitations defense, and then again erroneously granted summary judgment to the Government, and denied it to Claimants, on that defense. The District Court also disregarded this Court's instructions in re-evaluating Claimants' motion to suppress evidence that was seized pursuant to a warrant this Court found facially invalid, resulting once again in the wrongful denial of that motion.

A jury trial was held from May 30 through June 29, 2017. The Government alleged that Claimants violated economic sanctions imposed on Iran in 1995 pursuant to the International Emergency Economic Powers Act, 50 U.S.C.

§ 1701 *et seq.* ("IEEPA"), and that they laundered the proceeds of those violations. The bulk of the Government's evidence related to largely undisputed events that occurred prior to 1995, when the Foundation was knowingly involved in a commercial relationship with the Iranian government-owned Bank Melli. Specifically, the Foundation knew that Assa Corporation ("Assa"), its partner in the ownership of the Building, was indirectly owned by Bank Melli. But in 1995 Bank Melli indisputably transferred ownership of Assa to two individuals, Davood Shakeri and Fatemeh Aghamiri. A central factual dispute at trial was whether the Foundation *knew* that the transfer was a sham, and therefore knowingly violated the sanctions by continuing to provide services (*i.e.*, the management of the Building) to Bank Melli (through Assa) after 1995.

The month-long trial was riddled with errors. The District Court mishandled the issues that arise when Fifth Amendment invocations are implicated in civil cases. It wrongfully admitted evidence offered by the Government and improperly precluded the bulk of Claimants' case. It erred in various respects regarding the principles governing asset forfeiture. Its antipathy to Claimants' case and counsel was palpable throughout, and its rulings deprived Claimants of a fair trial.

The result was a judgment once again forfeiting a majority of the Defendant Properties, even though all but a portion of one of them had been purchased long before 1995, when the sanctions were imposed. But the District Court accepted the Government's argument that they were forfeitable based on actions that occurred after 1995, and also rejected Claimants' post-verdict contentions that the forfeiture was grossly disproportionate and violated the Eighth Amendment's prohibition of excessive penalties.

As discussed below, for numerous reasons, the judgment should be reversed.

STATEMENT OF JURISDICTION

To the extent the District Court had subject matter jurisdiction, it arose under 28 U.S.C. §§ 1345 and 1355.[1] The court entered final judgment on October 4, 2017. (SPA-510-24.)[2] Claimants timely filed a notice of appeal on October 11, 2017. (A-4222-24.) This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] In related judgment enforcement actions, the District Court found that the Fifth Avenue Company is an "agency or instrumentality" of Iran under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*. Claimants dispute that finding. But if it is affirmed, then the Fifth Avenue Company would have FSIA immunity and this Court would lack jurisdiction over it. Claimants raised this argument below by moving to dismiss for lack of subject matter jurisdiction (Dkt. 1993), and the District Court denied the motion, finding waiver and holding that it had jurisdiction under 28 U.S.C. §§ 1345 and 1355. (Dkt. 2062.) These holdings were erroneous, because no FSIA exception applies and an entity cannot knowingly waive immunity that it reasonably believes it is not entitled to assert.

[2] A consolidated joint appendix in this action was filed on April 20, 2018. Citations to "EX" are to the Exhibit Volumes of the consolidated joint appendix; citations to "A" are to the Joint Appendix Volumes of the consolidated joint appendix; and citations to "SPA" are to the Special Appendix of the consolidated joint appendix. Citations to "Dkt." are to filings in Case No. 08-cv-10934 (S.D.N.Y.), unless otherwise specified.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court improperly deny Claimants' requests for discovery relating to their statute of limitations defense, and then erroneously grant the Government's motion for summary judgment and deny Claimants' motion as to that defense?

2. Did the District Court err in denying Claimants' motion to suppress evidence obtained pursuant to a warrant that this Court has held was facially invalid?

3. Did the District Court err by permitting the Government to play videotaped Fifth Amendment invocations by former Foundation board members, and by precluding the testimony of two such witnesses who wanted to testify on the ground that they had invoked the privilege four years earlier?

4. Did the District Court err by allowing the Government to pursue forfeiture of properties allegedly "retained" through criminal services without a valid evidentiary basis?

5. Did the District Court deny Claimants a fair trial, thereby depriving them of due process of law, by committing numerous critical errors in the conduct of the trial and admission of evidence?

6. Did the District Court err by issuing a forfeiture judgment that was impermissibly disproportionate under the Eighth Amendment and 18 U.S.C. § 983(g), and by not holding a hearing as required by statute?

7. Should this case be reassigned to a different district judge on remand to ensure impartiality and the appearance of impartiality?

STATEMENT OF THE CASE

A. The Parties

1. The Alavi Foundation

In 1973, the Shah of Iran, Mohammed Reza Pahlavi, formed the Alavi Foundation[3] under New York's Not-For-Profit Corporation Law. (EX-1623-25; EX-13-22.) Throughout its history, the Foundation's mission has been to promote Persian history, culture, and religion in the United States, which it has done by making grants to, and facilitating the use of its properties as, schools, community centers, medical clinics, inter-faith programs, and mosques throughout the country. The Internal Revenue Service designated the Foundation as a charitable organization under Section 501(c)(3) of the Internal Revenue Code, and that designation remains in place today. (EX-1623.) As a charitable foundation, Alavi does not have any owners, members, or shareholders, and never has. (*Id.*) It is run by a president, a board of directors, and a handful of employees. The president and directors are selected in accordance with the Foundation's bylaws. (EX-235-44; EX-245-59; EX-260-69.)

2. The Fifth Avenue Company

The Fifth Avenue Company was formed in 1989 as a partnership between the Foundation and Assa. The story of the Partnership's creation begins in 1974, when the

[3] The Foundation has had a series of different names: from 1973 until 1980, it was known as the Pahlavi Foundation; in 1980, it was renamed the Mostazafan Foundation of New York; and in 1992, it was renamed the Alavi Foundation. (EX-1623-24.) For consistency, it is referred to in this brief as "Alavi" or the "Foundation."

Foundation acquired property at 650 Fifth Avenue in New York City with the proceeds of two separate mortgage loans. The following year, the Foundation borrowed $42 million from Bank Melli, which it used to retire those mortgages and build a 36-story office tower. (EX-1628-31.) Throughout the life of this loan from Bank Melli, it was an indisputably lawful arrangement.

Because it was a loan to a charitable foundation, the Bank Melli mortgage was interest-free as long as installments were paid on time. (EX-1759-60.) But during the 1980s—bad times in New York generally—the Foundation was unable to make its required payments. As a result, interest began accruing. (A-3200.) The interest exacerbated the Foundation's inability to pay, and by 1986 the Foundation owed approximately $36 million in principal and an additional $5 million in interest on overdue installments. (A-3203; EX-2268-69.) These financial difficulties were compounded by a tax issue. Although the Foundation was largely exempt from taxation, the fact that the Building was debt-financed caused the rental income the Foundation received to be taxable as "unrelated business income." (EX-1628-29.) That resulted in annual tax bills of approximately $3 million. (A-3205.)

In order to relieve the Foundation of the mounting interest payments and the large annual tax liability, in 1989 the Foundation extinguished the loan. (EX-1628-31; EX-1686-87.) The Foundation and Bank Melli created a partnership under New York law, the Fifth Avenue Company. (EX-1629.) Under the Partnership Agreement, the Foundation contributed the Building to the Fifth Avenue Company, while Assa, which Bank Melli created at the same time, contributed cash sufficient to retire the Bank Melli loan. (*Id.*; EX-23-103.) The Fifth Avenue Company became the 100% owner of the Building, and was, in turn, owned 65% by the Foundation and 35% by Assa. The Foundation

subsequently transferred another 5% to Assa, resulting in today's 60%/40% split. (EX-1629-30.) The Foundation was the managing partner of the Fifth Avenue Company, which did not have any employees of its own. (EX-1630.)

Although the Government made the uncharged insinuation that this 1989 transaction was a tax crime—an issue that the District Court grossly mishandled to Claimants' prejudice, as explained in the Argument section—it was in fact lawful.[4] It was also disclosed to and approved by the Charities Bureau of the New York Attorney General's Office and the Supreme Court, New York County. (EX-1629; EX-104-225; EX-226-29.)

It was undisputed at trial that the Foundation knew, in 1989, that Bank Melli was the ultimate owner of Assa. Through a corporate structure, Assa was at first indirectly owned primarily by two Bank Melli executives, Mohammad Behdadfar and Moshen Kakavand, from 1989 through 1992.[5] (A-3059; EX-1632-34.) Then, in 1993, Behdadfar and Kakavand's interests were transferred to Bank Melli itself.

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[4] The Government ultimately conceded as much, claiming that it was arguing only that the 1989 transaction was a "legal mode[] of tax avoidance." (A-2823.)

[5] Although it was undisputed at trial that Bank Melli's ownership of Assa was lawful until the 1995 sanctions were imposed, that ownership was nevertheless concealed, including from the Charities Bureau of the New York Attorney General's Office. The record is clear that the reason for concealing that legally permissible relationship was to maximize the rental income the building could earn, out of concern that prospective tenants would not want to rent space in a building in which the Iranian government had invested. (*E.g.*, A-3212-13.)

(EX-1632.) In 1995, in an event that was central at the trial, Bank Melli's interest in Assa was transferred to two individuals, Davood Shakeri and Fatemeh Aghamiri, who have owned Assa since 1995. (EX-1633.) Shakeri and Aghamiri were secretly merely straw owners, and Bank Melli maintained ultimate ownership of Assa; as discussed below, a crucial factual question at trial was whether Claimants *knew* that secret after the Iranian sanctions took effect in 1995.

B. Procedural History

1. Proceedings Before Remand

The Government commenced this case by filing a civil forfeiture complaint against properties held by Assa and its immediate parent company, Assa Ltd., on December 17, 2008 (the "Complaint"). (A-311-31.) The Complaint alleged that Assa and its parent company provided services on behalf of Bank Melli, in violation of the IEEPA, codified at 50 U.S.C. § 1701 *et seq.*, and the Iranian Transaction Regulations, 31 C.F.R. Part 560, and that their properties constituted proceeds of these criminal services. The Complaint further alleged that these properties were involved in or traceable to money laundering transactions. Among the properties sought to be forfeited was Assa's 40% minority interest in the Fifth Avenue Company.

Two days after that Complaint was filed, the Government executed a search warrant at the Foundation's offices, seizing virtually every document and electronic storage device there. As explained below, this Court later found the warrant facially invalid because, among other things, it did not identify the crimes for which the agents were authorized to search for and seize evidence and failed to provide a temporal limit on the property to be seized. *In re 650 Fifth Ave.*, 830 F.3d at 100.

On November 12, 2009, after spending almost a year reviewing the unlawfully seized materials, the Government amended its complaint (the "Amended Complaint") to seek forfeiture of properties belonging to the Foundation and the Fifth Avenue Company. The Amended Complaint alleged that since 1995, the Foundation had provided unlawful services to Assa, knowing of its ownership by Bank Melli, and therefore the Defendant Properties were subject to forfeiture. Specifically, the Amended Complaint alleged that the Foundation violated the IEEPA by managing the Building, running a charitable organization, and transferring funds to Bank Melli through Assa. (A-348.)

In the ensuing years, the case proceeded through the civil discovery process, which was still ongoing in the run-up to a September 16, 2013 trial date. Five days before the scheduled trial, the District Court informed the parties that it would grant summary judgment to the Government, forfeiting the Building in full. (*See* Dkt. 851.) Subsequently, the court forfeited virtually all of the Foundation's other property as well.[6] (A-902-83; Dkt. 1125.) After the District Court entered final judgment, Claimants appealed to this Court in June 2014.

On July 20, 2016, this Court reversed. *In re 650 Fifth Ave.*, 830 F.3d at 107. It held that (1) there were genuine disputes of material fact as to whether the Foundation *knew* that Assa was owned and controlled by Bank Melli after the 1995 sanctions went into effect, (2) the District Court erred by granting, *sua sponte*, summary judgment rejecting

[6] Besides the Building, the Defendant properties included community centers in New York, Texas, California, and Maryland (the "Community Centers"), undeveloped land in Virginia, and bank accounts owned by the Foundation and the Fifth Avenue Company. (Dkt. 1125 at 8.)

Claimants' statute of limitations defense without affording notice or an opportunity to be heard, and (3) the warrant authorizing the search of the Foundation's offices was facially defective, because it "plainly lacked particularity as to the crimes at issue" and failed to particularize either the categories of computerized information or the temporal scope of materials that could be seized. *Id.* at 100, 106-07.

2. Pre-trial Proceedings on Remand

After remand, the District Court held a conference with the parties on November 18, 2016 to discuss the issues related to Claimants' motion to suppress evidence and statute of limitations defense, and set a schedule for additional discovery and trial. The court indicated that it would bifurcate trial in this forfeiture action; the first phase would address the Foundation's knowledge of Bank Melli's ownership of Assa after 1995 and the second phase would address Claimants' statute of limitations defense. (A-1155-1209.) The District Court issued an order on November 21, 2016 scheduling the first phase of trial to begin on May 30, 2017. (A-1153-54.)

(a) Suppression

Following a suppression hearing over parts of five days in March 2017, the District Court denied Claimants' motion to suppress the evidence seized pursuant to the facially invalid warrant, finding that the agents had relied on the warrant in good faith and that all of the seized documents would inevitably have been discovered. (SPA-90-169.) The court further determined that excluding the evidence would "serve no significant salutary purpose" and would "deprive the jury of documents relevant to its decision." (SPA-163-65.)

(b) Statute of Limitations

On remand, Claimants sought discovery on the factual questions that this Court recognized in 2016 had "hardly [been] developed" prior to the first appeal. 830 F.3d at 97 & n.28. The Government refused to produce any of the requested documents. Claimants therefore moved to compel on January 13, 2017. (Dkt. 1439.) Five days later, the District Court *sua sponte* ordered Claimants to submit a supplemental letter providing a historical overview of the discovery Claimants had sought prior to the first appeal relating to the statute of limitations defense (A-1226-27), which Claimants did on January 25, 2017. (Dkt. 1445.) The Government responded that the discovery requests had been waived, and at any rate would be "extraordinarily burdensome." (Dkt. 1448.) The District Court agreed with the former argument, and refused to permit development of the record on the ground that Claimants had not requested statute of limitations-related discovery before the first appeal and therefore had waived the right to receive any discovery on remand. (SPA-1-41.)

After the District Court refused to re-open discovery on the statute of limitations, the parties filed cross motions for summary judgment on this issue. The District Court granted the Government's motion and denied Claimants', holding that the factual record—which it did not permit Claimants to develop—did not support more than a "series of investigations that went nowhere" into the same conduct alleged in the Amended Complaint. (SPA-69-89.)

3. Trial

From May 30 through June 29, 2017, the District Court conducted both a jury trial in this case and a simultaneous bench trial in actions seeking to hold Claimants liable for billions of dollars' worth of outstanding judgments against Iran (the "Judgment Enforcement Actions") brought by ten

groups of victims of terrorism or their families (the "Iran Creditors"). The testimony relevant only to the bench trial was heard in the evenings. (*See* SPA-59-61.) Over Claimants' objection, the more than ten attorneys representing the Iran Creditors occupied several additional tables in the well of the courtroom; the jury was told that the unidentified lawyers were present for "a different proceeding." (SPA-530.)

As explained in greater detail in the Argument section below, the trial was fundamentally unfair to Claimants, in part because they were effectively denied the ability to mount a defense. Among other errors, the District Court (1) precluded more than a dozen of Claimants' witnesses, including two Foundation board members and other lay and expert witnesses called to rebut the Government's key allegations; (2) significantly limited Claimants' cross-examinations of Government agents, even requiring Claimants to provide their cross-examination outlines to the court in advance for pre-approval; and (3) warned Claimants' counsel that it would *sua sponte* interrupt their summation if they relied on unspecified testimony it felt the Government should have objected to, or derogated the significance of the Government's pre-1995 evidence. (SPA-170-214; SPA-278-90; A-3339; A-3589-90.)

These and other legal and evidentiary errors appeared to flow from the District Court's obvious disdain for Claimants' defense. The trial featured repeated and unjustified accusations by the court that Claimants' counsel were acting in bad faith, engaging in "gamesmanship" and "scorched earth" tactics, and misleading the court. (SPA-565; SPA-567; SPA-570; A-2875; A-2877; A-3547.)

On June 29, 2017, the jury returned its verdicts, finding that the Foundation's 60% interest in the Fifth Avenue Company and the Building was subject to forfeiture in its entirety. With respect to the Community Centers, the jury

found that 7% of the California property, 15% of the Texas property, 17% of the Maryland properties, and 44% of the Queens property were subject to forfeiture. (SPA-478-84.) On the same day, the District Court issued its 155-page decision in the Judgment Enforcement Actions, finding that Claimants' assets were subject to execution to satisfy the Iran Creditors' judgments against Iran pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(b)(3), and Section 201 of the Terrorism Risk Insurance Act ("TRIA"). (SPA-323-477.) The judgment based on that decision is the subject of a separate, consolidated appeal. *See Kirschenbaum v. 650 Fifth Avenue Company*, No. 17-3278(L) (2d Cir.).

4. Post-Verdict Motions and Appeal

After the jury returned its verdicts, Claimants filed various post-verdict motions, including among others a motion for judgment as a matter of law and to set aside the verdict (Dkt. 1999), and a motion seeking to reduce the forfeiture amount awarded by the jury pursuant to 18 U.S.C. § 983(g) because it was grossly disproportional to the offense and contrary to the Eight Amendment (Dkt. 1998). On September 1, 2017, the District Court issued an order denying all of Claimants' motions. (SPA-494-509.) On October 4, 2017, it entered judgment against Claimants. (SPA-510-24.) On October 11, 2017, Claimants timely filed a notice of appeal to this Court. (A-4222-24.) On November 16, 2017, this Court stayed the judgment pending appeal. (Case No. 17-3258, Dkt. 94.)

C. The Facts Adduced at Trial

The facts adduced at trial, including the facts underlying the Government's central contentions, are set forth below. Although hampered by the District Court's limitations on the ability to fully present a defense, Claimants contended that

(1) Bank Melli made it clear to the Foundation as early as 1992 that it would sell Assa; (2) the Foundation therefore had good reason to believe that the undisputed transfer of Assa to two new individual owners was in fact legitimate; (3) the Foundation made numerous efforts in the ensuing 13 years to learn more about Assa's owners; and (4) Assa and Bank Melli conspired to hide from the Foundation the fact that the bank still owned Assa.

1. Events Preceding the Imposition of Sanctions in 1995

The overwhelming majority of the Government's evidence at trial concerned events that pre-dated the imposition of the 1995 sanctions against Iran. The Government introduced substantial evidence that the Foundation knew Bank Melli was its partner prior to the sanctions, and that the Foundation also regularly interacted with Iranian officials during that time. The evidence also showed that Bank Melli became dissatisfied with its investment in the Building after the 1989 transaction and stated an intention to sell its interest in Assa, and that the Foundation was told in 1995 that its interest had, in fact, been transferred to two individuals, Davood Shakeri and Fatemeh Aghamiri.

(a) Interactions with Iranian Officials Lead to Changes to the Foundation's Board

Much of the Government's evidence, including the testimony of Seyed Mojtaba Hesami-Kiche, a member of the Foundation's board prior to 1991 who subsequently became a paid informant, established only the uncontested fact that before the imposition of the sanctions in 1995, Iranian officials had influence over the Foundation itself. For example, the Government introduced documents and testimony indicating that in the 1980s and early 1990s,

officials of the Bonyad Mostazafan[7] would sometimes provide instructions or recommendations to the Foundation. According to the testimony of an FBI agent, a former Foundation president, Mohammad Badr, described the Bonyad Mostazafan as the Foundation's "parent company." (A-2886.) Another former president, Manoucher Shafie, testified that the Foundation would communicate directly with the Bonyad Mostazafan in Iran—the Iranian organization would, for instance, invite board members from Iranian foundations "both inside and outside" of Iran to seminars. (A-2994-95; EX-1667.)

Numerous documents provided to the Government by Hesami-Kiche, the cooperator, similarly showed that the Foundation had a relationship with the Bonyad Mostazafan during that period. They also showed that, against the backdrop of the Foundation's continuing financial difficulties, 1991 saw a power struggle between two new Iranian officials, the head of the Bonyad Mostazafan in Iran (Taj Moshen Rafiqdoost) and the Iranian ambassador to the United Nations (Kamal Kharazi). (*See* EX-1934-36.) The result of that power struggle was a new board. Rafiqdoost, who had unsuccessfully tried to get the Foundation to sell the Building (EX-2002-03), successfully pressured the board to resign (EX-1812-13), and Kharazi recommended their successors. Kharazi sought to professionalize the board by appointing Mohammad Geramian, a mechanical engineer with a Ph.D, as president, and Abbas Mirakhor, an economist with the International Monetary Fund ("IMF"), as treasurer. (A-3012-14; EX-1142-62; EX-2489-95.)

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[7] Trial testimony described the Bonyad Mostazafan as a government-run charitable organization that provided services to indigent and destitute persons in Iran. (A-3027.)

The Government contended that these and other efforts by Iranian officials to influence the Foundation were proof that the Foundation was merely an instrument of the Iranian government. (*E.g.*, A-3623-24.) The District Court effectively prevented Claimants from downplaying the significance of this pre-1995 evidence—which the court viewed as circumstantial evidence of continued post-1995 control—by repeatedly threatening to give jury instructions if Claimants' cross-examination or argument suggested the evidence was not deserving of significant weight. (*E.g.*, A-3030; A-3590.) The District Court also precluded evidence that would have proved that efforts by Iranian officials to influence the Foundation, whether before or after the sanctions were imposed, were neither unusual nor indicative of control. The Foundation was a 501(c)(3) organization dedicated to promoting the culture and history of a foreign country in the U.S. Claimants sought to elicit evidence that efforts to influence activities and board membership were a natural occurrence given the commonality of interests of such organizations and the relevant foreign governments, and not an indication of a lack of independence. The District Court precluded that evidence. (Dkt. 1802; Dkt. 1827; SPA-278-90.)

(b) Bank Melli Makes Clear Its Dissatisfaction with the Investment in 1992

In the years after the formation of the Partnership in 1989, the Foundation continued to struggle financially. In August 1992, its then-president, Mohammad Geramian, went to Tehran to meet with Bank Melli officials, including Siavash Naghshineh (one of the bank's board members), Gholamreza Rahi (the head of the bank's Overseas Network Supervisory Department), and Mohammad Karjooravary (the head of the bank's New York branch). Geramian told Bank Melli that the Foundation needed another loan—in the amount of $1.7 million—to pay real estate back taxes. He also reported that

the Partnership owed Assa an additional $2.2 million based on its share of the rental income from the Building. (EX-1719-21.)

For its part, Bank Melli was disappointed in its investment in the Building, in part because of the Foundation's financial struggles. At the 1992 meeting, Naghshineh complained to Geramian that if, instead of contributing to the Partnership, the bank had invested elsewhere, it would have made tens of millions of dollars in profit—rather than the losses its part-ownership of the Building had produced. (*Id.*; A-3209.) Bank Melli was also unhappy because, as the minority partner, it lacked managerial control of the Building. (A-3064.) For these reasons, Bank Melli hoped to exit the investment. (A-3079-80.)

The bank also believed it was required to divest its interest in Assa within five years because of applicable banking regulations, and so the 1989 transaction was always intended to be a temporary arrangement to afford the Foundation time to restructure its ownership and fix its financial troubles. (*E.g.*, A-3112; A-3195.) That temporary arrangement was expected to end by 1994, five years after the investment. (A-3210.)

(c) The 1995 Sanctions

In 1995 President Clinton, pursuant to the IEEPA, issued Executive Orders 12,957 and 12,959, declaring that the government of Iran posed a threat to national security and imposing economic sanctions.[8] (EX-2270-71; EX-2272-74.)

[8] Throughout the trial the Government sought to capitalize on the impetus for the sanctions. It gratuitously elicited references to terrorism and to the national security threat posed by the government of Iran, despite repeatedly acknowledging that those subjects were irrelevant to the

In September 1995, the U.S. Treasury's Office of Foreign Assets Control ("OFAC") issued Iranian Transactions Regulations ("ITRs") implementing the executive orders and prohibiting the provision of goods or services to Iran. (A-2866-67; EX-2275-2306.)

2. Post-Sanctions Evidence

A central factual dispute at trial was what the Foundation did and did not know after the sanctions were imposed. The record is clear that in 1995, ownership of Assa was transferred to two individuals, and that the Foundation was informed of that fact the same year. And significant documentary evidence, including evidence introduced by the Government, showed that the Foundation made repeated efforts over time to learn more about Assa and its owners (in part because of its desire to buy Assa out), but Assa responded by stonewalling at every opportunity. Contemporaneous documentation obtained and introduced by the Government showed that, unbeknownst to the Foundation, Assa secretly schemed with Bank Melli to conceal its true ownership.

The Government sought to discredit these documents as a fake paper trail, but its own post-1995 evidence was thin and inconclusive, and much of it corroborated the Foundation's lack of knowledge. The Government relied heavily on Fifth

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issues on trial. (*Compare, e.g.*, Dkt. No. 755 (Government brief acknowledging that terrorism, terror financing, and "Iran's nuclear ambitions" are "not topics relevant to the issues to be tried") *with, e.g.*, A-2835-36; A-2867-68; A-3122; A-3605; A-3690 (repeatedly referencing terrorism, weapons of mass destruction, and the "threat that [Iran] poses to this nation's national security[,] foreign policy and economy").)

Amendment invocations by Foundation board members and a criminal obstruction case against the Foundation's former president. That strategy worked in significant part because, as discussed below, Claimants were prevented from presenting contrary evidence by the District Court's erroneous rulings.

(a) Assa's Transfer to Shakeri and Aghamiri in 1995

The Government stipulated that in 1995 Assa's ownership had been transferred from Bank Melli to Davood Shakeri and Fatemeh Aghamiri. (EX-1628-31; EX-1109-10.) On August 30, 1995, the Foundation's counsel wrote to Assa's counsel seeking to learn the names of its owners so that it could report that information to the New York Attorney General's Charities Bureau, which had requested the information. (EX-1086-87.) A few months later, on November 7, 1995, Foundation president Geramian sent a follow-up letter to S.M. Shafa'at—an Assa representative (A-3057-58; A-3197)—asking: "Who owns the stock of ASSA Corp.? Who are the owners or stock holders of [the parent corporation,] ASSA Ltd. of Channel Island?" (EX-1109-10.) Shafa'at responded two days letter by informing the Foundation's comptroller, Hussein Mirza, by telephone that Shakeri and Aghamiri, both of Dubai, each owned 50%, which Mirza recorded in contemporaneous notes. (A-3525; EX-1109-10.) Neither Shafa'at nor anyone from Assa informed the Foundation that Shakeri and Aghamiri were in fact stand-ins for Bank Melli, which secretly continued to own 40% of Assa. (EX-1628-31.)

The transfer of Assa's ownership from Bank Melli to these two individuals would not have come as a surprise to the Foundation. Geramian had known for years that Bank Melli wanted to sell its interest in Assa, and that the

impending sanctions would preclude continuation of the investment.

(b) The Building Finally Turns a Profit; the Foundation Decides to Buy Assa Out

Abbas Mirakhor, an IMF economist who was the Foundation's treasurer and a board member from 1991 until 2005 (A-3393; A-3398), testified that in his first few years at the Foundation, there were no surplus revenues from the Building to distribute to the partners who owned it. It was not until the late 1990s that the Building began to generate a profit. (*See* A-3401.) In a striking indication of how far Assa was from the Foundation's radar screen, that was when Mirakhor first learned of its existence; he noticed that 40% of the profits from the Building were being distributed to Assa, an entity he had never heard of. (*Id.*) He immediately recommended attempting to buy Assa out. The Foundation thus directed its attorneys to approach Assa to try to purchase its shares.[9] (A-3401-03.) Over the ensuing years, the Foundation repeatedly tried, and failed, to do just that.

(c) The Foundation Tries to Buy Assa Out in 2003

An opening for the Foundation to acquire Assa's share in the Partnership finally came in 2003. That year, former Foundation president Hossein Mahallati, through a company

[9] Mirakhor testified that he also once directly approached an individual who he believed was involved with Assa to bring this topic up. He testified that he ran into an Iranian man, Azizi, on an airplane, and asked about buying Assa out. Mirakhor believed that Azizi worked for an investment bank in the United Kingdom—which he was not able to identify by name—with which he believed Bank Melli had an indirect financial relationship. (A-3402; A-3412.)

he created called Hanif Partnership ("Hanif"), made an offer to purchase Assa's ownership interest. (A-3526-27.) Under the Fifth Avenue Company's partnership agreement, the Foundation had a right of first refusal on any offer to purchase Assa's interest, and was therefore invited by Assa to purchase its interest for $42.4 million. (EX-1169-1271; EX-1163; A-3404.) On August 4, 2003, the Foundation notified Assa that it was accepting the offer to purchase the 40% partnership interest for $42.4 million. (EX-1272-73.) The parties negotiated a purchase agreement, and were set for a November 3, 2003 closing. (EX-1274-85.)

Just days before the closing, that deal fell through. The Foundation had arranged to finance the acquisition of Assa via a loan from Wachovia Bank (A-3526), but on October 28, 2003, less than a week before closing, Wachovia received an anonymous email (which the Foundation believed was connected to Hanif) warning that the proposed transaction was "dangerous" because both the Foundation and Assa were purportedly under investigation. This interference effort worked: Wachovia pulled out of the deal. (EX-1668-72; A-3526.)

The Foundation then turned to UBS, seeking alternative financing. (EX-1304-05.) In connection with its discussions with UBS, the Foundation requested of Assa's counsel "detailed information regarding Assa Corp." that the Foundation did not have, including the identities and countries of origin of Assa's intermediate and ultimate owners. (EX-1286-89; A-3527.) Assa stonewalled, refusing to provide information beyond the names that had already been provided in connection with the purchase agreement—even though in private communications with his client, Assa's lawyer recommended providing the requested

information. (EX-1274-85; EX-1290.) Ultimately, with the Foundation unable to secure financing, the deal fell apart.[10]

(d) The Foundation's 2006 Efforts to Meet Assa's Owners, and Assa's Stonewalling and Deception

The Foundation persisted in its efforts to learn more about Assa and to buy out its interest. Over an 11-month period in 2006, it continued to try to get more information about Shakeri and Aghamiri. The Foundation was put off, delayed, and, finally, flat-out lied to.

In January 2006, the Foundation sent a letter to Mohammad Deghani Tafti, Assa's sole employee and representative in the United States, requesting a meeting with Assa's board. (EX-1111.) Tafti agreed to a meeting, and proposed that it take place in May 2006. (EX-1112.)

Then, in May, the Foundation was informed that Assa's board would not attend the meeting. Instead, only Tafti and Assa's American attorney, Peter Livingston, would attend. (EX-1481.) As a result, the Foundation canceled the meeting (EX-1114), but continued to pursue a meeting with Assa's board, offering to meet anywhere in the United States or Europe. (EX-1113; EX-1115.) Assa agreed to a meeting of the boards in September 2006 (EX-1116), which it postponed until November, and then when it finally happened, only Tafti showed up. (EX-1167-68.) At that meeting, Geramian learned from Tafti that Assa Ltd. was a

[10] This led Hanif to file a lawsuit against Assa and the Foundation in February 2004, alleging breach of contract by Assa and tortious interference by the Foundation. In November 2004, the parties agreed to a settlement in which Hanif agreed to dismiss its lawsuit in exchange for a payment of $4 million from the Partnership. (EX-1497-98.)

British real estate investment company. (A-3528-29; EX-1168.)

With mounting frustration, but little recourse, the Foundation told Tafti to schedule a meeting with the elusive Shakeri and Aghamiri within a month. When, in early December 2006, he still had not done so, the Foundation's board authorized the president to seek the advice of counsel about what, if any, recourse the Foundation had. (EX-1167.)

(e) Continued Efforts to Investigate Assa's Owners in 2007-2008

Like the Foundation itself, its counsel tried and failed to arrange a meeting with Assa's directors. The Foundation's lawyers began calling Assa's counsel in January 2007, and sent a letter in March of that year reiterating the request for a face-to-face meeting between the directors of the Foundation and Assa. (EX-1117-19.) The letter noted that "for almost two years the Foundation's directors have requested (orally and in writing) a meeting with Assa's directors. However, Assa's U.S. representative, Deghani Tafti, has refused to arrange one. Indeed, it is our understanding he even has refused to communicate the Foundation's request to Assa's board." (EX-1117.) The Foundation's lawyers, however, were forced to concede: "While we cannot force you to do it, we hope you will convince Mr. Tafti to reconsider his position and arrange a meeting between the directors of the Foundation and Assa." (EX-1118.)

When a new president, Farshid Jahedi, took over at the Foundation, he sent yet another letter reiterating the request in August 2007. (EX-1120.) This effort, too, was unsuccessful. Jahedi complained to the property manager of the Building that although the Foundation hoped to buy Assa out, Assa would not even return his calls. (A-3441.) Jahedi was so frustrated by the lack of legal means to force Assa to meet with the Foundation that he withheld payment of

Assa's share of the rent proceeds, but still could not force them to the table. (*Id.*)

The Government never disputed that dozens of documents, generated over the course of more than a decade, were on their face inconsistent with its theory of the case. Instead, it dismissed them as a paper trail the Foundation had generated so that, years later, it could use them to prove a lack of knowledge. (A-3610 ("Those letters were written so that they could be shown to a jury like you.").) As discussed in the Argument section, the court's evidentiary rulings prevented the Foundation from effectively rebutting that contention.

(f) Assa Schemes with Bank Melli to Hide Its Ownership

While the Foundation was seeking information about Assa, Assa was scheming with Bank Melli to conceal that information from the Foundation and others. In a series of emails that the Government obtained, and that the Foundation did not know about, Tafti repeatedly discussed with Bank Melli ways to change information about the nominee-owners of Assa in order to conceal their identities and to avoid taxes. (EX-1608; EX-1611.) They also discussed steps to avoid detection and prevent "facing difficulties . . . due to operation of the U.S. sanctions." (EX-1621.) And as he did with the Foundation, Tafti put off other U.S. entities that sought meetings with Assa's directors. For example, he emailed Bank Melli that he planned to tell Citibank, which had requested a meeting with Assa's directors, that Shakeri "is on a trip or resigned from directorship," and to go to the meeting himself with Assa's American attorney (EX-1617), just as he had done to the Foundation.

(g) The Government's Principal Post-1995 Evidence

(i) Hesami-Kiche's Recorded Conversations

One of the Government's principal sources of evidence, from both before and after 1995, was its cooperator, Seyed Mojtaba Hesami-Kiche. He served on the Foundation's board until 1991, and more than a decade later, faced with severe financial pressures after years of unemployment while living in Germany, he pitched U.S. authorities on his value as a cooperator. He began by shopping allegations that (1) an individual from Iran's Atomic Energy Authority was working undercover for the Iranian Commercial Service, and (2) the Foundation had committed tax fraud. (A-3344-45; A-3348; EX-1479-80.) These efforts were repeatedly rebuffed, first by the U.S. embassy in Berlin and then by the FBI's Atlanta field office. (A-3261.) But in 2007, he came up with a new subject—the Foundation's alleged control by the government of Iran—that caught the interest of the FBI's New York field office, which signed him up as a paid informant. (A-3261-62; EX-2052-54). The FBI subsequently characterized Hesami-Kiche as the "lynchpin [*sic*]" to its case, without whom it would be "virtually impossible" to forfeit the Foundation's assets. (A-2932-33.) It relocated him and his family to a house in the Atlanta suburbs, reimbursed him for living expenses over the course of the ensuing decade, and paid him additional stipends totaling almost $800,000. (EX-12.)

Because Hesami-Kiche had left the Foundation years before the 1995 sanctions took effect, his cooperation was of limited utility. (A-2930; A-2980.) His testimony was almost entirely about events before 1991, when he resigned from the Foundation's board. (A-3360.) Until he began cooperating with the FBI, he had had little contact with anyone

associated with the Foundation for over 15 years. (A-3320-21.) The FBI sought to have Hesami-Kiche reconnect with members of the Foundation's board. Beginning in 2007, unsupervised and unsurveilled by FBI agents, Hesami-Kiche regularly visited mosques in the New York City area and engaged in conversations with Foundation board members and others. (A-2944.) On more than 100 days over a fourteen-month period, Hesami-Kiche had conversations with Foundation board members at the direction of the FBI without recording them. (A-2945-46.) He was not asked to testify to any of those conversations.

In September 2008, the agents decided to equip Hesami-Kiche with a recording device. (A-3366-67.) Thereafter, he made 15 recordings of conversations with several Foundation board members (A-2946), but the Government offered short excerpts from just three of them. (EX-2751-71; EX-2772-75; EX-2776-79.) The excerpts actually contained further proof that the Foundation did *not* know that Assa's owners, Shakeri and Aghamiri, were secret Bank Melli nominees.

Specifically, in October 2008, Hesami-Kiche recorded conversations with Mohammad Geramian, the Foundation's former president, and board member Hassan Hassani. In private, unguarded conversations in a Queens mosque, they told Hesami-Kiche the same thing they had said in Foundation letters: they did not know who owned Assa; they repeatedly tried to learn about the members of Assa's board; but they had failed to learn anything. Geramian told Hesami-Kiche: "for one to one and half year we asked [Tafti to] bring those people; let us know who they are. He would not tell us. My assumption was that they had an independent organization. That is even if the Bank Melli owned it, it had split it and established a Committee." (EX-2778.) Geramian and Hassani separately told Hesami-Kiche that the Foundation did not know who Assa's owners were; that they

had "written them five letters to learn who are the members of the Board of Trustees," but that "they have not responded to us yet." (EX-2774.)

In summation, the Government effectively ran away from Hesami-Kiche, assuring the jury that the case involved "mountains of evidence that had nothing to do with Hesami" and that his testimony "wasn't critical." (A-3617-18.)

(ii) Ebrahimi's Journals

The Government also relied on excerpts from numerous personal journals kept by Ali Reza Ebrahimi, who was on the Foundation's board from 1991 through 2013. The Government obtained stacks—eight to ten boxes full—of old, dusty journals from Ebrahimi. (A-2857; A-3123-24; EX-1764-1810.) They contained thousands of pages of seemingly random and mostly inscrutable entries, noting bathroom usage, parking meter payments, and grades for former students. (A-3124.)

The Government culled snippets from those thousands of pages and presented them at trial as purported evidence of the Foundation's post-sanctions knowledge. The Government presented these excerpts through an IRS agent, who read discrete words into the record and then explained his own understanding—uninformed by any discussion with Ebrahimi—of their import. The Government suggested that this testimony by the agent was smoking-gun evidence that the Foundation's board knew that Shakeri and Aghamiri were fronts for Bank Melli, based on the inclusion of isolated words like "Zarif" (an Iranian ambassador to the United Nations) or "OFAC," or strings of connected words like "I lied – mystery – coordination – information level – not all the fingers are the same . . . " (*E.g.*, A-3125-26; A-3127; A-3130-31.)

(iii) Fifth Amendment Invocations by Foundation Board Members

Part of the Government's strategy in this case was to collect Fifth Amendment invocations to introduce at trial. The Government issued deposition subpoenas and warned the witnesses that they risked criminal jeopardy if they testified. It took recorded "depositions" of those witnesses who made it clear they would invoke the privilege, while abruptly cancelling the depositions of Foundation witnesses who said they would testify. (*See* A-883.18-19.)

The details of this strategy are discussed in the Argument section below, but its effect was two-fold. First, the trial was interrupted five separate times for video-recorded Fifth Amendment invocations by former Foundation board members, which were then heavily relied upon in the Government's summation. Second, the Foundation was deprived of the witnesses who could have placed the documentary record outlined above in context, and who could have explained to the jury what they knew, and when, and how they reacted. These witnesses would have been able to testify to their actual knowledge if the Government had not cowed them into invoking their Fifth Amendment right. (*See, e.g.*, A-2935; A-3151.) Indeed, two of the witnesses, board members Hassan Hassani and Ali Dabiran, expressed a *willingness* to testify (and to be deposed beforehand) in the run-up to the 2017 trial, but on the Government's motion the District Court prohibited them from doing so because they had asserted the privilege four years earlier. (SPA-170-214.)

(iv) Farshid Jahedi's Obstruction of Justice

Finally, the Government relied on an obstruction of justice committed in December 2008 by Farshid Jahedi, who, as discussed above, had become the Foundation's president a year earlier. Jahedi continued the Foundation's prior efforts

to learn more about Assa by trying to meet with Shakeri and Aghamiri (EX-1120), and withholding payments due to Assa to attempt to obtain such a meeting. On December 17, 2008, NYPD Detective Michael Esposito, who was working with the FBI, interviewed Jahedi at the Foundation's offices. After approximately two hours of questioning, during which Jahedi told Esposito that he did not know who Assa was, and that the Foundation's goal was to find that out and to buy Assa out, Esposito served a grand jury subpoena on him. (A-2862.)

Jahedi panicked. The next day, while under FBI surveillance, he threw some torn-up documents into a trash can near his Westchester home. Because the documents were responsive to the subpoena, Jahedi was guilty of obstructing justice, which he admitted. (EX-1530-31.) The Government argued that this was "devastating" evidence "that the Alavi Foundation knew exactly who Assa was." (A-3618.) But none of the documents evidenced Jahedi's or the Foundation's awareness that Bank Melli owned Assa. Indeed, none were even remotely important, and at least one was a copy of a document the original of which Jahedi himself produced to the Government.

(h) The Government's Theories of Forfeiture

The Government relied on the facts outlined above to argue to the jury that Claimants violated the IEEPA by providing four different types of services to Iran.

First, the Government asserted that Claimants operated a charity at Iran's direction. The Government argued that evidence showed Iran's control of the Foundation's operations, which it contended extended to the Foundation's charitable giving, rendering its donations in the United States and Canada unlawful services for Iran. (A-2807; A-3611.) The Government did not identify any proceeds Claimants received as a result of that alleged control.

Second, the Government argued that Claimants violated the IEEPA by transferring approximately $27 million in partnership distributions to Assa, and therefore to Bank Melli as its indirect owner. (A-3418-19; EX-1501-02.) The Government did not introduce evidence that Claimants were compensated or received any other benefit as a result of transferring money to Assa.

Third, the Government argued that the Foundation violated the IEEPA by managing the Building and the Partnership. (A-3609; A-3611.) In connection with its role as managing partner, the Foundation was paid $5,815,548 in management fees after the sanctions went into effect. (A-3523.) Claimants argued that these management fees were the sum total of any "potentially forfeitable proceeds." The Government argued, however, that "all of the money generated by the building"—approximately $102,004,502 in net rental income during the relevant period—was earned as a result of the Foundation's management services. (A-3630.)

Fourth, the Government argued that Claimants provided services to Iran by concealing Assa's true identity and Iran's influence over the Foundation. In summation, the Government described these alleged concealment services as broadly encompassing "everything the partnership does." (A-3621-23; A-3628.) But the Government did not contend that Claimants *obtained* property as a result of these "concealment services"; rather, it argued that Claimants *retained* and *improved* the Defendant Properties as a result of those services. (*See* A-3630; A-3435-36; A-3447; A-3449-51; EX-1500; EX-1503-08.) Specifically, the Government argued that Claimants provided allegedly false testimony in two litigations in the 1990s, allowing them to retain assets which they otherwise would have lost in those lawsuits, and used rental income from the Building to make capital

improvements in the Building and the Community Centers. (A-3622-23; A-3688-89.)

The Government also argued that the Defendant Properties were forfeitable because they were involved in or traceable to money laundering transactions. The Government argued that, because the Building and Partnership were the proceeds of alleged concealment services, "[a]ny transaction involving those properties" constitutes money laundering because the transactions purportedly "conceal[] the nature, the origin, the ownership of the properties involved." (A-3630-31.) The Government also argued that the Building was involved in money laundering because it "generates income and that income is then reinvested into the building to promote the management and the generation of funds for and on behalf of Bank Melli Iran or the government of Iran." (A-3630.)

SUMMARY OF ARGUMENT

The judgment forfeiting Claimants' properties must be reversed because of the District Court's errors.

First, the District Court erred in dismissing Claimants' statute of limitations defense. In vacating the District Court's previous *sua sponte* grant of summary judgment on this defense, this Court found that the District Court had "repeatedly denied Claimants' attempts to obtain discovery that might show when the Government learned of the Claimants' alleged forfeitable offenses." *In re 650 Fifth Ave.*, 830 F.3d at 96-97 & n.28. The District Court completely ignored the clear record evidencing those requests and this Court's acknowledgement that those requests were denied, erroneously finding that Defendants had waived their right to receive such discovery during the pre-remand proceedings.

Then, having denied discovery, the District Court granted summary judgment to the Government, and denied Claimants' cross-motion for summary judgment, erroneously finding as a matter of law that the Government could not have known of the supposed crimes giving rise to forfeiture within five years of its Amended Complaint. The record evidence contradicted the District Court's findings: official FBI reports describe the alleged offenses as early as 1996, shortly after the relevant sanctions were put in effect, and earlier. The District Court then further erred by holding that even if the Government knew or should have known of facts giving rise to forfeiture prior to 2004, it could pursue its forfeiture claims based on discrete post-2004 offenses—despite the Government's acknowledgement that it alleged a continuing offense. The forfeiture claims in this case are time-barred and must be dismissed; at a minimum, this Court should reverse and remand for discovery and a fair adjudication of this defense, which the District Court has now wrongfully dismissed twice.

Second, the District Court also ignored this Court's instructions as to Claimants' motion to suppress evidence seized pursuant to a facially invalid search warrant. *See In re 650 Fifth Ave*, 830 F.3d at 99-100. Claimants sought to suppress the fruits of the Government's seizure of virtually every document and electronic device from their offices pursuant to that constitutionally flawed warrant. But the District Court denied that motion a second time, finding that both the inevitable discovery and the good faith exceptions to the exclusionary rule applied. It erred on both counts. The court's inevitable discovery decision failed to comply with clear directions from this Court about the nature and scope of the required analysis. Specifically, the District Court failed to heed this Court's instruction to analyze whether "each event leading to the discovery of evidence would have occurred," and to make particularized findings about what evidence actually would have been discovered.

Id. at 102. And as for the good faith exception, the District Court second guessed this Court's holding that the warrant's defects were clear on its face, instead applying case law governing the application of the good faith exception in the context of a facially valid warrant. It thus found the Government's reliance on the facially deficient warrant reasonable even though the search team was neither provided the unincorporated affidavit nor made familiar with its terms. The District Court thus countenanced an unbounded search, which resulted in the seizure of nearly every document in Claimants' offices.

Third, the District Court erred in multiple respects in its handling of Fifth Amendment privilege invocations. The Government procured such invocations from many of the Foundation's directors by conducting an aggressive FBI investigation and then having prosecutors use their subpoena power to collect Fifth Amendment invocations rather than testimony. It recorded those privilege invocations in videotaped depositions, five of which the District Court permitted the Government to play to the jury. The trial was thus punctuated by videos of Fifth Amendment assertions, followed by a prosecutor reading into the record five questions hand-picked from the dozens of questions each witness had refused to answer on privilege grounds. In connection with each video, and again in the final jury charge, the District Court told the jury it was permitted to draw an adverse inference against Claimants. The court then ensured the jury would do so by precluding Claimants' evidence about the nature of the FBI agents' and prosecutors' interactions with the witnesses, which would have given the jury an understanding of the reasons for the privilege invocations and supported a contrary inference.

But the prejudicial Fifth Amendment errors did not end there. The witnesses who had invoked the privilege in 2013 were considering testifying on remand. Claimants told the

Government as much, and offered depositions months before trial. The Government tried to intimidate these witnesses into re-asserting their Fifth Amendment rights, and when those efforts failed with respect to two former Foundation board members, it moved *in limine* to prevent them from testifying. The District Court granted that motion, holding that witnesses who had invoked the privilege four years earlier could not testify at trial, thus depriving Claimants and the jury of key exculpatory evidence. These errors require reversal for a new trial.

Fourth, the District Court erroneously allowed the jury to consider whether certain of Claimants' property was "retained" by virtue of the allegedly illegal conduct. That theory was impermissibly speculative—and evidence supporting it was absent—yet the Government succeeded in obtaining forfeiture of the Foundation's partnership interest on this basis. Compounding the error, the District Court gave the jury an improper instruction that appeared to confirm the Government's theory that property was retained through unlawful "concealment" services. The verdict should be vacated to the extent it relied on this theory.

Fifth, numerous other errors and irregularities deprived Claimants of a fair trial. These included orders excluding Claimants' evidence on critical issues. For instance, the Government was permitted to question the legitimacy of Claimants' charitable works, and to argue that they were merely a service performed for Iran, but Claimants' rebuttal evidence was precluded as unduly prejudicial because it could cast the Foundation in a favorable light. And the Government was permitted to elicit testimony that the 1989 transaction that created the Partnership amounted to tax fraud, but Claimants' witnesses who could have rebutted that testimony were prevented from testifying. These and other errors deprived Claimants of the fair trial to which they were entitled.

Sixth, the judgment in this case is an excessive fine under the Eighth Amendment and 18 U.S.C. § 983(g). Where, as here, a civil forfeiture is at least partially punitive, Eighth Amendment protections attach. Those protections should have operated to prevent the forfeiture of substantially all of Claimants' assets—valued in excess of half a billion dollars—which for the most part they owned long before the sanctions on which the case was based even took effect. At a minimum, an evidentiary hearing on this issue should have been held, as required by Section 983(g). If the jury verdicts otherwise survive this appeal, this Court should remand with instructions to reduce the forfeiture so that it is not excessive.

Finally, the case should be assigned to a new district judge on remand to ensure impartiality and to preserve the appearance of justice.

ARGUMENT

I. The District Court Erred in Dismissing Claimants' Statute of Limitations Defense

The Government must commence a civil forfeiture action within five years of discovery of the offense giving rise to forfeiture. *See* 19 U.S.C. § 1621. The limitations period begins to run when "the Government discovers or possesses the means to discover the alleged wrong, whichever occurs first." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 502 (6th Cir. 1998) (citation omitted); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("discovery" of alleged facts "encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known"). For continuing offenses or violations, the limitations period runs from the *initial* point when the offense is discovered, even if the offense continues. *$515,060.42 in U.S. Currency*, 152 F.3d at 501-02 (citation omitted).

In 2013, the District Court granted summary judgment against Claimants on their statute of limitations defense, even though neither party had moved for summary judgment on the defense or had the opportunity to brief the issue. (A-979-82.) This Court vacated that decision, emphasizing that a *sua sponte* decision can stand only "when the facts before the district court were fully developed so that the moving party suffered no procedural prejudice." *In re 650 Fifth Ave.*, 830 F.3d at 96 (citation omitted). This Court found that the District Court failed to allow Claimants "any" opportunity to present evidence in support of the statute of limitations defense, "let alone a full and fair [one]." *Id.* at 97 (citation omitted). This Court observed that the record "was hardly developed at all on the statute of limitations question" and that the District Court "repeatedly denied Claimants' attempts to obtain discovery that might show when the Government learned of the Claimants' alleged forfeitable offenses," making its grant of summary judgment improper. *Id.* at 97 & n.28 (citation omitted). Accordingly, this Court vacated the summary judgment decision and remanded the case for further proceedings consistent with its opinion.

On remand, the District Court ignored this Court's decision. It *again* denied Claimants discovery on what the Government knew of the alleged offenses and when, and *again* granted summary judgment against Claimants on their statute of limitations defense, erroneously finding as a matter of law that the Government could not have known of the supposed offense giving rise to forfeiture before the limitations period and further that the continuing nature of the offense constantly revived the limitations period. The record evidence contradicted those findings: official FBI reports describe the alleged offenses as early as 1996, shortly after the relevant sanctions were put in effect, and earlier. This Court should reverse the District Court's summary judgment decision, and dismiss the forfeiture claims based on the statute of limitations. At a minimum, the District

Court's decision on the defense should be vacated, and the case remanded with instructions to permit adequate discovery and a fair adjudication of that defense.

A. On Remand, the District Court Repeated Errors That Led This Court to Vacate Its Previous Decision on the Statute of Limitations

On remand, Claimants once again sought discovery relevant to whether the Government knew or should have known of the alleged offenses before November 2004—*i.e.*, five years before the Amended Complaint was filed. On December 23, 2016, Claimants issued requests for documents relevant to their statute of limitations defense. (A-1216-19.) Rather than reiterating the requests made in 2011—when discovery on all matters in the case was underway—Claimants refined their requests to identify and target a narrower subset of materials relevant to the statute of limitations. Using information gleaned from prior Government discovery, Claimants requested documents concerning specific FBI investigative file numbers for relevant investigations and specific Government memoranda. (*See, e.g.*, A-1216-18.)

The Government categorically refused to produce *any* documents in response to these requests. (A-1221-25.) Claimants moved to compel. (Dkt. 1439.) On its own initiative, the District Court then directed Claimants to submit a supplemental letter detailing the history of discovery Claimants had sought relating to the statute of limitations before the first appeal. (A-1226-27.) Claimants did so, detailing their efforts—including their 2011 document requests, their repeated requests for investigative files at court conferences, and their 2013 motions to compel the Government to produce documents and answer questions regarding its prior investigations of Claimants. (Dkt. 1445; *see also* A-841-53; A-855-65; A-870-75; A-892-94.)

As explained to the District Court, Claimants' requests prior to the first appeal sought documents relevant to the Government's knowledge of the alleged offenses. Claimants sought the Government's investigative files, including all of the Government's "internal files, records, reports, memoranda, correspondence, notes, or other documents" related to the Foundation, Assa, or the Fifth Avenue Company dating back to 1973. (A-1229-43, Req. 36; *see also* Reqs. 14-15, 37-40.) Claimants' 2011 requests also specifically sought Government records relating to any agreement between Claimants and Iran, the alleged services Claimants provided to Iran, allegations that the Foundation was controlled by Iran, "the ownership, control, or management of Assa," and any acts by Claimants to conceal Bank Melli's affiliation with Assa; the Government agreed to produce non-privileged documents responsive to these requests. (A-1234-36, Reqs. 4, 6, 8, 16, 18; *see also* A-1252-60, Responses to Reqs. 4, 6, 8, 16, 18.)

Nonetheless, the Government did not actually produce *any* documents from its own files until January 31, 2013. (Dkt. 1445-8; Dkt. 1445-9; Dkt. 1445-10.) Even then, its production was incomplete. In the months that followed, Claimants sought to compel the Government to provide discovery regarding its prior investigations of Claimants' relationship with Iran on four separate occasions. On April 15, 2013, Claimants filed a motion to compel that specifically sought the Government's "investigative files" and records from the IRS, the U.S. Department of State, and OFAC reflecting those agencies' earlier investigations concerning Claimants. (A-841-53.) On July 9, 2013, Claimants asked the court to compel the Government "to make a complete production of documents from federal agencies other than the Department of Justice, including the Department of State, the IRS, and the OFAC," including documents related to investigations undertaken by OFAC and the Department of State. (A-857-68.) On August 8,

2013, Claimants moved for an order compelling "the production of documents regarding OFAC's investigations of Claimants," explaining that the documents revealed "that OFAC has been investigating the Foundation for decades." (A-872.) On August 30, 2013, Claimants again sought relief from the District Court, explaining that "OFAC's involvement in this past investigation of Claimants . . . directly impact[s] whether the statute of limitations has run." (A-893.)[11]

Despite the record described above and this Court's statement that the District Court had "repeatedly denied Claimants' attempts to obtain discovery that might show when the Government learned of the Claimants' alleged forfeitable offenses," 830 F.3d at 97 n.28 (citation omitted), on remand the District Court ruled that Claimants had waived their right to seek statute of limitations related discovery because they had failed to seek it in 2013. (SPA-1-41.) Claimants moved for clarification, arguing that even if they were denied document discovery, they nonetheless should be permitted to depose IRS and OFAC witnesses on matters related to the statute of limitations because it was undisputed that Claimants timely had sought to do so in 2013. (Dkt. 1492.) The District Court denied this motion, too, finding that Claimants had waived their right to seek such depositions by not raising the issue before a January 13, 2017 deadline for discovery motions. (SPA-42-45.)

Following the denial of Claimants' request for statute of limitations discovery, the parties cross-moved for summary

[11] The District Court denied each of those requests, ruling that discovery regarding the Government's past investigations of Claimants would invade the law enforcement and deliberative process privileges. (A-867-69; A-884-91; A-899-901.)

judgment on the defense. (Dkt. 1557; Dkt. 1562.) On May 10, 2017, the District Court denied Claimants' motion and granted the Government's motion, finding that no reasonable juror could conclude that the Government had discovered, or should have discovered, the facts giving rise to its claims before November 2004. (SPA-83-86.) In addition, the District Court determined that "each unlawful transaction alleged in the forfeiture complaint constitutes a separate 'offense' giving rise to forfeiture" upon which the statute of limitations begins anew. (SPA-83.)

B. The District Court Erred in Again Denying Statute of Limitations Discovery[12]

The District Court's finding that Claimants failed to seek discovery relevant to the statute of limitations in 2013 was wrong.[13] Starting with their first set of document requests in

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[12] This Court reviews a district court's decisions regarding discovery for abuse of discretion. *Stagl v. Delta Airlines*, 52 F.3d 463, 474 (2d Cir. 1995). A district court abuses its discretion "when the discovery is so limited as to affect a party's substantial rights." *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985).

[13] The District Court's contention that discovery had closed on June 28, 2013 (*see* SPA-1) was also inaccurate. Discovery was ongoing as the parties prepared for the then-scheduled September 2013 trial. The Government produced more than 20,000 pages of documents in August 2013 alone, and nine depositions took place from July-September 2013. (*See, e.g.*, A-892-94; Dkt. 615; Dkt. 778; Dkt. 781; Dkt. 811.) Even on remand, the Government failed to satisfy its discovery obligations prior to trial. The Government *continued* to produce documents in *May and June of 2017,* even after trial began. (*See* Dkt. 1806.)

2011, Claimants repeatedly sought discovery regarding the Government's knowledge of the allegations in the Amended Complaint and its past investigations into the conduct underlying those allegations. As the case progressed in 2013, Claimants made further efforts to obtain such discovery—asking the District Court on four separate occasions for relief. (A-841-53; A-855-65; A-870-75; A-892-94; *see also* Dkt. 1445 at 8-13.) The District Court's conclusion that Claimants "had not, in fact, made any of the [December 2016] requests during the [pre-appeal] discovery period" (SPA-5) was incorrect. Claimants did not repeat their pre-appeal requests *verbatim* in December 2016, but rather tailored those requests to specifically target the narrower set of material at issue.

The District Court also refused to allow Claimants to question an OFAC witness on issues relevant to the statute of limitations, finding that Claimants had waived their ability to do so by not seeking to compel such a deposition prior to January 13, 2017. (SPA-42-45.) Claimants plainly sought such a deposition in 2013. (*See* A-892-94.) Claimants did not specifically include the OFAC deposition in their January 13, 2017 motion to compel only because the issue was not ripe—there were still ongoing disputes regarding document discovery. When the District Court's February 28, 2017 Order made clear that such document discovery would not be permitted, Claimants timely asked the District Court to clarify whether its order precluded such a deposition (and, to the extent it did, to reconsider that decision). (Dkt. 1492.) Even if Claimants had missed the January 2017 deadline, any such failure was immaterial. This is particularly so because an OFAC representative was deposed on May 23, 2017 on matters unrelated to the statute of limitations. (*See* Dkt. 1759 at 1.) The Government would have suffered no prejudice had Claimants been permitted to ask that witness about OFAC's prior investigations of Claimants, and there was no reasonable basis to preclude such questions. *See*

Zerega Ave. Realty Corp. v. Horbeck Offshore Transp. LLC, 571 F.3d 206, 212-13 (2d Cir. 2009) (district court abused its discretion in precluding witness where both parties failed to comply with the relevant deadline but only one was sanctioned, the testimony was critical, and allowing the testimony would not have caused prejudice to the other side).[14]

The District Court's refusal to allow Claimants discovery regarding their statute of limitations defense was once again error, just as it was in the first appeal.[15] Once again, the District Court "denied Claimants' attempts to obtain discovery that might show when the Government learned of the Claimants' alleged forfeitable offenses." *In re 650 Fifth Ave.*, 830 F.3d at 97 n.28 (citation omitted).

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[14] *See also Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 835-36 (1st Cir. 2015) (district court abused its discretion in applying discovery limitations that entirely foreclosed a party from seeking "plainly relevant discovery"); *Hadley v. United States*, 45 F.3d 1345, 1350 (9th Cir. 1995) ("[F]or discovery violations, a court should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment." (citations and internal quotation marks omitted)).

[15] Unlike it did in 2013, the District Court did not rely on the law enforcement or deliberative process privileges in denying Claimants' discovery relevant to the statute of limitations in 2017. Had it done so, such a decision would have been error. *See In re City of New York*, 607 F.3d 923, 943-44 (2d Cir. 2010); *Brennan Ctr. for Justice v. United States Dep't of Justice*, 697 F.3d 184, 201-02 (2d Cir. 2012); *MacNamara v. City of New York*, 249 F.R.D. 70, 79 (S.D.N.Y. 2008).

C. The District Court's Statute of Limitations-Related Summary Judgment Decisions Should Be Reversed

Notwithstanding the District Court's erroneous decision precluding discovery, there was still ample evidence demonstrating that the Government knew or should have known of the allegations underlying its Amended Complaint before November 2004. The District Court erred when it categorically rejected that evidence and improperly granted the Government's motion for summary judgment on Claimants' statute of limitations defense, and denied Claimants' motion.[16]

1. Admissible Evidence Demonstrates the Government Knew or Should Have Known of the Forfeitable Offenses Before November 2004

The District Court found that no reasonable juror could conclude that the Government had discovered, or should have discovered, the facts giving rise to its claims prior to November 2004. (SPA-83-86.) Even with extremely limited discovery, however, the record showed otherwise. Claimants demonstrated that the Government knew, or if reasonably diligent should have known, of the alleged facts underlying its forfeiture claims well before the limitations period.

By 1995, when the sanctions went into effect, the Government already had a wealth of information about the alleged conduct that gave rise to the forfeiture claims in this

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[16] A district court's decision to grant or deny summary judgment is reviewed *de novo*. *Sudler v. City of New York*, 689 F.3d 159, 168 (2d Cir. 2012); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 152 (2d Cir. 2006).

case. Almost immediately after the Iranian revolution in 1979 the Government began what would become a decades-long investigation of the Foundation. (A-1335-38.) By the late 1980s, both the Department of Treasury and the IRS had been informed that the Foundation "may be controlled by the government of Iran." (A-1343-56; *see also* A-1335-38; A-1357-60.) The FBI began its own "full field investigation" in 1982. (A-1363.) By 1989, the FBI obtained and translated a March 22, 1988 letter to the Foundation's board, describing its plans to "prevent paying enormous and unnecessary taxes," possibly by "becoming a partner" with Bank Melli. (A-1420-24; *see also* A-1414 (stamp showing FBI received document in 1989); A-1412-13.) By 1991, the FBI was informed that the Foundation "was giving support to the [Government of Iran] and/or to the Iranian Security and Intelligence Organization," and planned to further investigate. (A-1428.11-12.)[17]

The Government's investigation continued after 1995, when the sanctions went into effect. "[I]n the mid-1990s, financial information obtained in the [FBI's] investigation was provided to the IRS and OFAC to determine if any potential criminal violations existed." (A-1503.) On March 22, 1996, the FBI met "with OFAC representative Mark Roberts regarding possible legal action instituted by OFAC against [the Foundation] for acting outside the scope of its non-profit corporation charter." (A-1363.) On April 30, 1996, the FBI sent copies of an "LHM" (*i.e.*, letterhead

[17] The 1991 memorandum is described in another FBI memo dated May 19, 2008. The 1991 memorandum was never produced.

memorandum) regarding the Foundation "to OFAC and IRS." (A-1361-71.)[18]

By April 1996, the FBI had received and reviewed a copy of an article titled "Islamic Iran's American Base," published in the *American Spectator* in December 1995. (A-1363-64.) That article reports that "according to a classified FBI report of 1994, Alavi is 'entirely controlled by the government of Iran.'" (A-1512-16; *see also* A-1456 (October 1995 report stating that "[a]ccording to a 1994 classified report to Congress, the FBI asserted that Alavi was 'entirely controlled by the government of Iran'").) The article further sets forth the allegations that since 1979, the Foundation has been "a vehicle for propagating the ideas and the cause of the Islamic Republic in the U.S."; that former presidents Manoucher Shafie and Hossein Mahallati have both been investigated by the Government; and that "[t]he FBI alleges that the brother of Iran's current ambassador, Kamal Kharrazi, is a regular visitor to the foundation's Fifth Avenue headquarters." (A-1514-15.) The article concludes that "there would seem to be enough maneuvering room . . . to allow Treasury and other agencies to close down the Alavi Foundation." (A-1516.) The article was referenced in the FBI's files and discussed with OFAC and the IRS. (A-1363-64.)

FBI documents reveal that its investigation of the Foundation continued into the late 1990s and beyond. Documents relating to the FBI's work with its cooperating witness Hesami-Kiche indicate that the FBI relied on information "derived from" a January 1997 FBI report. [19]

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[18] In discovery, the Government redacted the contents of that memorandum in its entirety. (A-1362-71.)

[19] The 1997 FBI report was never produced.

(A-1527-47.) FBI documents also show that, in 2004, the Senate Finance Committee investigated the Foundation as part of its review of "records related to 'tax exempt organizations such as charities and foundations which finance and perpetuate violence.'" (A-1504; *see also* A-1563-66.)

During the same time period, a number of major news outlets, including *The Wall Street Journal*, *Newsday*, and the Associated Press, published articles that quoted allegations of Government officials about Claimants' ties to Iran, including a statement by a former FBI executive that "the foundation's activities in the United States are directed by Iran's mission to the United Nations." (A-1431; *see also* A-1339-42; A-1425-27; A-1505-11; A-1517-26.) Similarly, a 2003 *Washington Post* article reported that "[a]fter two decades of classified investigation, U.S. officials say that, besides having close ties to the hard-line mullahs in Tehran, Alavi also has had close associations for years with the Mostazafan Foundation in Iran." (A-1561.) The facts giving rise to the forfeiture claims were thus widely reported before November 2004. "Where events receive widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *McIntyre v. United States*, 367 F.3d 38, 60-61 (1st Cir. 2004) (citation omitted); *see also Kronisch v. United States*, 150 F.3d 112, 122 (2d Cir. 1998) (claim was untimely where information underlying the claim was publicly available long before the limitations period); *Grynberg v. Total S.A.*, 538 F.3d 1336, 1349-50 (10th Cir. 2008) (rejecting claims that general publicity was inadequate to establish that plaintiff knew or should have known of cause of action where plaintiff was not unsophisticated and where public information was not imprecise).

2. The District Court's Finding that the Alleged Facts Underlying the Forfeiture Complaint Were "Not Discoverable" Before 2004 Constitutes Error

The District Court disregarded the above-described evidence, which at a minimum demonstrates the existence of an issue of material fact as to whether the Government knew or should have known of the acts alleged in the Amended Complaint before November 2004. Although the District Court (and the Government) conceded that the Foundation had been under scrutiny from numerous federal agencies for years prior to the limitations period, the District Court nonetheless concluded that any pre-1995 investigations had no bearing on the statute of limitations because they were not targeted at "the offenses that form the basis of the forfeiture complaint,"[20] and there was "no evidence" that post-1995 investigations "uncovered the facts that form the basis for the allegations of unlawful conduct at issue in the forfeiture complaint." (SPA-85.) This conclusion is both legally and factually wrong.

Contrary to the District Court's assertion, the statute of limitations can be triggered even where the Government has conducted no investigation at all, so long as it "possesses the means to discover the alleged wrong." *$515,060.42 in U.S.*

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[20] The record contains ample evidence of the Government's knowledge both before and after 1995, which Claimants should have been permitted to present to a jury. The District Court's categorical rejection of pre-1995 evidence regarding the Government's investigation is directly contrary to the District Court's emphasis on such evidence against Claimants. (*Compare* SPA-85 *with* SPA-542 ("[I]t's important that the jury not be left with the impression that pre-1995 evidence is irrelevant.").)

Currency, 152 F.3d at 502 (citation omitted); *see also* 146 Cong. Rec. H2051 (2000) ("19 U.S.C. sec. 1621 has been construed as requiring the government to exercise reasonable care and diligence in seeking to learn the facts disclosing the alleged wrong. Thus, the courts have held that time begins to run as soon as the Government is aware of facts that should trigger an investigation leading to discovery of the offense."). Here, the Government's files demonstrate that it was aware of and actively investigating the central allegations of the Amended Complaint as soon as the sanctions went into effect (and even before). The District Court disregarded the pre-2004 evidence, stating that those investigations "went nowhere" and showed "no actionable conduct," purportedly proving that "the facts necessary to sustain a plausible complaint were not discoverable." (SPA-85-86.) That conclusion is belied by the District Court's own statement *eight days later*, when it found (in resolving a different issue) that "it is not at all clear that the Government found no wrongdoing in connection with [those] criminal investigations." (SPA-213 (describing the same investigations).) Moreover, the conclusion is, at best, an inference, which the District Court should not have drawn in the Government's favor in connection with the Government's motion for summary judgment. An equally permissible and more logical inference is that the Government had uncovered sufficient facts to be on notice of forfeiture claims against Claimants' assets, but chose not to pursue them.

An additional reason given by the District Court for rejecting the statute of limitations defense was that in the five years prior to the filing of the forfeiture claims, the Government obtained additional documents and continued to conduct interviews. (SPA-79-82.) But the Government's continuing investigation in those years says nothing about what it knew, or should have known, of the key allegations prior to the limitations period. Moreover, because the

Government categorically refused to provide discovery regarding *when* it first learned of the relevant facts underlying its allegations, it should not have been permitted to unilaterally assert that evidence gathered after 2004 revealed facts it did not previously know. *Cf. Brennan Ctr.*, 697 F.3d at 208 (when a party relies on a privileged communication in asserting a claim or defense, "the party cannot invoke that relied-upon authority and then shield it from public view"); *United States v. Doe (In re Grand Jury Proceedings)*, 219 F.3d 175, 182 (2d Cir. 2000) (a party cannot "affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party" (citation omitted)).

Even on the limited record developed thus far, the evidence is clear that the Government knew or should have known of the allegations giving rise to this forfeiture claim before November 2004. Accordingly, this Court should reverse the District Court's decision and remand with instructions to grant Claimants' motion for summary judgment on their statute of limitations defense. At a minimum, it should reverse and remand with even clearer instructions to allow Claimants to obtain discovery relevant to this defense.

3. The District Court Further Erred by Deeming the Alleged Offenses as Separate and Distinct for Statute of Limitations Purposes

As a separate basis for its decision, the District Court found that the Government's action was timely because Claimants "may have committed separate offenses" during the limitations period by transferring funds to Assa, and that each separate offense "starts the limitations period anew." (SPA-88.) This decision was wrong as a matter of law.

Regardless of whether or not the Government *could* have premised its forfeiture complaint on offenses alleged to have taken place after November 2004, the record is clear that it did not do so. The Amended Complaint alleges that the Foundation provided IEEPA-violating services to Iran that began in or about 1995 and that its activities continued unabated through the time of filing in a single unbroken course of conduct. (A-348; A-352; A-363; A-373 (¶¶ 21, 30, 48, 62).) Moreover, the Government's claims for forfeiture do not identify individualized unlawful acts or connect the property subject to forfeiture to such acts. (A-421-26 (¶¶ 144-55).) Rather, they generally allege that the "Defendant Properties constitute or were derived from proceeds traceable to violations of executive orders and regulations issued pursuant to IEEPA" and "involved in money laundering" (A-423; A-426 (¶¶ 148, 157)), without providing any detail about which properties are subject to forfeiture as a result of specific, discrete acts. The Government conceded as much in its briefing, acknowledging that it had "cho[sen] to characterize the continuous chain of offenses as an ongoing scheme rather than enumerate each individual occasion . . . upon which Alavi performed a service for the Government of Iran." (Dkt. 1610 at 6-7.)[21] On the basis of that decision, the Government sought forfeiture of proceeds

[21] The Government has also acknowledged that it alleged a continuing offense on other occasions. (*See, e.g.*, Brief for the United States of America at 79-80, *In re 650 Fifth Avenue and Related Properties*, No. 14-2027 (2d Cir. Jan. 29, 2015, Dkt. 194) (characterizing the crimes giving rise to forfeiture as "an ongoing conspiracy to commit IEEPA violations by providing services to the Government of Iran" and consisting of "complex violations of IEEPA that occurred as part of a scheme that spanned years and continents").)

of alleged offenses and property involved in alleged money laundering transactions going back to 1995.

The District Court should have evaluated the applicability of the statute of limitations based on the continuing offense the Government *actually* alleged rather than based on discrete offenses that the Government hypothetically could have alleged, but did not. This is particularly true in the context of forfeiture, where a complaint is subject to the pleading requirements of Supplemental Rule G, which sets a "higher standard than notice pleading" under Federal Rule of Civil Procedure 8. *United States v. Aguilar*, 782 F.3d 1101, 1109 (9th Cir. 2015) (citation omitted). In a forfeiture complaint, the Government is required to "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Fed. R. Civ. P., Supp. Rule G(2)(f). The Amended Complaint fails to offer "sufficiently detailed facts" regarding any discrete offenses during the limitations period to support its broad claims of forfeiture, or which properties would be forfeitable as a result of which offenses. Rather, the Amended Complaint alleges an unbroken course of conduct in violation of the sanctions. Accordingly, the statute of limitations runs from the first point in time those offenses were discovered by the Government, whether or not they continued beyond 2004. *See $515,060.42 in U.S. Currency*, 152 F.3d at 501-02 (citation omitted).

The District Court erroneously found that "[t]he fact that the Government has alleged . . . a continuing course of conduct," rather than separate and discrete offenses, is irrelevant to the statute of limitations. (SPA-88-89.) In reaching this conclusion, it relied primarily on *United States v. Kivanc*, 714 F.3d 782 (4th Cir. 2013), which stated that "the Court may adjudicate this forfeiture action because at least 'one underlying offense is not time barred, even if the statute of limitations has run on the remaining offenses.'"

(SPA-88 (citing *Kivanc*, 714 F.3d at 790).) The District Court's reliance on *Kivanc* is misplaced.

In *Kivanc*, the Fourth Circuit addressed two distinct groups of offenses, finding that the first group (conspiracy to distribute controlled substances) *was* time-barred, but that the second (conspiracy to commit health care fraud) *was not* because it consisted of separate and distinct offenses that occurred later in time. 714 F.3d at 790. That conclusion was based in part on the Government's decision to indict Kivanc *separately* for healthcare fraud, rather than treating all of the unlawful conduct (*i.e.*, overprescribing and healthcare fraud) as a single conspiracy, and the fact that the Government sought forfeiture based only on the unlawful conduct that occurred within the limitations period. *See id.* at 790 ("The government based its civil forfeiture action not on Dr. Kivanc's overprescribing of controlled substances, but specifically on the Remicade health care fraud. . . . The fact that the government separately indicted Dr. Kivanc for each crime supports our conclusion."). In contrast, here, the Government has *not* sought forfeiture on the basis of separate and distinct acts (it did not allege such acts), but rather an alleged continuous scheme.

The facts here are analogous to those in *$515,060.42 in U.S. Currency*. There, the Sixth Circuit deemed the action time-barred because it had not been brought within five years of when the Government learned the defendant currency was used to facilitate the commission of the illegal gambling offense. The Sixth Circuit rejected the Government's argument that the currency seized was a product of "relatively recent bingo operations" for which the statute of limitations had not yet run, reasoning that the "Government cannot disregard its discovery of earlier occurring offenses in preference for later offenses which would produce a more favorable timeline." 152 F.3d at 502-03. The court concluded the unlawful bingo games were not individual,

discrete acts, but part of a continuing violation—the operation of a gambling business—and affirmed the dismissal of the claims. *Id.*[22]

Because the Government alleged and presented evidence to the jury that Claimants were engaged in continuing violations (*see, e.g.*, A-2809; A-3625; A-3689-90), and because the Government knew or should have known of these alleged offenses before November 2004, its forfeiture claims against Claimants' assets are barred by the statute of limitations.

4. The District Court Erred by Allowing the Government to Forfeit Assets Based on Pre-2004 Conduct

Having construed the Amended Complaint as alleging separate and discrete offenses after 2004, the District Court nevertheless allowed the Government to seek forfeiture of assets as if it had alleged a continuing violation dating back to 1995. This was error.

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[22] The Seventh Circuit applied the same reasoning in *United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504 (7th Cir. 2010). That case addressed whether an individual's multiple cigar-smuggling offenses should be classified as separate offenses or grouped together as the operation of a cigar smuggling business. *Id.* at 507-08. Based on the specific facts of that case, the court found that the smuggling acts were "distinct" because they were not tied to one another and that conduct within the limitations period "independently could support forfeiture" of the property at issue. *Id.*; *see also* Dkt. 1607-4 (complaint in *5443 Suffield Terrace* specifically identifying the cigars smuggled within the limitations period).

Had the Government alleged discrete offenses in 2004 and later, it would have been limited to forfeiting only the proceeds of IEEPA violations after November 2004 or property involved in money laundering transactions after that date. *5443 Suffield Terrace*, 607 F.3d at 509 (government "cannot seek forfeiture" of property where "it failed to file its forfeiture action within five years" of the conduct otherwise rendering the property forfeitable); *cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) ("[A] plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period"). The portions of the properties subject to forfeiture based on post-2004 conduct are of significantly lesser value than the forfeiture sought by the Government and awarded by the jury.

For example, the jury found that 44% of the Queens property is forfeitable as proceeds of an IEEPA violation that began in 1995 and continued through November 2009. (A-4172; A-4174; *see also* EX-2.) Had the jury used the same calculation method but limited its analysis to proceeds of IEEPA violations occurring after November 2004, it would have found that *no more than 0.6%* of the value of that property is subject to forfeiture. (*See* EX-2.) Likewise, the jury found that the Foundation's *entire* interest in the Partnership is forfeitable as proceeds of an IEEPA violation. But, as explained in Section IV, *infra*, the Government's "retained" theory is premised on actions that took place entirely in the 1990s—well before the November 2004 cutoff. Had the Government limited this action to discrete offenses in 2004 and later, substantially less would have been subject to potential forfeiture:

Percentages of Properties Subject to Forfeiture as Proceeds Based on Date of Relevant Conduct

Property	Conduct after May 1995 (Jury verdict)	Conduct after Nov. 2004	Source
Building	11.4%	4.2%	EX-7-9
Queens CC	44%	0.6%	EX-2
Maryland CC	17%	8%	EX-3
Texas CC	15%	0%	EX-4
California CC	7%	0%	EX-6
Partnership Interest	100%	0%	*Supra* § IV

The Government should not have been permitted to rely on the existence of multiple discrete offenses post-November 2004 for purpose of satisfying the statute of limitations, while simultaneously seeking to forfeit property obtained as a result of an alleged continuing violation dating back to 1995. The District Court's summary judgment decision should therefore be reversed.

II. The District Court's Denial of Claimants' Suppression Motion Was Erroneous and Should Be Reversed

On December 19, 2008, pursuant to a warrant that this Court held was "constitutionally defective" on "its face," *In re 650 Fifth Ave.*, 830 F.3d at 99-100, federal agents searched Claimants' offices. They seized virtually every document and electronic device going back to the early 1970s (A-2938), including documents clearly containing attorney-client correspondence. (EX-3763; EX-3766; EX-3768; EX-3770-71.) The overwhelming majority of the seized items had nothing to do with the allegations under

investigation, as evidenced by the fact that 176 of the 200 seized boxes were later deemed "in no way pertinent to the case against Alavi" and were returned to Claimants. (EX-3781.) In the previous appeal, this Court reversed the District Court's denial of the Foundation's motion to suppress, holding that the search warrant "plainly lacked particularity as to the crimes at issue" and did not "particularize categories of computerized information for which there was probable cause to seize, or the temporal scope of the materials to be seized." *Id.* at 100. This Court specifically rejected the District Court's determination that the Foundation's pre-existing civil discovery and production requirements "obviate[d] the need for any Fourth Amendment analysis," and remanded for the District Court to conduct a hearing to determine if either the inevitable discovery or good faith exceptions to the exclusionary rule applied. *Id.* at 75-76 (citation omitted).

On remand, the District Court again denied Claimants' suppression motion, finding both exceptions to have been met. (SPA-90-169.) It failed to complete the required analysis for making an inevitable discovery determination, despite this Court's specific instructions. *In re 650 Fifth Ave.*, 830 F.3d at 103 (citing *United States v. Eng (Eng I)*, 971 F.2d 854, 861-62 (2d Cir. 1992)). And in making a determination that the agents' reliance on the invalid warrant was reasonable under the good faith exception, the District Court failed to appreciate that the Government carefully drafted, and its agents deliberately executed, a warrant so facially deficient that they could not reasonably have "belie[ved] that their conduct did not violate the Fourth Amendment." *United States v. Leon*, 468 U.S. 897, 918 (1984). The denial of Claimants' suppression motion should

be reversed and, on remand, the new trial should proceed without the unlawfully seized evidence.[23]

A. The District Court Did Not Undertake the Required Inevitable Discovery Analysis

"To show that the inevitable discovery exception to the exclusionary rule applies, the burden is on the Government to 'prove that each event leading to the discovery of evidence would have occurred with a sufficiently high degree of confidence for the district judge to conclude, by a preponderance of the evidence, that the evidence would inevitably have been discovered.'" *In re 650 Fifth Ave.*, 830 F.3d at 102 (quoting *United States v. Vilar*, 729 F.3d 62, 84 (2d Cir. 2013)). The Government's burden is heavy, as it requires establishing with "certitude" that the evidence would have been produced absent the unlawful search. *United States v. Heath*, 455 F.3d 52, 58 n.6 (2d Cir. 2006).

The District Court here spent minimal time analyzing the inevitable discovery exception—less than four pages of its

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[23] On appeal of a suppression decision, this Court reviews factual findings for clear error and conclusions of law, or mixed questions of fact and law, *de novo*. *See United States v. Bershchansky*, 788 F.3d 102, 108 (2d Cir. 2015). As the beneficiary of the District Court's erroneous suppression decision, the Government "bears the burden of establishing that such error was harmless." *United States v. Dhinsa*, 243 F.3d 635, 650 (2d Cir. 2001) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The unlawfully seized evidence's significance in this case is beyond dispute: as the District Court acknowledged, the seized evidence "[has] subsequently been used in the forfeiture litigation and form[s] the basis for many of the factual allegations in the [amended complaint]." (Dkt. 828 at 6.)

80-page suppression decision. (SPA-165-68.) It stated that the required specificity for making inevitable discovery findings "is done relatively easily in this case" because the materials that "would have been inevitably discovered" were essentially identified by way of what Claimants would have produced in response to a grand jury subpoena served two days before the search or by Claimants' actual production in response to civil discovery requests made in this action. (SPA-167-68.) The District Court thus did not consider which documents would inevitably have been discovered by what particular means; it simply found that all documents would have been produced in response to the subpoena or in discovery. This approach was erroneous, and this Court should reverse.

1. The Grand Jury Subpoena Required the Production of Only a Small Fraction of the Unlawfully Seized Materials

On December 17, 2008, the same day the Government filed the initial forfeiture complaint against Assa (A-2907; A-2933; A-2984; EX-3795-3815), the FBI served a grand jury subpoena on Claimants. (EX-3819-23.) The subpoena called for the production of documents relating to the Fifth Avenue Company, Assa, Assa Ltd., and Bank Melli; it did not demand documents relating generally to the Foundation or its internal operations. (*Id.*) The subpoena was limited to documents from January 1, 1989 to the date of its service. (*Id.*) Despite these limitations in scope and time period, the District Court found that "this subpoena materially covers the relevant documents seized two days later, on December 19, 2008." (SPA-108.) In holding that the same documents would inevitably have been discovered, the District Court relied on its finding that "a subpoena for the same documents as those at issue had already been served" by the time of the search, and "was in fact being vigorously pursued." (SPA-166-67.)

These findings are clearly erroneous. The District Court's decision denying Claimants' suppression motion identifies the limitations of the grand jury subpoena, but then proceeds to ignore them. (SPA-108.)

The subpoena simply *could not* have resulted in the production of all of the documents seized in the illegal search. The search was not limited by time period or scope. Indeed, the agents seized numerous documents from a fifteen-year period before 1989, other documents that would not have been responsive to the subpoena's requests based on the entities specifically identified, and yet others still that would have been withheld (but which were seized) because they were privileged. At no point did the District Court identify which documents or category of documents the subpoena "materially cover[ed]," much less explain how each piece of evidence would have been produced in response to the subpoena. *In re 650 Fifth Ave.*, 830 F.3d at 107 (requiring District Court to "make particularized findings *with respect to each item of seized evidence* as to 'what would have happened had the unlawful search never occurred'" (quoting *Eng I*, 971 F.2d at 861) (emphasis added)). The District Court failed to conduct the required analysis, and therefore failed to appreciate the material differences between what was called for in the subpoena and what was seized in the unlawful search. *See Eng I*, 971 F.2d at 860 ("special care is required on the part of a district court when the government relies on the subpoena power" to prove inevitable discovery).

2. The District Court Erred in Finding that the Seized Materials Would Have Been Produced in Civil Discovery

The District Court's finding that documents *identical to* those taken in the unlawful search would have been produced by way of civil discovery also does not withstand

scrutiny. Approximately half of the District Court's suppression decision consists of its factual findings that allegedly support its determination that, despite the Government's decision not to proceed with forfeiture claims against Claimants' properties in December 2008, "it was inevitable that the Forfeiture Unit of the U.S. Attorney's Office would seek to forfeit Alavi's interest" at some later date. (SPA-166.) According to the District Court, discovery of the seized materials was inevitable because "[j]oining Alavi's interest in the litigation would have allowed the U.S. Attorney's Office to have used civil discovery devices. This Court has a factually based, high level of confidence that this would have occurred." *Id.* This finding rested on a distortion of the record,[24] but even had it been supported by

[24] The District Court's finding was clearly erroneous. It was reached only by downplaying contemporaneous documents written by Government witnesses that the District Court found "highly credible and reliable." (SPA-98.) The court disregarded these documents, crediting instead decade-later recollections that put an unwritten gloss on the documents to bolster the Government's case. These documents left no doubt that at the time of the illegal search, the Government believed that it lacked sufficient evidence to forfeit Claimants' properties along with Assa's. Sharon Cohen Levin, the head of the U.S. Attorney's Office for the Southern District of New York's ("SDNY") Forfeiture Unit, wrote to a DOJ colleague in November 2008 that while she "believe[d] that through the investigation we will obtain sufficient probable cause to file on the entire building," the SDNY was only "at about 40 percent right now," referring to Assa's interest. (EX-3789-90.) Two weeks later, one of the prosecutors wrote that "significant legal and evidentiary hurdles" stood in the way of seizing Claimants' properties. (EX-3791.) And when one of the FBI's case agents corroborated these documents by agreeing that "there wasn't

the evidence, it would only be the beginning of the required analysis. Yet the District Court stopped there, and failed to make the additional findings necessary to apply the inevitable discovery exception to the exclusionary rule.

Even assuming the Government would inevitably have filed an amended forfeiture complaint against Claimants' assets (*i.e.*, the Defendant Properties) absent the search, the District Court did not make particularized findings with respect to the remaining contingencies: whether that complaint would inevitably have included equally extensive allegations and claims for forfeiture, whether the Government would inevitably have served discovery requests sufficient to cover all of the seized materials, and whether service of such requests would inevitably have resulted in their production. Considering that the grand jury subpoena requested only documents going back to 1989, when the Partnership was created, there is no reason to believe—and the District Court did not find—that the hypothetical complaint and discovery requests would have focused on the pre-1989 time period. At the suppression hearing, the Government presented no evidence to assist the District Court in making any of these critical findings. It did not offer proof of a draft complaint that included forfeiture

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sufficient evidence in the view of the U.S. Attorney's Office to proceed with the forfeiture complaint against the Alavi Foundation" (A-2166), the court discredited his testimony on the irrelevant ground that he is not a lawyer. (SPA-102 n.10.) Finally, the court simply ignored an email among all four prosecutors on the eve of the search that noted the need to delete all allegations against the Foundation from the initial complaint against Assa's assets because they were not "ready to fully proceed on this theory." (EX-3794.)

claims against the Foundation's properties, nor did it offer testimony as to what discovery was contemplated in December 2008 with respect to the Foundation. There was no basis for the District Court to find that the seized evidence would have been discovered. In any event, the District Court did not even try to make such findings.

In discussing the inevitable discovery exception, the District Court found it could "easily conclude that prior to the search, a majority of the facts that were later included in the complaint against Alavi's interest [in the Building] . . . had already been developed." (SPA-165-66.) But in actually outlining these facts, the District Court identified only 35 of the Amended Complaint's 157 paragraphs as including references to documents that the Government possessed before the search. (SPA-133.) The District Court did not compare the references in these 35 paragraphs to the evidence underlying the allegations in the remaining 121 paragraphs, or even mention this Court's finding in the previous appeal that "*[m]any* of the amended complaint's allegations against Alavi and 650 Fifth Avenue Co. *derived from documents seized during the December 19, 2008 search*." *In re 650 Fifth Ave.*, 830 F.3d at 105 (emphasis added). Without any finding as to what a hypothetical complaint would have alleged, the District Court could not have reached any credible finding as to what documents would have been requested or produced in discovery.

The actual discovery requests in this case were served by the Government in the middle of 2011, after it had had more than two years to familiarize itself with the items unlawfully seized from Claimants' offices. (A-2402-03; EX-3963-77.) The Government offered no evidence suggesting that, absent the search and untainted by its results, it would have served the same requests—or that it would have served different ones that would inevitably have led to the same results. Nor

did the Government present any evidence—nor did the District Court find—that if it had issued civil discovery requests uninformed by the search but that would have sought all of the seized documents, those requests would inevitably have resulted in Claimants' production of all of the same documents. Nonetheless, the District Court found that the Government had established "with specificity" that *all* documents seized on December 19, 2008 would inevitably have been produced through civil discovery. (SPA-168 ("In fact, such specificity is done relatively easily in this case as they are included in the series of productions . . . .").)

As this Court previously held, however, the fact that Claimants "actually produced the disputed documents . . . was insufficient to support a finding" of inevitable discovery. *In re 650 Fifth Ave.*, 830 F.3d at 103. Claimants' discovery productions were made in response to the Government's and Iran Creditors' joint document requests, drafted with the benefit of a thorough review of the unlawfully seized materials. As this Court held in the previous appeal, "[o]n this record, we cannot confidently conclude that a request for production in the amended forfeiture action was not tainted by the challenged search so as to admit a finding of inevitable discovery." *Id.* at 105. The record on this issue was not supplemented at the suppression hearing. Indeed, the fact of Claimants' document production does nothing to prove what the Government had to establish: that its document requests were not influenced by the preceding unlawful search and would inevitably have been issued had it never taken place. Nor is it relevant, despite the District Court's emphasis (SPA-167-68), that Claimants' document productions also went to the Iran Creditors. That was a function of the *joint* discovery demands, and this fact does not prove that absent the search, the Iran Creditors would inevitably have amended their own complaints, served discovery demands covering

the seized materials, and turned over those materials to the Government.

Accordingly, the District Court's finding for this last contingency was insufficient. Rather than comply with this Court's instructions for a more detailed analysis on remand, the District Court repeated what this Court previously found unacceptable: "a general conclusion that all of the evidence seized pursuant to the challenged warrant was nonetheless admissible in the Government's forfeiture action because it would inevitably have been discovered in civil discovery." *In re 650 Fifth Ave.*, 830 F.3d at 103.

B. The District Court Erroneously Applied the Good Faith Exception to the Deliberate Execution of a Facially Invalid Warrant

This Court held that the Government illegally searched Claimants' offices with a search warrant that was constitutionally defective "[o]n its face." *In re 650 Fifth Ave.*, 830 F.3d at 100. The good faith exception can save the fruits of that illegal search only if, notwithstanding these facial defects, the agents "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 486 U.S. at 918. Rather than picking up from this point on remand, the District Court second-guessed the holding that the warrant was invalid, and deemed its execution reasonable without reliance on applicable law. The District Court then paradoxically found that while the Government acted deliberately and according to typical procedures, any legal errors it made "were the result of oversight" and unfit for the exclusionary rule. (SPA-163.) The Government's agents could not reasonably have relied on so deficient a warrant, and their purposeful execution of the unlawful search was "sufficiently deliberate that exclusion can meaningfully deter it." *Herring v. United States*, 555 U.S. 135, 144 (2009).

1. The District Court Failed to Analyze Whether the Government Could Reasonably Have Relied on a Facially Invalid Warrant

The good faith exception applies only when law enforcement "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918. To make that determination, courts presume that officers have "reasonable knowledge of what the law prohibits." *Id.* at 919 n.20 (citation omitted). Accordingly, the District Court's first task was to determine whether the warrant was "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officer[s could not have] reasonably presume[d] it to be valid." *Id.* at 923.

On remand, the District Court never proceeded as if it were analyzing whether the Government's agents could reasonably have relied on a facially invalid warrant. It found instead that "the Government's theory of their investigation of Alavi and 650 Fifth Ave. Co. fully supports the categories of documents sought." (SPA-120.) While the District Court acknowledged that "those categories are certainly broad—seeking as they do 'any and all documents,'" it arrived at a conclusion contrary to this Court's, stating that "there are instances when such breadth may be appropriate, and this was one of them." (*Id.*)

Nor was the District Court deterred by this Court's holding that the warrant unlawfully failed to include temporal limits. *See In re 650 Fifth Ave.*, 830 F.3d at 100. Instead, relying on an FBI agent's belief that "the entire timeframe—going back to the 1970s" would be "probative" of a crime that could not have occurred until 1995, the District Court held that the search's lack of temporal limitation "was reasonable." (SPA-118-19.)

Finally, the District Court waved away this Court's insistence "that the Fourth Amendment's particularity requirements must be satisfied 'in the warrant, not in the supporting documents.'" *In re 650 Fifth Ave.*, 830 F.3d at 99 (quoting *Groh v. Ramirez*, 540 U.S. 551, 557 (2004)). The District Court described the failure to incorporate the affidavit as a procedural blemish that came out in the wash, not a constitutional defect. (*See* SPA-157-58 ("Had those supporting materials been specifically incorporated by reference, the lack of particularity as to crimes under investigation would no longer exist. In any event, the Judge duly signed the warrant.").)

This case is a textbook example of why failing to incorporate a more particularized affidavit has constitutional significance. The search was led by FBI Agent Michelle Nicolet, who was not the case agent or warrant affiant and who did not review the affidavit or make it available to the search team—either at the pre-search briefing (which she led in the absence of the case agents) or during the search. (A-1640-41; A-2015; A-2044-45; SPA-122; SPA-124.) It was therefore undisputed that the agents relied solely on the insufficiently particularized warrant. Under those circumstances, "the absence of the affidavit meant that any restraint in the conduct of the search 'was imposed by the agents themselves, not by a judicial officer'—a violation of the particularity requirement's core purpose." *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 466 (S.D.N.Y. 2013) (quoting *Groh*, 540 U.S. at 561). The District Court's repeated invocation of the more particular affidavit is baffling in light of the uncontroverted fact that the executing agents did not ever see it or any document that incorporated its terms.

After minimizing or contesting the warrant's constitutional defects, the District Court proceeded as if it were instead determining whether the agents could

reasonably have relied on a facially *valid* warrant. (*E.g.*, SPA-142 ("This [good faith] exception, first enunciated in *Leon*, provides that evidence seized by officers reasonably relying on a facially *valid* warrant . . . should not be suppressed." (quoting *United States v. Roberts*, 852 F.2d 671, 675 (2d Cir. 1988)) (emphasis added).) Perhaps for this reason, every case the District Court cited for the applicable legal standards involved facially *valid* warrants—or even less appropriately, conduct that was indisputably *lawful* at the time it occurred. *See Leon*, 468 U.S. at 902 (1984) (applying good faith exception to execution of "facially valid search warrant"); *Davis v. United States*, 564 U.S. 229 (2011) (applying good faith exception to search lawful under then-binding appellate precedent); *Roberts*, 852 F.2d at 675 (2d Cir. 1988) (record insufficient to determine good faith).[25]

2. The Agents Could Not Have Reasonably Relied on the Facially Invalid Warrant

This Court's decision in *United States v. Rosa*, demonstrates the extraordinary circumstances that are needed to find that reliance on a facially invalid warrant was "isolated negligence," and that, as a result, excluding the evidence seized was inappropriate. 626 F.3d 56, 66 (2d Cir. 2010). The Court began with a careful analysis of whether officers could reasonably have overlooked the warrant's facial invalidity. *Id.* at 61-64. While the warrant was

[25] The District Court cited additional out-of-circuit cases that do not actually involve the good faith exception. (SPA-144.) Rather, each one determined that the overbroad execution of a *lawful* warrant does not constitute an illegal search. *See United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982) (overbroad execution of a "valid search warrant" does not constitute unlawful search or seizure); *United States v. Hargus*, 128 F.3d 1358, 1362-63 (10th Cir. 1997) (same).

insufficiently particularized, *id.* at 64, its shortcomings were not "glaring," *id.* at 66, and the same officer who prepared the more particularized affidavit also executed the search along its narrower parameters. *Id.* at 65. Moreover, this Court had not yet clarified that an unincorporated affidavit cannot cure an insufficiently particularized warrant for purposes of the good faith exception. *See id.* at 62-63 (holding for the first time that *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993), was abrogated by *Groh*, 540 U.S. 551 (2004)).

Most important to *Rosa*'s outcome were the exigent circumstances in which the warrant was drafted and the way it was executed. At 2:00 A.M., local police learned that a man had sexually abused two boys who reported that he kept child pornography on his computers and a gun by his bed. *Rosa*, 626 F.3d at 58. One officer, Blake, who had expertise in child pornography investigations, gathered the information and prepared the warrant application. *Id.* It was approved by a local judge at 4:10 A.M., and Blake executed the search himself less than an hour later. *Id.* at 58-59. As a result of Blake's narrow execution, there was no evidence that law enforcement seized anything unrelated to the crimes for which Blake had established probable cause. *Id.* at 65.

The confluence of the exigency, the dangerousness of the underlying crimes, the warrant's lack of "glaring deficiencies," and the limited search compelled the Court "to conclude that the failure to ensure that the items to be seized were properly limited under the express terms of the warrant was simply an inadvertent error that was the product of 'isolated negligence.'" *Id.* at 65 (quoting *Herring*, 555 U.S. at 137).

The District Court simply ignored *Rosa*. It also failed to meaningfully engage with the thoughtful opinion in *United States v. Zemlyansky*, which confronted the identical question and charted a useful roadmap for its analysis. 945

F. Supp. 2d 438, 450-76 (S.D.N.Y. 2013) (concluding that execution of a warrant whose facial defects violate clearly established law is not objectively reasonable and is sufficiently culpable to justify the exclusionary rule).[26]

Viewed against the backdrop of *Rosa* and *Zemlyansky*, the District Court's decision is even more conspicuously erroneous. *First*, *Rosa*'s warrant lacked "glaring deficiencies," 626 F.3d at 66, whereas here, the "two-page warrant['s] . . . boilerplate language," failed to "identify the crimes for which agents were authorized to search or seize the listed property," and to "place any temporal limit on the property to be seized." *In re 650 Fifth Ave.*, 830 F.3d at 83-84. Accordingly, this Court held that the warrant "plainly" lacked particularity. *Id.* at 100.

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[26] The District Court summarily distinguished *Zemlyansky* in a footnote, stating that while *Zemlyansky* "focused on the failure to attach the affidavit . . . to the warrant itself," "[h]ere, the Second Circuit has already found constitutional infirmity on just such a basis." *Id.* But *Zemlyansky* made clear that the failure to incorporate the affidavit was relevant not just to the warrant's validity but to the good faith exception's applicability, as the officers should have known that the affidavit could not cure the warrant's defects. *See* 945 F. Supp. 2d at 475-76. Next, the District Court stated that, "In *Zemlyansky* . . . the good-faith exception was inapplicable in large part based on the fact that the officer who oversaw the execution of the search had not read the affidavit." (SPA-142 n.34.) Yet even though the *very same thing was true in this case*, the District Court pointed to "clear evidence that [Nicolet] had significant information about the nature and scope of the investigation" and that she was "a qualified lawyer." (*Id.*) But those facts, even if true, do not change that Nicolet did not read the affidavit or use it to guide the execution of the search.

Second, the search in *Rosa* occurred before this Court had clearly established that unincorporated affidavits cannot cure insufficiently particularized warrants for purposes of the good faith exception. 626 F.3d at 63 (recognizing for the first time *Groh*'s abrogation of cases permitting consideration of unincorporated affidavits in application of good faith exception). In contrast, when the agents executed this warrant in 2008, each of those facial defects violated clearly established law. *See, e.g.*, *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (warrant failing to state underlying crimes lacks particularity); *United States v. Buck*, 813 F.2d 588, 590-92 (2d Cir. 1987) (warrants with unduly broad or catch-all categories lack particularity); *United States v. Cohan*, 628 F. Supp. 2d 355, 365-66 (E.D.N.Y. 2009) (collecting cases invaliding warrants for failing to include temporal limitations). *Rosa* itself made clear that these defects cannot be cured by an unincorporated affidavit, much less one that the searching agents did not even read. 626 F.3d at 64 ("[W]e may no longer rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant."). "Given that all applicable law was clearly established at the time of the [search], and that the Government's agents nonetheless violated the law, the officers acted in an objectively unreasonable manner." *Zemlyansky*, 945 F. Supp. 2d at 472.

Third, there was no exigency. The Government's claim that the warrant was sought in response to the destruction of documents was false, as it eventually conceded after the argument fell apart during the suppression hearing.[27]

[27] The Government consistently represented, both to this Court during the prior appeal and to the District Court on remand, that the decision to seek the search warrant was motivated by the document destruction by the Foundation's former president (*see supra* at 28-29), and argued that this excused reliance on the facially invalid warrant. (*See, e.g.*,

Documentary evidence produced after remand proved otherwise, and FBI Agent George Ennis ultimately conceded that the decision to seek a search warrant and the drafting of the warrant application preceded his learning of the document destruction by several hours. (A-1792-96.)

Undeterred by the Government's concession, the District Court found that this event "played some role in why deficiencies in the warrant were not caught." (SPA-156-57.) It did not explain what that "role" was, other than that "attention was further distracted by efforts expended by the AUSAs and Ennis to draft and present to the district court a criminal complaint against Jahedi." (SPA-157.) This excuse has no support in the record; not a single agent or prosecutor raised it in their testimony and it has no basis in any contemporaneous documents. And even if Ennis had been distracted for that reason, it would not explain how a facially deficient warrant was drafted, reviewed, and approved by an experienced federal prosecutor and his supervisor, or why Ennis's co-case agent George Alexander and the search team leader Nicolet (a lawyer) relied on the facially invalid warrant without even consulting the affidavit.

Dkt. 1486 ("[T]he warrant was sought under exigent circumstances created by the destruction of evidence"); Case No. 14-2027, Dkt. 194 at 81("[T]he warrant was executed under exigent circumstances.").) But the suppression hearing incontrovertibly established that the decision to seek the warrant and its drafting both preceded Jahedi's crime. (*See* EX-3532-33 (FBI requested warrant application at 12:42 P.M. on December 18); EX-3520-23 (final draft of the warrant was complete at 6:53 P.M.); A-1788-91 (FBI did not inform SDNY of Jahedi's acts until 9:35 P.M.).)

Nor is there any evidence that the FBI acted as if "there was new urgency to the execution of the warrant early on December 19, 2008," as the District Court found. (*Id.*) The FBI did not secure Claimants' offices after learning of Jahedi's acts, nor did the agents launch a pre-dawn raid or do *anything* early on December 19, the following morning, choosing instead to execute the search after noon. Nor did the District Court find, or the record reflect, any additional exigencies present during the execution of the search. *Zemlyansky*, 945 F. Supp. 2d at 472 (finding "no evidence that the [search] involved any sort of exigency that might excuse" its illegality); *United States v. Wey*, 256 F. Supp. 3d 355, 398 (S.D.N.Y. 2017) (refusing to apply the good faith exception where "the record reflects no evidence that the agents' failure to recognize these infirmities may be attributed to exigent or otherwise unusual circumstances" (citation omitted)).

Fourth, unlike *Rosa* and like *Zemlyansky*, "the affiant did not oversee execution of the warrant, the search team leader and his team had never read the affidavit, and the agents relied principally on a briefing that purported to convey the gist of the relevant information." 945 F. Supp. 2d at 473. Ennis, the warrant's affiant, did not participate in the pre-search briefing (SPA-122 n.20), and did not attend the search. (A-1698.) Nicolet, who led the search, did not review the affidavit. (A-2015.) Nor was the affidavit brought to the search site or made available to the search team before execution. (SPA-122; SPA-124.) While the District Court found that Nicolet "answer[ed] any questions the searching agents might have" (SPA-125), her responses were based only on the warrant's attachment (the "any and all" lists of documents that this Court identified as overly broad, 830 F.3d at 100) or "information she had gleaned based on her knowledge of the investigation." *Id.* But Nicolet's "knowledge of the investigation" was as minimal as her role in it. The District Court found that Nicolet "had

assisted in various elements of the investigation prior to the search" (SPA-123), but Nicolet could not recall what those "various elements" were. (A-2011.) The District Court's findings, on their own terms, demonstrate that the search team was not meaningfully cabined by any authority beyond the facially invalid warrant. *See Zemlyansky*, 945 F. Supp. 2d at 473 (counting as factors weighing against a finding of good faith that search team had limited knowledge of investigation and no access to affidavit).

Fifth, while there was no evidence in *Rosa* that the agents seized any items unrelated to the crimes for which probable cause had been established, 626 F.3d at 65, the search in this case was excessively broad and indeed could not have been broader. As Ennis acknowledged, the agents seized "everything," including boxes clearly marked as including attorney-client correspondence. (A-1825-26; A-1828; A-2185; A-2195-2201; *see also* A-1828-29.) The District Court acknowledged the search's breadth, but did not count that as a strike against applying the good faith exception. Shrugging off this Court's holding that the warrant failed to "particularize categories of computerized information for which there was probable cause to seize," *In re 650 Fifth Ave.*, 830 F.3d at 100, the District Court found instead that, "While those categories are certainly broad—seeking as they do 'any and all documents'—there are instances when such breadth may be appropriate, and this was one of them." (SPA-120.) It made no attempt to articulate what those "instances" are beyond the specific case, or what principle or principles might limit them.

Having excused the warrant's infirmities and the agents' reliance on them, the District Court went on to determine that any "documents protected by the attorney-client privilege were inadvertently seized," (SPA-128 n.27), even though they were clearly marked and the FBI broke protocol by not bringing a taint team to the search. (EX-3763; EX-

3766; EX-3768; EX-3770-71; A-2062; A-2272; A-2343-44.) It stated that Nicolet "made selections of documents" (SPA-161), and that "while many documents were taken, others were left behind" (SPA-126), without noting that the "others" included nothing more than a few scattered items such as a store of petty cash, a shopping bag, and a towel. (A-1907; A-2032-38; A-2083-86.)

3. The District Court's Findings Undermine Its Conclusion that the Government's Unlawful Conduct Was an Undeterrable "Oversight"

Finally, the District Court held that "[a]ny deficiencies" in the Government's reliance on the facially invalid warrant "were the result of oversight" and that the conduct was insufficiently "deliberate" to warrant exclusion. (SPA-163-64.) But even its findings, flawed as they are, established that all of the Government's conduct, from the drafting of the warrant through its execution and the two-year review of its fruits, was deliberately planned and carried out following "normal procedures." (SPA-163.) Its repeated emphases on these typical procedures and the extensive training and qualifications of the Government's agents underscore that the unlawful conduct in this case did not arise from "isolated negligence" and is capable of deterrence. *Herring*, 555 U.S. at 137.

In particular, the District Court emphasized that "the warrant was drafted by the U.S. Attorney's Office according to established procedures," and that "the procedures used to execute the warrant were entirely typical and objectively reasonable." (SPA-156; SPA-158; *see also* SPA-111 (finding that "supervising counsel" at the U.S. Attorney's Office reviewed and signed off on the final draft warrant application).) It found further that the search team leader "[was] a trained lawyer" who was "highly knowledgeable with regard to the relevant issues." (SPA-123-24 & n.22.)

The District Court implied that these procedures and the prosecutors' and agents' experience made it *less* likely that they should have known the warrant and its execution were unlawful. But highly trained agents operating under protocol are *more* likely to be aware of legal deficiencies in a warrant they execute—especially when those deficiencies are "[o]n its face." *In re 650 Fifth Ave.*, 830 F.3d at 100. *See Herring*, 555 U.S. at 145 (determination whether "reasonably well trained officer would have known that the search was illegal" may consider "a particular officer's knowledge and experience") (citation omitted); *Zemlyansky*, 945 F. Supp. 2d at 475 (finding officers violated clearly established law and "did so even though they are presumed to be familiar with the governing law and even though they acted on the basis of extensive training and experience"); *United States v. Lindsey*, 596 F. Supp. 2d 55, 62 (D.D.C. 2009) ("[T]he fact that [the agent] is a well-trained and exceptional agent also weighs toward the conclusion that he should have known that the search was illegal despite the magistrate's authorization.").

That this plainly deficient warrant and overbroad search arose out of "entirely typical" and "established procedures" of the U.S. Attorney's Office, including the involvement of "supervising counsel" (SPA-111; SPA-156; SPA-,158), suggests the opposite of "isolated negligence." *Herring*, 555 U.S. at 144. It describes conduct that could not be more different from *Rosa*'s single small-town police officer obtaining a warrant by himself in the middle of the night, during an emergency and without a prosecutor's assistance, from a local magistrate. Instead, it suggests "conduct [that was] sufficiently deliberate that exclusion can meaningfully deter it." *Id.*; *see also Zemlyansky*, 945 F. Supp. 2d at 472-76 (constitutional violations "did not result from isolated negligence and do[] call for deterrence" where agents executed search and made sweeping seizures in reliance on facially invalid warrant).

Accordingly, this Court should reverse the District Court's denial of Claimants' motion to suppress.

III. The District Court Erred in Its Handling of the Fifth Amendment Privilege Assertions by Foundation Board Members

Apart from the Government's evidence that the Foundation knew that Bank Melli owned Assa between 1989 and 1995, the centerpiece of its case at trial consisted of invocations of the Fifth Amendment privilege against self-incrimination by five former Foundation board members: Mohammad Geramian, Ali Reza Ebrahimi, Houshang Ahmadi, Hassan Hassani, and Farshid Jahedi. In handling those Fifth Amendment assertions, the District Court erred in several respects.

First, the District Court improperly precluded at least two witnesses who were *willing* to testify in depositions and at trial in 2017 on the ground that they had asserted the privilege *four years earlier*, depriving Claimants of evidence important to their defense. *Second*, the District Court abused its discretion by admitting the invocations. The tactics that led to them, as well as other evidence in the case, diminished their probative value, and the Government's presentation of them in video installments every few days during the trial maximized their unfair prejudicial effect. The District Court's balancing of the probative value and the unfair prejudice should be reversed because (a) it was based squarely on an error of law, and (b) even in the absence of the legal error, the factors this Court considers in reviewing Federal Rule of Evidence 403 determinations in this context all weigh in favor of reversal. *Third*, the District Court erroneously precluded Claimants from offering evidence that would have undermined the inference that these witnesses invoked their privilege because their testimony would have favored the Government. *Finally*, the District Court should

have precluded any use of the privilege invocations as a sanction for the Government's misconduct.[28]

This Court should order a new trial at which all witnesses who previously invoked their privilege are free to testify. At that trial, previous privilege invocations should be inadmissible; in the alternative, this Court should remand for a Rule 403 determination regarding the admissibility of such invocations. The Court should further order that if the District Court determines prior privilege invocations are admissible (a) those facts must be presented by stipulation, and (b) no specific questions posed by the Government may be presented to the jury.

A. The District Court Abused Its Discretion by Precluding Witnesses Who Were Willing to Testify

At least two of the former Foundation board members who had invoked their Fifth Amendment privilege in 2013 were prepared to testify at deposition and trial in 2017. Despite acknowledging the importance of their testimony, the District Court refused to allow these witnesses—Hassan Hassani and Ali Dabiran—to testify, on the grounds that "[d]iscovery closed in this case long ago," and that their

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[28] On appeal, the District Court's decisions to admit or preclude evidence are reviewed for abuse of discretion. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 170 (2d Cir. 2017) (citations omitted); *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 194 (3d Cir. 1994). The court's legal instructions are reviewed *de novo*. *Woods*, 864 F.3d at 170 (citation omitted). Evidentiary decisions that rest on an erroneous understanding of the law are an abuse of discretion. *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (citation omitted).

2017 testimony would "unfairly" surprise the Government. (SPA-179-80.) This erroneous decision deprived Claimants of crucial defense testimony.

Courts "may adopt remedial procedures or impose sanctions" to prevent prejudice where "a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process." *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 84-85 (2d Cir. 1995) (citation omitted). But that is not what happened here. Hassani and Dabiran chose to exercise their Fifth Amendment rights in 2013. By the time this case was on remand, years had passed and, as discussed below, the statute of limitations for the crimes the Government had previously threatened had expired. Claimants informed the Government at a November 2016 conference—over *six months* before trial—that witnesses who had previously invoked their Fifth Amendment privileges would be willing to testify at the 2017 trial and would be available for depositions. (A-1204.) The Government took no steps to depose them. Then, on March 7, 2017, nearly three months before trial began, Claimants specifically notified the Government that Hassani and Dabiran would be testifying and were available for deposition. (Dkt. 1620-1.) The Government again declined to depose them (and instead spent the next seven weeks trying to get them to change their minds, as discussed further below). The Government had ample opportunity to depose these witnesses; it just chose not to. There plainly was no prejudice or surprise that needed to be remedied.

The District Court's preclusion of Hassani and Dabiran severely prejudiced Claimants. It deprived them of testimony by two members of the Foundation's board about their lack of knowledge regarding Assa's true ownership

during their time on the board,[29] as well as about the Foundation's good faith efforts to obtain more information from Assa. Indeed, in 2008, Hassani was secretly recorded in a Queens mosque by the Government's confidential source, Hesami-Kiche, and that conversation revealed both his and Geramian's lack of knowledge and the board's unsuccessful efforts to learn more. During the conversation, Hassani and Geramian explained to Hesami-Kiche that the Foundation had made numerous attempts to learn the identity of Assa's owners, but that Assa did not respond to their requests:

> Geramian: Now, you see the problem in the middle here is we did not know who they were.
>
> Hassani: They have not responded to us yet.
>
> Geramian: We don't know who they are. I have written them five letters to learn who are the members of the Board of Trustees.

(EX-2774.) Had he been permitted to testify consistent with the documentary record and the recorded conversations, Hassani would have given powerful testimony that the Foundation did not in fact know that Bank Melli was the true owner of Assa during the post-sanctions period, and he would have been fully corroborated by the documentary record and the Government's secret recordings of him.

Instead, the jury heard him invoke the privilege, and was instructed that it could infer that his testimony would be unfavorable to Claimants. The Government specifically capitalized on this in summation to counter the recorded conversation that undermined its case: it immediately followed its reference to the above-quoted conversation by

[29] Hassani and Dabiran served on the board from 2005-2013. (EX-1494.)

stating "[a]nd you saw Mr. Hassani's video deposition testimony where he invoked his Fifth Amendment privilege." (A-3608.)

Courts should "seek out" ways of furthering the truth-seeking function of a trial "because *all* parties—those who invoke the Fifth Amendment and those who oppose them—should be afforded every reasonable opportunity to litigate a civil case fully," and the "exercise of Fifth Amendment rights should not be made unnecessarily costly." *4003-4005 5th Ave.*, 55 F.3d at 84-85 (citations and footnotes omitted). Thus, where a party who previously relied on the privilege later seeks to waive it and testify, courts should "take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur." *Id.* The District Court failed to do that here. Claimants are entitled to a trial where they have an opportunity to present all relevant evidence, including testimony from Hassani, Dabiran, and any other of their former board members who wish to testify.

B. The District Court Abused Its Discretion by Admitting the Privilege Assertions into Evidence

The District Court also erred by admitting into evidence the invocations of the Fifth Amendment. Its assessment of the probative value of the invocations was flawed, and the manner in which it permitted the Government to present them maximized their unfairly prejudicial effect on Claimants. As for the District Court's balancing of the factors, the decision should be reversed because it was based squarely on an error of law: the District Court's incorrect belief that the demeanor of a witness invoking the privilege constituted evidence of whether the invocation had been coerced. In addition, even in the absence of that fatal legal error, the factors this Court considers in reviewing Rule 403 determinations in this context all weigh in favor of reversal.

See Brink's Inc. v. City of New York, 717 F.2d 700, 710 (2d Cir. 1983); *Woods*, 864 F.3d at 170-71. These matters are addressed in order below.

1. The Probative Value

The Fifth Amendment invocations had probative value only to the extent they supported the inference that "the withheld information would have been unfavorable to claimants." (*See, e.g.*, A-3160.) But there were good reasons to question the probative value of the Foundation board members' privilege assertions.

The documentary evidence in the post-1995 period showed that the Foundation's board consistently tried to obtain more information about the owners of Assa and its board of directors, and Assa just as consistently tried to frustrate those efforts. *See supra* at 22-23. The Government never disputed the fact that, on their face, those documents reflected a *lack* of knowledge of Assa's true ownership, which is why it needed to write them off as an especially elaborate "paper trail."

Moreover, the Government—including FBI agents and prosecutors—repeatedly engaged in inappropriate tactics that intimidated Foundation witnesses. The FBI's aggressive treatment of them, motivated at least in part by repugnant anti-Muslim bias,[30] caused many witnesses reasonably to

[30] When one FBI agent "joked" in an email that a former Foundation board member kept "Hizballah Illustrated magazines" in his attic, one of the case agents in charge of the investigation responded with a breathtakingly offensive follow-up email. He wrote that he "love[d]" the "burqa wearing centerfolds in that mag," the "ads for swords," and the "fun" letters section, for which the case agent proposed the following letter: "*While at the souk today, I saw the smallest glimpse of the ankle of my own grandmother. I*

invoke their Fifth Amendment rights. Before interviewing a single Alavi witness in this investigation, the FBI concluded they were all guilty, and the "continuing goal of the investigation" was to arrest anyone associated with the Foundation. (A-2149-52.) FBI agents were "salivating" over criminal charges. (A-2533.1.) The case agent lamented in August 2008 that the "main problem" was that the prosecutors (who were not the same ones assigned to the case in 2013 and 2017) "will not allow us to be confrontational" (A-2542.1-2), and did not want the FBI "put[ting] words in the witness' mouth." (A-2934.)[31]

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immediately went home and satisfied myself while chanting verses from the Koran. Was that wrong?" (A-2547.1-2 (emphasis in original).) The other case agent, when asked "what's wrong with" the author of the offensive email, shrugged it off: "HQ [FBI Headquarters] can do that to ya." (A-2547.1.)

Unfortunately, this was not an isolated incident: the first agent referenced above remarked to a colleague that he "like[s] the negative press from the [Iranian-American] community . . . makes our life easier if they all go [live in] LA." (A-2546.1-4.)

[31] In that same time period, prosecutors repeatedly expressed concerns to each other about the FBI's handling of the case. One prosecutor wrote to a colleague that he had "concerns about the agents' plans based on remarks [a case agent] made." (A-2543.1-2.) Another wrote "we are not happy with the agent situation." (A-2544.1-2.) One veteran prosecutor even asked to be removed from the case entirely, causing a colleague to ask if she could tell a supervisor "why you asked to be removed," explaining "I just want to make sure she knows how serious the issues w/ the agent are." (A-2545.1.)

Nonetheless, the agents followed through on an aggressive plan to "hit everyone at once" in order to "destabilize" the Foundation. The witness interviews were to be "99% pitch," with "no listening to denials"; interviewees would either admit to criminal acts and be "onboard" as cooperating witnesses, or be told "we'll lock you up." (A-2534.1.) This approach made clear to the Foundation's board members that they had limited options: either admit to the crimes under investigation, or, in the eyes of the FBI, commit a new one—making a false statement to a federal official in violation of 18 U.S.C. § 1001. In light of these tactics, it is no surprise that the Foundation's witnesses invoked their constitutional protections.

The prosecutors assigned to the case in 2013 and 2017 also took an aggressive approach. In 2013, they served deposition subpoenas on the Foundation's board members while simultaneously making it clear to them that the Government had an open criminal investigation into potential violations of IEEPA sanctions and the money laundering statutes. The Government's position, announced in open court in 2013, was that the five-year statute of limitations for such a prosecution would not run until November 2014. (*See* A-883.17; A-455.) Unsurprisingly, in advance of the trial scheduled in 2013, several witnesses informed the Government that they planned to invoke their Fifth Amendment rights. Obtaining such invocations was the Government's goal; when prosecutors learned in 2013 that two subpoenaed Foundation employees (Hanieh Safakamal and Ali Aliabadi) were willing to testify, the Government abruptly canceled their depositions. (A-883.18-19.)

After this Court remanded the case for a new trial in 2016, the Government remained intent on presenting Fifth Amendment invocations rather than testimony. In doing so, it faced a problem of its own making: the prosecutors had

procured the privilege assertions in 2013 by warning the subpoenaed witnesses that the statute of limitations on their open criminal investigation would not expire until November 2014. That statute had run. Undaunted, the Government came up with a new potential charge—bank fraud—which conveniently carried a longer limitations period that had not yet expired. Thus, in late 2016, the prosecutors wrote to counsel for Mohammad Geramian, saying "your client (quite properly) invoked his Fifth Amendment right" in 2013, and asking "whether his position was still the same, *particularly in light of the statute of limitations for bank fraud not having lapsed*." (A-2536-37 (emphasis added).)

When Claimants' counsel informed the Government on March 7, 2017, that Hassani and Dabiran would testify at trial, and invited the Government to depose them, it had no interest in doing so. Instead, it went directly to the lawyer for Hassani and Dabiran to press its case that they should change their minds. "Having been informed by [Claimants' counsel] that Hassani and Dabiran intend to testify," the prosecutors began, "the Government writes to inform you of its position with respect to the statute of limitations. . . . It is the Government's position that the statute of limitations . . . has not yet run." (Dkt. 1618-4.) The extraordinary letter then proceeded to brief the issue of why these Foundation board members still had good reason to refuse to testify, even attaching a copy of a district court decision as support for the Government's new position. (Dkt. 1720 at 2 n.1.) No reasonable lawyer or witness could read that letter and conclude anything other than that the prosecutors were warning Hassani and Dabiran—who after consulting with independent counsel had announced their decisions to testify—that they were making a mistake and that it was in their best interests to once again assert the Fifth.

In successfully opposing Claimants' motions in limine to preclude evidence of the Fifth Amendment invocations, the Government denied any intention to induce the Foundation's board members and employees to exercise their privilege. It claimed that its communications were "honest dialogue" that stemmed from the prosecutors' "*bona fide* concern" about the witnesses' criminal exposure. (Dkt. 1674 at 5.) That explanation is belied by the record. But if there was any doubt about the prosecutors' true intentions, it was dispelled by a phone call to counsel for Hassani and Dabiran on June 29, 2017, the day the jury returned its verdict, by the same prosecutor who had engaged in this supposed "honest dialogue." There was no legitimate reason for the call; those witnesses had been precluded from testifying at trial. But under the pretense of releasing them from their obligations to testify, the prosecutor left a gloating message, saying: "This is your official notification that we won't be needing either of your witnesses at trial after all. In the event that this is in some sort of forwardable form that you also wish to send to Alavi's counsel, um, you may want to include this: ha ha ha ha ha ha ha! Good day." (EX-3991.)[32]

Claimants argued that the Government's handling of the investigation had a critical bearing on why Foundation witnesses invoked their privilege. From the outset of this investigation, the FBI gave these witnesses good reason to believe that statements *in favor* of the Foundation would be considered false and subject them to arrest. For their part, the prosecutors clearly signaled to these witnesses that a

[32] This voicemail was obviously unavailable to the District Court when it made its decision to preclude Hassani and Dabiran, and to admit evidence of the former board members' invocations. But its content and tone are powerful additional evidence of the Government's true intent: to bully witnesses into invoking their privilege.

decision to waive the privilege and testify could be punished by a decision to prosecute them. These circumstances seriously undermined the probative value of the privilege invocations.

The District Court dismissed that contention with hyperbole, stating that "[t]here is not a shred of evidence that suggests that the agents engaged in any unusual or coercive tactics." (SPA-182.) That conclusion is simply indefensible on a record that includes, among other things, the prosecutors in 2008 *openly clashing with the FBI over their coercive tactics*. (A-2542.1.) The District Court's assessment of probative value is not entitled to deference by this Court.

2. The Unfair Prejudice

The cold record of the trial cannot adequately convey just how unfairly prejudicial the Fifth Amendment presentations were. In 2013, each witness had been required to appear in person to assert the privilege on camera. At those "depositions," the Government presented the witness with a lengthy list of questions—written by the Government in advance with the knowledge that the witness would invoke the privilege regardless of what questions were asked—and the witness was asked to confirm that he in fact invoked the privilege with respect to all of the questions on that list. (A-3899-3900.)

The excerpts of these video recordings that were played for the jury in 2017 were not brief. On each one the case was announced; the attorneys were identified for the record; the witness was placed under oath; and then the prosecutor asked five transcript pages of questions to establish the fact that the witness was declining to testify. Specifically, Hassani was asked 27 questions; Jahedi was asked 24. (A-

3371-73; A-3505-07.)[33] In a word, each video presentation was a spectacle, and the spectacle became the Government's refrain during the month-long trial. Geramian's turn was on June 6; Ebrahimi's video was played on June 8; Ahmadi's on June 12; Hassani's on June 15; and Jahedi's on June 21. Videos of dejected Foundation board members invoking their right to remain silent were never far from the jury's attention. And it was all wholly unnecessary, as Claimants had offered to stipulate to the privilege invocations in the event the District Court found them admissible. (Dkt. 1617 at 9.)

Each privilege invocation was capped off with an extra measure of prejudice flowing from the District Court's erroneous belief that adverse inferences could be based on the specific questions the witness declined to answer. Rejecting Claimants' contention that the prosecutor's questions were not evidence, the District Court likened a privilege-based refusal to answer a question to an affirmative answer to a leading question. (A-3159.) As a result, after each video was played, the court allowed the prosecutor to read aloud to the jury five hand-picked questions from the numerous questions the board member had refused to answer. (*E.g.*, A-3160.) And each time, the questions asked, in substance, whether the witness knew while serving on the board that Assa was owned by Bank Melli, and whether the Foundation was controlled by the government of Iran. (*See* A-3050 (Geramian); A-3160 (Ebrahimi); A-3223 (Ahmadi); A-3372 (Hassani); A-3507 (Jahedi).)

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[33] The "depositions" of Geramian, Ebrahimi, and Ahmadi proceeded in like fashion, but the court reporters at trial did not transcribe the questions and answers. (*See* A-3050; A-3160; A-3222-23; A-3341.)

What made this feature of the presentations especially pernicious and prejudicial was there was other evidence in the case that these Foundation directors did *not* know who owned Assa, and made extensive efforts to find that out. And indeed that might have been their answer to the specific question each one was asked, but because of the prohibition on selective waiver of the privilege they could not provide that answer without risking a determination that the privilege had been waived as to the many other questions the Government had posed.

After Ebrahimi's video was shown, Claimants made this argument to the District Court, and asked for an instruction before the jury left for a three-day weekend that the specific questions were not evidence and should not be the bases for any inference drawn from privilege invocations. (A-3164-65.) That request was denied (A-3165), but the court agreed to reconsider the issue further if an instruction were proposed in writing. (A-3165-66.)

Claimants thereafter proposed such an instruction, with supporting case law, that would have informed the jurors that any inferences they drew should be based only on "*all* the facts and circumstances in the case," not on any specific questions the witnesses declined to answer. (Dkt. 1825.)[34] On June 14, 2017, the District Court rejected the proposed instruction, again squarely and incorrectly holding that "when an adverse inference as to a factual matter is drawn, *it is only drawn with regard to a particular question posed*."

[34] Claimants also specifically asked for an instruction that "since these witnesses refused to answer those questions, the questions read to you by the Government are not evidence." (Dkt. 1825 at 3.) While awaiting the court's ruling, the objection was repeated when Ahmadi's Fifth Amendment video was played. (A-3223.)

(A-3978; *see also* A-3979 (reiterating that adverse inference is considered on a "question-by-question basis").)

Judge Winter's dissent in *Brink's* warned that the practice the District Court permitted here "inevitably invites jurors to give evidentiary weight to questions rather than answers. Moreover, it leaves the examiner free, once having determined that the privilege will be invoked, to pose those questions which are most damaging to the adversary, safe from any contradiction by the witness no matter the actual facts." 717 F.2d at 716. This was precisely what happened here, despite the specific objections by Claimants' counsel, and the prejudice was not blunted, as it was in *Brink's*, where (1) the invoking witnesses had criminal convictions that were already in evidence, and (2) they were called live to the witness stand and given a chance to "come clean" and testify. *Id.* at 710.

3. The District Court's Rule 403 Determination

(a) The Determination Was Based Squarely on an Error of Law

It is well established that courts should not admit evidence in a prejudicial fashion where other, less prejudicial, means exist. *Old Chief v. United States*, 519 U.S. 172, 182-85 (1997). Here, assuming there was probative value in the Fifth Amendment invocations, a simple stipulation would have accomplished the Government's legitimate purpose.

In rejecting that proposal by Claimants, the District Court's written decision explicitly based its Rule 403 determination on the following conclusion: "The jury is entitled to see a witness who is or has taken the Fifth and to assess his or her demeanor just as they would any other witness." (SPA-184.) Specifically, the court believed that *how* a witness invoked the privilege was evidence of *why* he

did so. (*See* A-1050-51 (District Court explaining that if a witness "took the Fifth because of fear and coercion," he would have a "shaky and fearful and concerned" demeanor on the video).) And indeed in its rebuttal summation the Government explicitly relied on this demeanor-as-testimony theory as proof that the FBI treated the witnesses fairly.[35]

The District Court was wrong. The appearance of a witness who, after consulting with counsel, lawfully refuses to testify is no testimony at all, let alone a proxy for evidence of a confrontational (or cordial, for that matter) encounter with FBI agents years earlier. The only evidence of how the witnesses were treated by the FBI and the prosecutors was the evidence of the FBI's and prosecutors' actual conduct, which Claimants proffered and the District Court wrongfully precluded. The repeated visual displays of the exercise of the privilege by Foundation board members provided five installments of "high courtroom drama," *Bowles v. United States*, 439 F.2d 536, 541 (D.C. Cir. 1970), but their demeanor was evidence of nothing, and thus the videos should have been excluded in favor of the stipulation Claimants proposed.

Although Rule 403 determinations by district courts are discretionary decisions, and normally receive deference on appeal, an exercise of discretion based on a legal error is necessarily an abuse of discretion. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405 (1990); *see also United States v. Figueroa*, 548 F.3d 222, 226 (2d Cir. 2008). Here, the exercise of discretion premised on the erroneous belief

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[35] *See* A-3684 ("[Claimants argued that the] FBI bullied them into [invoking the privilege]. Really? . . . You saw their demeanor on the video, and you can judge for yourself whether five years later they were somehow bullied.").

that the jury was entitled to assess the demeanor of the invoking witnesses was itself an abuse of discretion.

(b) Even Absent the Legal Error, the Rule 403 Determination Was an Abuse of Discretion

In evaluating whether a trial court erred in admitting Fifth Amendment invocations, this Court considers "(1) whether the evidence bore on the most important issues in the case; (2) whether the evidence was simply cumulative or corroborative; (3) whether the evidence was used in summation; and (4) whether the appellee's case was particularly strong." *Woods*, 864 F.3d at 170; *see also* Fed. R. Evid. 403. These factors all weigh in favor of the conclusion that the District Court abused its discretion.

First, the privilege invocations bore directly on one of the most important factual issues in the case: whether the Foundation's directors in fact knew after 1995 that Assa was still owned by Bank Melli. Indeed, the invocations were heavily relied upon by the Government in its attempt to prove the underlying sanctions violation giving rise to forfeiture. (A-2809; A-3606; A-3608; A-3627; A-3683-84; A-3687.) It had little else to rely on; substantial documentary evidence pointed in the other direction, as did the secret recordings of board members made by the Government's cooperating witness.

Second, the privilege invocations were anything but "cumulative or corroborative" with respect to the other evidence. As discussed above, the other evidence tended to show that although the board members tried repeatedly to ascertain more about Assa's ownership, Assa and Bank Melli prevented them from doing so. The inference from the privilege invocations was the Government's principal evidence that the Foundation's board was aware that Bank Melli still owned Assa.

Third, in this case, as in *Woods*, "the way in which [the] Fifth Amendment invocation[s were] raised and later argued at closing elevated the prejudice to an intolerable level." 864 F.3d at 171. Right off the bat, the Government described its collection of Fifth Amendment assertions as a "major source of evidence" in the case (A-2809), and then the prosecutors mentioned them seven separate times in their primary summation (A-3606; A-3608; A-3627) and three more times in rebuttal (A-3683-84; A-3687).

Fourth, the Government's evidence of the Foundation's knowledge of Assa's ownership (or of Iranian control over the Foundation) after the relevant sanctions went into effect was hardly strong. Indeed, it presented minimal evidence of events occurring after 1995. With the exception of Abbas Mirakhor, who served on the Foundation's board from 1991 to 2005 (EX-1494; A-3393), the only Alavi witnesses the Government called at trial had left the Foundation years before the sanctions took effect. (A-2983.) And Mirakhor testified that the Foundation was not under the control of the government of Iran and that its board made legitimate, good faith efforts to identify Assa's owners. (A-3400-01; A-3408.) The Government relied heavily on the Fifth Amendment assertions out of necessity to try to establish post-1995 knowledge and control.

In addition to those factors, this Court has also found it significant whether the Government knew ahead of time that a witness would assert the privilege. *See Brink's*, 717 F.2d at 707-08; *United States v. Five Cases*, *etc.*, 179 F.2d 519, 523 (2d Cir. 1950). This factor also weighs heavily in Claimants' favor. Back in 2013, the Government knew that the five Foundation board members would assert their privilege; that was the strategy all along, as demonstrated by its decision not to take the testimony of the Foundation's witnesses who were willing to testify, including Hassani and Dabiran in 2017. At trial, the Government guaranteed there

would be Fifth Amendment assertions by refusing to call Hassani and Dabiran to the witness stand, an option the District Court had offered the Government (but not Claimants). (SPA-184.) The last thing the Government wanted was for the Foundation board members to actually "come clean" and testify in support of Claimants' defense. *Brink's*, 717 F.2d at 710.

In sum, the prejudicial impact of the Fifth Amendment assertions vastly exceeded any probative value that they had, and the District Court's Rule 403 determination should be reversed. If this Court permits the privilege invocations to be received on remand (subject to a proper Rule 403 balancing), it should direct that (1) they be introduced by stipulation (rather than by videotape or some other form) and (2) that none of the specific questions posed to the invoking witnesses be read to the jury.

C. The District Court Abused Its Discretion by Excluding Claimants' Evidence Explaining the Fifth Amendment Invocations

Once it decided to receive the privilege invocations and give the jury an adverse inference instruction, the District Court should have permitted Claimants to present the evidence that would have placed those invocations in context, evidence from which a different inference could be drawn. Claimants sought to question the FBI agents about their aggressive techniques and biases, and to question the board members' attorneys regarding the prosecutors' efforts to silence their clients. (Dkt. 1719 at 1, 5-7.)

As recounted above, the FBI's excessively confrontational investigative tactics gave the Foundation's witnesses ample reason to fear that any testimony *in favor* of Claimants would be viewed as false. *See supra* at 83. The jury reasonably could have inferred from that evidence that the witnesses invoked the privilege because their testimony

would have denied wrongdoing on the part of the Foundation, and they were led to fear a prosecution for perjury if they so testified. Subsequent admonitions from the prosecutors in 2013 and 2017 that they could still be prosecuted and would be wise to continue invoking their privilege would have supported an inference that the witnesses chose not to testify out of fear of antagonizing the Government with testimony that undermined its case. (Dkt. 1719 at 7.)

The District Court largely precluded that evidence because of its erroneous belief that the jury should determine whether coercion occurred only by assessing the demeanor of the invoking witnesses. (SPA-240.) As discussed above, that was error. The only way to prove coercion is with evidence of how the witnesses were actually treated by the Government, and the District Court erroneously precluded virtually all of Claimants' evidence under the guise of prohibiting Claimants from putting the Government's investigation "on trial." (SPA-241-42.)

By doing so, the District Court prevented Claimants from effectively challenging the adverse inference. As the District Court instructed the jury (A-2775; A-3050; A-3160; A-3371; A-3505), the adverse inference is permissive. *Brink's*, 717 F.2d at 709. Claimants should have been allowed to offer evidence supporting other permissible inferences based on the Government's conduct in this case. Indeed, courts recognize that the "harshness" of the Fifth Amendment adverse inference "is mitigated by the ability of the person invoking the privilege to explain why he did so or to show by other evidence that his response would not have incriminated him." *Penfield v. Venuti*, 589 F. Supp. 250, 255 (D. Conn. 1984) (citation and internal quotation marks omitted); *see also First Interregional Equity Corp. v. Haughton*, No. 91-cv-0143, 1993 WL 361576, at *4 (S.D.N.Y. Sept. 16, 1993); *SEC v. DiBella*, No. 04-cv-1342,

2007 WL 1395105 at *4 (D. Conn. May 8, 2007). The failure to afford Claimants that opportunity is yet another basis for reversal on this issue.

D. The Erroneous Failure to Sanction Flagrant Government Misbehavior

There is a separate reason the District Court should have precluded the privilege invocations. The Supreme Court observed long ago that it may amount to prosecutorial misconduct "when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege." *Namet v. United States*, 373 U.S. 179, 186-88 (1963). In applying that rule, "courts have analyzed various factors, including the prosecutor's intent in calling the witness, the number of questions asked, their importance to the [Government's] case, whether the prosecutor draws any inference in his closing argument from the witness' refusal to answer . . . and whether the trial judge gives a curative instruction." *Rado v. Connecticut*, 607 F.2d 572, 581 (2d Cir. 1979).

Ethical considerations are implicated here as well: prosecutors are not permitted to use their criminal investigative powers with the intent to induce witnesses to make themselves unavailable. *See* American Bar Association, *Criminal Justice Standards for the Prosecution Function* Standard 3-3.4(g) (4th ed.).

There could hardly be clearer evidence of a "conscious and flagrant" Government effort "to build its case out of inferences arising from the use of the testimonial privilege" than Claimants presented here. When Foundation witnesses wanted to testify in 2013, the Government, interested in privilege invocations rather than testimony, abruptly cancelled their depositions. When Hassani and Dabiran were willing to testify in 2017, the Government first tried to bully them into changing their minds, and then moved to preclude

their testimony. In 2013, the Government claimed board members faced criminal exposure until November 2014; in 2017, the Government came up with a new theory, resulting in potential exposure for another several years.

Both the case law and the ethical guidance focus on the *intent* of the prosecutor when he or she engages in conduct that causes witnesses to withhold testimony. In this regard, the record is clear. But any doubt about intent was dispelled by the prosecutor's post-verdict voicemail message to counsel for Hassani and Dabiran. (EX-3991.) If the Court listens to that voicemail, it will better understand the necessity in this case of precluding entirely the privilege invocations on remand as a sanction.

IV. The District Court Erroneously Permitted the Government to Pursue Forfeiture of Properties "Retained" through Alleged Criminal Services Without a Valid Evidentiary Basis

At trial, the parties stipulated that Claimants acquired all of the Defendant Properties, other than the bank accounts and one small parcel of the Queens Community Center, *before* the 1995 sanctions went into effect. (EX-1635-36.) Accordingly, it was undisputed that these properties were not *obtained* as a result of the alleged criminal services and, therefore, could not constitute forfeitable "proceeds" of IEEPA violations on that basis. *See United States v. Capoccia*, 503 F.3d 103, 116 (2d Cir. 2007) ("[T]he government has not established (nor logically could it) that the funds involved in the [earlier] transfers were 'obtained . . . as a result' of the later, particular transfers of which [defendant] was convicted."). Nonetheless, the Government argued that these properties were subject to

forfeiture in full as criminal proceeds because they were *retained* as a result of IEEPA violations.[36]

In advancing the retained property theory, the Government argued that Claimants were able to keep their ownership interests in the Defendant Properties as a result of so-called "concealment services" to Iran. (A-3621-23; A-3627.) It vaguely characterized those services as encompassing "everything the partnership does," arguing that Claimants "were constantly worried that the building would be taken away if the government of Iran's role were revealed" and that the Foundation's conduct "prevent[ed] that from happening." (A-3623; A-3628.) But the Government barely explained how Claimants' services prevented their property from being "taken away"; in fact, the Government identified only one actual mechanism through which it claimed that Claimants might have lost assets after 1995. It asserted that two Foundation board members provided false testimony in civil actions brought in the 1990s—*Gabay v. Mostazafan Found. of Iran*, 92-cv-6954 (KMW) (S.D.N.Y.) and *Flatow v. Islamic Republic of Iran*, AW-98-4152, Misc. No. 98-285 (D. Md.)—and that testimony saved Claimants from losing all of their assets. (A-3622-23; A-3688-89.) That argument is legally and

[36] The Government separately argued that the Building and Community Centers were subject to *partial* forfeiture on the theory that proceeds of IEEPA violations—*i.e.,* the Building's net rental income generated after 1995—were used to invest in or improve those properties. (A-3628; A-3630; A-3631.) The jury in fact found that the Building and Community Centers were partially subject to forfeiture as proceeds of IEEPA violations, in amounts ranging from 0-44%. (A-4174.) That is a separate aspect of the jury's verdict (resulting in a far smaller forfeiture) that is not specifically addressed in this section.

factually meritless since both cases were dismissed for reasons having nothing to do with the allegedly false testimony, and this Court's decision in the first appeal confirms that the cases were properly disposed of as a matter of law. *See Kirschenbaum v. 650 Fifth Ave. and Related Prop.*, 830 F.3d 107, 130 (2d Cir. 2016).

The District Court erred in permitting the Government to proceed on its retained property theory on the basis of the *Gabay* and *Flatow* cases, and it exacerbated its error by giving a jury instruction that seemed to endorse the Government's theory. The jury's verdict—in particular the jury's finding that the Foundation's entire interest in the Partnership had been retained as a result of an IEEPA violation—is not supported by sufficient evidence. The verdict on the retained theory of forfeiture should be vacated, and judgment as to forfeiture of the partnership interest should be entered in Claimants' favor as a matter of law. In addition, this Court should vacate the jury's verdict that the Defendant Properties are forfeitable under the money laundering theory of forfeiture. That verdict is contingent upon the jury's determination of what constitutes proceeds, and the District Court's error in addressing allegedly retained property invalidates it.

A. The Government's Retained Property Theory Is Not Supported by Sufficient Evidence

While property retained as a result of a criminal offense may be subject to forfeiture on that basis, *see United States v. Torres*, 703 F.3d 194, 200-02 (2d Cir. 2012), here, the Government presented no legally sufficient evidence that Claimants actually retained their interests in the Defendant Properties as a result of IEEPA violations.[37] At trial, over

[37] The District Court should not have allowed this theory to be presented to the jury. It further erred by denying Claimants' motion for judgment as a matter of law. Fed. R.

Claimants' objection, the District Court permitted the Government to argue that "but for" allegedly false testimony by the Foundation's directors in *Gabay* and *Flatow*, the Foundation would have lost the Defendant Properties. (*See* A-3622-23.) In *Gabay*, the Foundation directors Mohammad Geramian and Houshang Ahmadi, among other witnesses, provided deposition testimony, and Geramian submitted an affidavit. (EX-2057-2193; EX-2194-2267; EX-2307-09.) In *Flatow*, the parties largely relied on evidence from *Gabay*. Both cases were ultimately dismissed based on the courts' holdings that the Foundation was not an "alter ego" or "agency or instrumentality" of Iran under the FSIA and could not be held liable for outstanding judgments against Iran. *See Gabay v. Mostazafan Found. of Iran*, 968 F. Supp. 895 (S.D.N.Y. 1997), *aff'd* No. 97-7826, 1998 WL 385909 (Table) (2d Cir. May 4, 1998); *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535 (D. Md. 1999), *aff'd* No. 99-2409, 2000 WL 1012956 (4th Cir. July 24, 2000).

In reaching their decisions, neither court relied on Geramian's testimony or affidavit *at all*, and both courts referenced Ahmadi's testimony only for an uncontroversial fact about how he was appointed to the Foundation's Board. *Gabay*, 968 F. Supp. at 899-900; *Flatow*, 67 F. Supp. 2d at 540. Instead, those courts relied on other evidence and on legal principles involving the FSIA that are distinct from the issues in this forfeiture action, and on which the jury was not instructed. The court in *Gabay* dismissed the case for lack of subject matter jurisdiction, concluding that the facts "do not show that the Iran Foundation exercised control over the day-to-day activities of the New York Foundation." *Id.* at

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Civ. P. 50; *see also Hernandez v. Keane*, 341 F.3d 137, 143-44 (2d Cir. 2003). A district court's determination of a motion for judgment as a matter of law is reviewed *de novo*. *Lore v. City of Syracuse*, 670 F.3d 127, 150 (2d Cir. 2012).

899. In *Flatow*, the court also granted summary judgment, holding that as a New York citizen, the Foundation could not be deemed an "agency or instrumentality" of Iran under the FSIA, among other reasons. *Flatow*, 67 F. Supp. 2d. at 538, 542. Contrary to the Government's argument, the board members' testimony did not allow the Foundation to retain its assets.

As further confirmation of that fact, the possibility that *Gabay* or *Flatow* would have come out differently but for the directors' testimony is foreclosed by *this* Court's decision in the previous appeal in the related *Kirschenbaum* case. In *Kirschenbaum v. 650 Fifth Ave. and Related Prop.*, 830 F.3d 107 (2d Cir. 2016), this Court evaluated the evidence supporting the theory that the Foundation is an agency or instrumentality or alter ego of Iran under the FSIA—the very same question that was before the courts in *Gabay* and *Flatow*.[38] This Court held that the evidence "is insufficient to demonstrate Iran's *disregard* for Alavi's separate corporate form, much less Iran's exercise of *day-to-day* control over Alavi." *Id.* at 130. Accordingly, this Court concluded that the Foundation "do[es] not qualify, as a matter of law, as the agenc[y] or instrumentalit[y] of the foreign state of Iran" and that it "do[es] not qualify as the alter ego[] of Iran," such that its properties may be turned over to "help satisfy Plaintiffs' judgments under the FSIA." *Id.* at 141-42. In *Gabay* and *Flatow*, the courts were legally required to reach the same decision this Court reached in *Kirschenbaum*. Thus, as a matter of law, Geramian and Ahmadi's testimony could not have properly impacted the results of those actions.

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[38] Neither Gabay nor Flatow brought any claims under the TRIA, 28 U.S.C. § 1610 note, which had not yet been enacted into law, or any claims against the Partnership.

Because no evidence in this case supports the Government's "retained" theory, the verdict should be set aside and judgment should be entered as a matter of law in Claimants' favor. *Provost v. City of Newburgh*, 262 F.3d 146, 156 (2d Cir. 2001) (finding district court "properly granted the defendants' Rule 50 motion" where verdict "was, at best, the result of . . . speculation").

B. The District Court's Instruction Regarding the *Gabay* and *Flatow* Actions Unfairly Prejudiced Claimants

Compounding its error in permitting the Government to proceed on its retained property argument in the absence of legally sufficient evidence, the District Court provided an instruction to the jury that characterized selected portions of the *Gabay* and *Flatow* testimony and those courts' decisions in a manner that supported the Government's theory, effectively placing its imprimatur on the Government's case.[39] Claimants objected, explaining that the District Court should admit the underlying materials without selectively referencing only narrow portions of them, but the objection was overruled. (Dkt. 1848.) With respect to *Gabay*, the District Court highlighted to the jury two sentences about the Foundation's relationship with Iran from the 1992 Geramian affidavit, and one answer each from Geramian's and

[39] A verdict should be vacated where, as here, the District Court's erroneous admission of unfairly prejudicial evidence had a "substantial and injurious effect or influence on the jury's verdict." *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005) (internal quotation marks omitted); *see also United States v. Morgan*, 786 F.3d 227, 234-35 (2d Cir. 2015); *United States v. Curley*, 639 F.3d 50, 63 (2d Cir. 2011). A district court's evidentiary decisions are reviewed for an abuse of discretion. *Garcia*, 413 F.3d at 210.

Ahmadi's depositions in 1995 and 1996. (A-3501.) The District Court then stated: "Gabay's case was eventually dismissed following the [F]oundation's motions to dismiss and motions for summary judgment. Among the arguments defendant in that case had made was that Gabay had failed to show that the Bonyad Mostazafan exercised day-to-day control over the Alavi Foundation during the relevant time periods." (*Id.*) The District Court provided a similar instruction with respect to *Flatow*. (*Id.*)

The instruction suggested a link between the allegedly false testimony in *Gabay* and *Flatow* and the dismissal of the plaintiffs' claims. It condensed years of litigation, hundreds of pages of deposition testimony, and pages of judicial opinions into a few short paragraphs. (*See id.*) It presented an incomplete and misleading picture of what actually occurred during those litigations, and what would have occurred if the relevant testimony had been different, thereby blessing the Government's cherry-picked version of the facts. *See United States v. Mundy*, 539 F.3d 154, 158 (2d Cir. 2008) ("[By] exercising their own judgment on how evidence should be described, which aspects should be stressed, which aspects ignored . . . , courts inescapably influence the jury on decisions which should be in the jury's sole province."); *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9, 10-11 (2d Cir. 1981) (vacating verdict where trial judge summarized defendant's evidence at length but made no reference to plaintiff's evidence or arguments); *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993) ("Judicial findings of fact present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice." (internal quotation marks omitted)).

The District Court's erroneous instruction, coupled with the Government's arguments, invited the jury to speculate about the outcome of the *Gabay* and *Flatow* litigations,

without giving the jury any of the material (such as other evidence that those courts considered or the relevant legal framework) that it would need to determine whether the allegedly false testimony actually influenced the outcomes of those cases. These errors had a "substantial and injurious effect or influence on the jury's verdict," and so the verdict should be vacated. *Garcia*, 413 F.3d at 210.

C. This Court Should Vacate the Jury's Findings Regarding Money Laundering

The District Court's errors in connection with the Government's retained property theory also require that the jury's findings that certain Defendant Properties are subject to money laundering forfeiture, in whole or in part, be vacated. The jury's verdict regarding money laundering was contingent upon its finding with respect to the proceeds of IEEPA violations; indeed, a money laundering transaction cannot occur unless there is first a separate, underlying offense giving rise to criminal proceeds. *See, e.g.*, *United States v. Napoli*, 54 F.3d 63, 68 (2d Cir. 1995) (describing money laundering as a "two-step" process that "requires the defendant to (1) acquire the proceeds of a specified unlawful activity, and then (2) engage in a financial transaction with those proceeds").

If the jury had not been presented with the improper argument and jury instruction regarding retained property, and had not reached a legally invalid conclusion regarding property retained as proceeds of an IEEPA violation, it is by no means clear that the jury would have found that a money laundering transaction occurred, let alone that the Building or the Partnership was involved in it. The Government specifically relied on the retained property theory in its argument that a money laundering transaction occurred. (A-3630.) Because this Court cannot "determine with certainty" that the District Court's errors with respect to allegedly retained property did not also infect the money laundering

verdict, *Cweklinsky v. Mobile Chem. Co.*, 364 F.3d 68, 77 (2d Cir. 2004), it should set aside the jury's findings regarding money laundering forfeiture (A-4176-80 (questions 4-7)) and remand for a new trial on that issue. *See Bruneau ex rel. Schofield v. South Kortright Cent. School Dist.*, 163 F.3d 749, 759 (2d Cir. 1998) ("[W]hen alternative theories for imposing liability are given to the jury, but one of those theories should not have been submitted . . . the usual course is to reverse the verdict and order a new trial because it is impossible to determine whether the invalid theory was or was not the sole basis for the verdict.").

V. Additional Errors Deprived Claimants of Their Right to a Fair Trial

A. The District Court Erred in Numerous Evidentiary Rulings

Evidentiary rulings are discretionary, but the discretion in this case was uniformly exercised in favor of the Government.[40] No party is entitled to a particular share of rulings in its favor, or any favorable rulings at all. But the record in this case, viewed as a whole, reveals a playing field unfairly tilted in the Government's favor, which skewed the

[40] This began on remand with the motions *in limine*, where the District Court ruled for the Government on every contested issue but one—then reversed itself on that single outlier ruling. (*See* SPA-170-214; *see also* SPA-245-48; SPA-270-73.) It continued through trial, where the court decided virtually every written evidentiary ruling for the Government. (*See* SPA-218-25; SPA-226-31; SPA-232-44; SPA-245-48; SPA-249-51; SPA-252-57; SPA-258-65; SPA-270-73; SPA-274-77; SPA-278-90; SPA-291-96; SPA-297-98; SPA-299-305; SPA-306-22; A-4011-12; A-3984-86.)

evidence presented to the jury and irreparably prejudiced Claimants' case.

1. The District Court Erred by Barring Claimants from Rebutting the Government's Claim That Alavi's Philanthropy Was a Service for Iran

The Government contended that the Foundation was only "ostensibly a charitable organization" (A-2879), and opened its case by telling the jury that the Foundation's philanthropy was actually a "service" it provided to, and at the direction of, the government of Iran. (A-2807.) These statements were not true, but when Claimants sought to counter them with evidence showing the scope of the Foundation's charitable works and its independence from Iranian government control, the District Court erected one road block after another.

Claimants sought to elicit testimony from five representatives of diverse organizations that had received funding from the Foundation. (Dkt. 1737.) This testimony would have demonstrated that the Foundation's philanthropy was not only free from Iranian control, but that it often was contrary to the policy and the expressed preferences of the Iranian government. (*Id.*) In particular, this evidence would have refuted the Government's claim—emphasized in its summation—that the Foundation took instructions from the Iranian government to "only be giving to Shiites." (A-3626.)

The District Court initially "preclude[d] all testimony from donees of Alavi" on the faulty but revealing logic that evidence of the Foundation's charitable works would risk "prejudicing the Government" and "mislead the jury." (SPA-203; SPA-205.) Claimants provided a "showing of relevance" at the court's invitation (SPA-203-04) for witnesses representing five organizations whose donee relationships with the Foundation refuted the Government's

claims about the Foundation's charitable work. (Dkt. 1737 at 3-4.) The District Court permitted just two of these five witnesses to testify and imposed severe restrictions on the scope and length of Claimants' examinations. (SPA-226-31.) The court limited the two witnesses' testimony to twenty minutes each, and permitted only the most abstract discussion about the Foundation's philanthropic guidelines, prohibiting "mention[ing] any specific type of project that Alavi has funded." (SPA-260-63.) When Claimants were finally permitted to put these witnesses on the stand, the District Court interrupted to demand that Claimants explain why they were asking basic background questions. (*See* A-3455.)

These rulings enabled the Government to argue in its summation its version of the Foundation's approach to charity: "With respect to Alavi's charity giving, the ambassador instructed, you should only be going to Shiites and then Assa." (A-3626.) But the District Court unfairly prevented Claimants from proving otherwise. More broadly, the District Court's rulings also inhibited Claimants' ability to fairly prove to the jury what the Foundation actually did, year in and year out. The Government capitalized on the resulting vacuum by creating the false impression that the main focus of the Foundation's board was on Assa, or the Iranian ambassador to the United Nations, or anything but the extensive and varied charitable activities the Foundation supports. For example, the rebuttal summation began with this sarcastic comment: "They called Ms. Van Dyk, Mr. Kazimi [the two witnesses permitted by the District Court]. Perhaps we should pause to admire some of the work that those people do. But then we can move on to what is relevant in this case." (A-3682.) But a fair depiction of the full range of the Foundation's charitable works in the United States was *always* relevant to this case, and was made more so by the Government's central themes at trial.

The dearth of evidence about the board's actual work also enabled the Government to unfairly belittle the evidence of the Foundation's efforts to pierce Assa's obstructive efforts and find out more about its true owners. Thus, again from the rebuttal summation, referring to the period between 1995 and 2003: "Let's go back to the timeline of the letters. Eight years go by. *Nothing happens*." (A-3686.) It indeed seemed that way from the evidence because Claimants were unfairly restrained from proving that plenty of things were happening during that period. The Foundation's board was supervising the management of the Building and the other properties and vetting countless funding proposals. (A-3398-99.) There was no focus on Assa; the treasurer of the Foundation beginning in 1991, a world-class economist, did not even know Assa *existed* until the late 1990s, when the Building began to turn a profit. (A-3394; A-3398; A-3401.) But with the record unfairly truncated by the District Court's instinct that evidence of the Foundation's charitable works would only prejudice or mislead, Claimants could not effectively make that argument.

2. The District Court Erred by Permitting the Government to Argue That the 1989 Transaction Was Illegal, Then Barring Claimants from Proving Otherwise

Before the trial started, and over Claimants' objections, the District Court specifically held that "[t]he Government is fully entitled to tell their story of possible tax violations concerning the 1989 partnership transaction." (*See* SPA-192.) It stated in the same ruling that it "would certainly be willing to give a limiting instruction to the jury that no criminal tax charges were ever brought." (SPA-193.)

Having been granted permission to do so, the Government raised the specter of tax violations in its opening, telling the jury that the Foundation sought to "get out of paying

millions of dollars per year in taxes on the [Building's] income." (A-2808.) Claimants' counsel responded in their opening by asserting that the transaction was lawful, and that was why the Government had never filed tax charges. (A-2818.) The District Court reprimanded Claimants' counsel for mentioning that no criminal tax charges had been brought, deeming that an "impropriety" (A-2849), and instructed the jury to disregard this statement and that "whether the government brought tax charges against any of the claimants is not your concern. It is not relevant." (A-2853.)

The District Court then proceeded to permit the Government to elicit ample testimony about the purported unlawfulness of the 1989 transaction. For example, the Government said that this arrangement was "clearly going to be illegal" (A-2888), that its purpose was to "not have to pay the taxes" (A-2886), and that although the Foundation "had several different ideas that would have been completely legal," those lawful options "were vetoed." (A-2887.) The court instructed the jury that it could consider the tax implications of the transaction in evaluating the Foundation's "state of mind." (A-3502.)

Having first denied Claimants' pretrial request to keep this issue out of the case, and then having allowed the Government to insinuate that the Foundation engaged in tax fraud unrelated to alleged wrongdoing on trial, the District Court switched gears and prevented Claimants from responding. In the middle of trial, the court precluded Claimants from offering the long-planned testimony of Professor John Steines, a tax-law expert who had been on Claimants' witness list for years and deposed by the Government in 2013. (Dkt. 1826 at 1-2.) After previously permitting an IRS agent to testify that the transaction was "clearly going to be illegal" (A-2888), the court turned its own Rule 403 determination on its head: suddenly, Steines's

rebuttal testimony about the transaction's legality was "both improper, irrelevant and, under Rule 403, [ran] a strong risk of confusing or misleading the jury." (SPA-288.)

Perhaps recognizing this flaw in its logic, the court *sua sponte* revisited its preclusion of Steines the next morning. Despite its acknowledgment in its written opinion the day before that "no party suggests that Professor Steines lacks appropriate expertise in the area" (SPA-288), the court pronounced that Steines's testimony was "separately excludable under *Daubert*" because it would be "nothing more than improper legal conclusions," and "in addition to all those things, Rule 403 provides a separate basis for precluding admissibility." (A-3339.)

In sum, the District Court first erred by even allowing this issue into the trial. But it compounded that error by letting the Government allege a tax fraud that the court instructed the jury shed light on the Foundation's "state of mind."[41] (A-3501-02.) Then the court left the jury to make its determination with only one side's evidence. This was an abuse of its discretion.

3. The District Court Erred by Preventing Claimants from Rebutting the Government's Assertion That an American Foundation's Contacts with Foreign Officials Were Suspect and *Prima Facie* Evidence of Illicit Ties

The Government leaned heavily on evidence that various people at the Foundation had communicated and met with

[41] The District Court did not explain why the Foundation's "state of mind" in 1989, as evidenced by any tax impropriety in the transaction that created Assa, would be relevant to whether it knowingly violated sanctions that took effect six years later.

Iranian diplomats in New York. Indeed, it began its case with a statement that the Foundation is "not like an ordinary charity," and promised to reveal contacts "between and among Alavi board members and between government officials," including the Iranian ambassador to the United Nations. (A-2807; A-2809.) Circling back in its summation, the Government told the jury that the Foundation was "controlled" by the "Iranian ambassador to the United Nations" (A-3605), providing the names and tenures of four different Iranian ambassadors. (A-3608-09.) It asked the jury to focus in particular on "notes about meetings with the ambassador[s]" (A-3606), and the fact that some of these diplomats "attended some Alavi board meetings." (A-3609.) In response, Claimants sought to elicit testimony from Marie-Monique Steckel, the president of the French Institute Alliance Française, a Franco-American national-heritage foundation based in New York, to demonstrate that such contacts with home-country diplomats are not only common for similar national-heritage nonprofit organizations, but it would be unusual if they did not occur. (Dkt. 1827.) The District Court precluded this testimony completely (SPA-279-82), and in so doing ensured that the Government was free to draw nefarious implications from the Foundations's contacts with Iranian diplomats that Steckel's testimony would have put in a much more benign context.

Steckel's testimony easily satisfied Rule 401's "very low" threshold for relevance. *United States v. al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008). The Government made an issue out of whether the Foundation's contacts with Iranian diplomats made it "not like an ordinary charity," and Steckel's testimony would have helped the jury understand the fallacy of that argument: that "ordinary charit[ies]" organized as national-heritage foundations often communicate or confer with their home country's local diplomats. Nor was jury confusion a reasonable basis for precluding Claimants' proffered testimony. (SPA-281-82.)

Claimants never disputed that the Government could attempt to differentiate Steckel's foundation from the Foundation; and the Government would have been free to cross-examine Steckel to draw out any distinctions and argue them to the jury. (*See* Dkt. 1827.) That objection, and the District Court's apparent related concern, went only to the weight of Steckel's precluded testimony, and not its admissibility. *See, e.g.*, *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003) ("Nonconclusive evidence should still be admitted if it makes a proposition more probable than not; factors which make evidence less than conclusive affect only weight, not admissibility." (citation and internal quotation marks omitted)). The District Court's refusal to permit Claimants to rebut one of the Government's central factual assertions was one more example of its consistent exercise of discretion in the Government's favor.

4. The District Court Erred in Its Zeal to Avoid "Putting the Government on Trial"

There was no dispute at the trial that the prosecutors in charge of the investigation had clashed with the FBI agents because the latter were excessively "confrontational" and too eager to "put words in the witness's mouths" during interviews. (A-2934.) As discussed above, when Claimants sought to suggest that the overbearing agents were one reason why those witnesses asserted the Fifth Amendment privilege, the District Court refused to allow this effort to put the agents "on trial." (A-2725); *see supra* at § III.C. The court *sua sponte* interrupted Claimants' opening statement, reprimanding counsel in front of the jury and directing there be no mention of anything regarding "the nature of the investigation." (A-2821.)

The court then imposed a unique and extraordinary procedure on Claimants: their counsel were required to "pre-clear" their cross-examination outlines of Government

witnesses with the district judge, in advance. (A-3827.) When Claimants sought twenty minutes of additional testimony from an NYPD detective who was the Government's second witness, the court required that Claimants "prepare something in writing immediately for the Court to review at a break." (*Id.*; *see also* A-2853 (court reviewed counsel's cross-examination outline).) Before Claimants were permitted to cross-examine the FBI case agent, the District Court reviewed counsel's cross-examination outline and made substantive edits to Claimants' lines of inquiry, "indicated through X'g [*sic*] out certain portions" of counsel's "personal notes." (A-2912; A-2961.)

The District Court also *sua sponte* interrupted Claimants' summation on this topic. When called to sidebar, Claimants' counsel was told he "went over the line" by arguing that the FBI agents "knew the real facts even before they spoke to anybody at Alavi." (A-3634-35.) The argument was based on the case agent's testimony that "I knew what the real facts were" before the interviews of Foundation witnesses. (A-2935.) The court promised to "cut [counsel] off" again if he mentioned the topic. (A-3635.)

5. The District Court *Sua Sponte* Policed Claimants' Defense Presentation in Other Ways

The District Court repeatedly intervened *sua sponte* in the Claimants' presentation of their defense, unduly limiting the scope of permissible argument and even restricting the use of admitted evidence.

The District Court seemed especially intent on policing Claimants' summation. One of Claimants' themes from the outset was that most of the Government's evidence related to events long before the sanctions were imposed, and thus failed to prove the requisite post-sanctions knowledge. (A-

2819-20.) Early in the trial, when Claimants' counsel pointed out that one of the Government's witnesses was last employed at the Foundation in 1983, the District Court expressed its concern that Claimants would derogate the pre-1995 evidence. (A-3029-30.) Later, at the charge conference, it warned Claimants' counsel that any argument that overly diminished the relevance of that evidence would draw a *sua sponte* interruption and "curative" instruction. (A-3589-91.)

In addition, the District Court notified Claimants' counsel that it would compensate during summation for the admission of unchallenged portions of the deposition testimony of Abbas Mirakhor, a former IMF economist who served as the Foundation's treasurer during the post-sanctions period, that it found objectionable. Specifically, it said it would interrupt the summation if Claimants relied on any parts of the lengthy testimony that the court considered "infirm." (A-3386.) Mirakhor testified that the Foundation's board's knowledge regarding the ownership of Assa was limited to its awareness that Assa was owned by investors in the United Kingdom (A-3403), which is precisely what (according to the documentary evidence) Assa had falsely told the Foundation's board in 2006. (A-3528-29; EX-1168.) When Claimants counsel said he "understood this testimony to be evidence" that was "coming in without objection," the court responded that it was "plain error" for the parties to agree to the admission of testimony that could not withstand "evidentiary challenge." (A-3387.) So counsel had to "be careful or I will interrupt you during your closings" if unspecified "quotable quotes" from Mirakhor's testimony were referenced in summation. (A-3386-87.)

6. The District Court Erred by Admitting Prejudicial Hearsay

While taxing Claimants' defense with unreasonable preclusions of evidence and close *sua sponte* supervision, the District Court buttressed the Government's case by admitting prejudicial hearsay and inflammatory but irrelevant evidence. The court permitted out-of-court statements, mostly through the testimony of agents recalling decade-old interviews, from three individuals without recent (or any) ties to the Foundation: Mohammad Badr, the Foundation's president until 1991; Mohammad Deghani Tafti, Assa's sole U.S. employee; and Hamid Firooznia, an accountant whose statements were recorded more than a year after he stopped working for the Foundation. The erroneous admission of this hearsay prejudiced Claimants by allowing agents, again and again, to insinuate that vague ties existed between the Foundation and Iran.[42]

(a) Mohammad Badr

The Government elicited from FBI case agent George Ennis his own paraphrased version of statements that were purportedly made to him in a 2009 interview of Mohammad Badr, who served as the Foundation's president from 1988 until 1991. The Government used these statements to draw what it suggested were illicit connections between the

[42] The harm of these statements was compounded, and the evidence further skewed, by the District Court's refusal to permit Claimants to meaningfully cross-examine the agents about the reliability of these statements or to introduce evidence impeaching the agents based on bias. *See supra* § III.C; *cf. Williamson v. United States*, 512 U.S. 594, 599 (1994) (recognizing risk that hearsay declarant's "words might be misunderstood or taken out of context").

Foundation and the government of Iran throughout the 1980s and early 1990s. Ennis testified to a series of purported statements that did not describe any criminal or unlawful conduct, but which served the Government's purpose of insinuating criminality from murky references to "connections" between Iran and the Foundation during the decade before the sanctions were implemented. Over repeated objections, this testimony included that the Iranian Bonyad Mostazafan was the Foundation's "parent company" (A-2886), that "at some point" the Iranian ambassador to the United Nations came to be "in charge of all things Iran in the United States," that the Foundation made "secret reports" to Iran during the late 1980s (A-2887), that Iranian officials were involved in the 1989 partnership transaction (A-2888), and so on.

The District Court erroneously admitted these statements about events from before 1991 on the ground that they were declarations against Badr's interest when made in 2009. (SPA-245-48; SPA-306-22.) The Government acknowledged that statements about pre-1991 ties with Iran, or "concealment" of those ties, would not subject Badr to liability under the IEEPA. Rather, the Government argued that Badr's references to the tax implications of the 1989 partnership transaction were against his interests (Dkt. 1741 at 5-6),[43] and that "statements concerning the Government of Iran's exercise of control over the personnel and activities of Alavi while he was president" would tend to "subject [Badr] to reputational harm, *even if not actual criminal liability*." (Dkt. 1741 at 6 (emphasis added).) And indeed, the District Court invoked this supposed "reputational harm" as an

[43] The District Court apparently accepted the Government's claim that Badr's purported statements were admissible because they exposed him to liability for "tax violations." (SPA-317.)

additional justification for admitting Badr's purported statements. (SPA-310-11.)

This is not how Federal Rule of Evidence 804 works. As the Government conceded, none of what Badr supposedly revealed was unlawful during the time he was describing (*see* SPA-315-16), and Congress *expressly rejected* this "reputational harm" rationale more than four decades ago. *See* Fed. R. Evid. 804, advisory committee's note (noting congressional rejection of "propos[al] to expand the hearsay limitation . . . to include . . . statements tending to make him an object of hatred, ridicule, or disgrace"); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1259 (E.D. Pa. 1980) (same).

The court further erred by admitting hearsay-within-hearsay statements that Badr purportedly related to Ennis in their 2009 interview. For instance, Ennis told the jury that Badr told him that an unidentified representative of the Iranian government told a *fourth person*, Hossein Mahallati (who was president of the Foundation in the 1980s, before Badr), to resign because the Iranian government had supposedly determined that it "would look like a much too close relationship between the government of Iran and the foundation to have two brothers each running the other thing." (A-2887.) Ennis was thus relating to the jury the view of the Iranian government as represented to Mahallati by an unidentified purported representative of that government, as Badr later learned (we do not know how) and told Ennis nearly a decade before Ennis's testimony. Despite having no basis for knowing or even being able to guess the identity of the actual speaker of these statements, and over Claimants' objection (A-2889), the District Court found that they were "admissible as co-conspirator statements," and that "[t]he facts and circumstances suggest that the statements made to [Badr] were from Mahallati or, at the least, someone else involved in the conspiracy." (SPA-

321 & n.8.) The District Court relied on a Fifth Circuit case for the proposition that "even if the precise identity of the speaker was unknown, the statements are still admissible under [801]." (*Id.* (citing *United States v. El-Mazain*, 664 F.3d 467, 505 (5th Cir. 2011)).) Even if *El-Mazain* were the law in this Circuit—and this Court does not appear to have adopted a similar rule—the District Court's reasoning must fail here for the same reason mentioned above: there was no conspiracy at the time described by these statements. It was neither criminal nor unlawful in the 1980s or in 1991, Badr's last year at Alavi, for the Foundation to coordinate with or even take instructions from Iranian officials. And the District Court never explained how it could have been.

Finally, the District Court simply ignored the second half of the Rule 804(b)(3) inquiry. After determining that a statement is against the declarant's penal interest, "the court must then determine whether there are corroborating circumstances indicating both the declarant's trustworthiness and the truth of the statement." *United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014) (citation and internal quotation marks omitted). And "the inference of trustworthiness from the proffered 'corroborating circumstances' must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987). Shortly before trial, Badr met with Claimants and refuted critical features of the statements documented in 2009 by the FBI, particularly with respect to the government of Iran's control of the Foundation during his time as president. (Dkt. 1760 at 9.) This history was brought to the District Court's attention, *id.*, but was never even addressed. And of course, Ennis was one of the agents the prosecutors chastised for putting words in the mouths of the Foundation's witnesses, further undermining this extensive, inadmissible testimony.

(b) Mohammad Deghani Tafti

After one of its only *in limine* rulings in Claimants' favor, the District Court arbitrarily reversed itself and ruled for the Government. Mohammad Deghani Tafti was Assa's U.S. representative, and, after 1995, the Foundation's sole point of contact with Assa besides Assa's American lawyer. Tafti routinely frustrated the Foundation's efforts to investigate Assa's true ownership, obscuring the facts at every turn and repeatedly evading meetings or refusing meaningfully to engage with the Foundation's requests for information. *See supra* at 22-23.

Over Claimants' objections (Dkt. 1617 at 22-26; Dkt. 1760; A-2914-15), the District Court permitted Ennis to testify to statements Tafti made in a 2008 proffer session held while he was detained on a material witness warrant and seeking release. (A-2924.) The District Court permitted Ennis to tell the jury, among other things, that Tafti said during the proffer that Assa was "owned" and "thoroughly and completely" controlled by Bank Melli Iran, and that Tafti also said that the government of Iran controlled the Foundation. (A-2925.)

Claimants moved *in limine* to exclude Tafti's hearsay statements, and the District Court initially agreed, finding that the circumstances of the statements "cut[] against Tafti's statements as being made in circumstances suggesting criminal exposure," and holding they were not admissible under Rule 804(b)(3) as statements against interest. (SPA-198-99.) But at the Government's urging, the District Court reversed this decision. (SPA-270-73.) The District Court stated that the Government's belated production of its proffer agreement with Tafti was "central to [the District] Court's changed ruling." (SPA-272.) Because the agreement included standard provisions permitting prosecution for false statements, perjury, or obstruction, the District Court

concluded that Tafti's statements were admissible under Rule 804(b)(3).

This ruling was in error. Whether a statement is against a declarant's interest "can only be answered in light of all the surrounding circumstances," *Williamson*, 512 U.S. at 599, and Tafti's statements in this context did not have a "tendency to . . . expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3). To the contrary, Tafti's statements were an attempt to "curry favor with the authorities" (and thus not against Tafti's interest), *see* Fed. R. Evid. 804 advisory committee's note, and indeed the prosecutors to whom Tafti spoke that day later permitted him to leave the United States after he committed to "sign over" $3 million of Assa's funds. (A-883.32.) Moreover, Tafti's proffer agreement granted him significant protections that prohibited the Government from using statements he made in the proffer session against him, except under narrow circumstances. (A-3829-30.)

The District Court's arbitrary reversal on this issue was erroneous. *See United States v. Cantley*, Crim. Nos. 86-00293-02-06, 1987 WL 13668, at *14 (E.D. Pa. July 8, 1987) (refusing to admit statement made pursuant to proffer agreement and noting that "[t]he slight risk of derivative use of a statement made in a proffer letter is insufficient to satisfy the requirement of Rule 804(b)(3)").

(c) Hamid Firooznia

The District Court wrongly permitted the Government to play an audiotape recorded by its paid informant, Hesami-Kiche, consisting of conversations he had with Claimants' former accountant Hamid Firooznia. At the time of the recording, Firooznia had not worked for or been connected to the Foundation for more than a year. (Dkt. 1769 at 1.) The court found that the conversation contained co-conspirator statements, and that "numerous other statements"

within it were "admissible under the state of mind exception of Rule 803(3)." (SPA-277.) And it refused to exclude the parts of the recording that consisted only of the Government's paid informant's self-serving statements, many of which Firooznia did not adopt. (Dkt. 1769 at 5.) All three rulings were wrong.

Firooznia was an accountant, and as mentioned above he had not performed services for Claimants for more than a year before the conversation. The District Court perfunctorily declared him to be "among the conspirators" (SPA-276), but there were no facts to support its implicit conclusion that that was the case *at the time the statements were made*. As for the equally shallow declaration that numerous unspecified statements in the conversation fell within Rule 803(3), it is inconceivable that the Foundation's former accountant's then-existing state of mind in late 2008 could either be proved by the conversation or relevant to this case. The Government contended that the conversation proved Firooznia's then-existing awareness that Bank Melli owned Assa. (Dkt. 1774 at 4.) First, even if Hesami-Kiche had told Firooznia that Bank Melli owned Assa, that fact would not be admissible to prove the point. More importantly, Firooznia's alleged awareness of that fact in late 2008 would not have been relevant to any issue in this case since he was not affiliated with the Foundation.

Finally, a paid informant's unadopted statements lack probative value and are patently inadmissible. Hesami-Kiche's comments contained loaded language that painted the Foundation in a negative light—as expected for someone working to build the Government's case. For example, Hesami-Kiche discussed the involvement of "Mahallati" as a "middleman" to solve a problem, and stated that "in the Bank Melli there is no one who can tell them that this appraising of the building is one issue and the issue that we have a problem with is something else." (Dkt. 1769 at 5.)

But Firooznia never adopted these statements, and the untaken bait is not evidence: "Statements of a cooperating witness—who is acting as a law enforcement agent—designed to inculpate, in the form of a recording offered to prove the truth of the cooperating witness's statements, are not admissible." *United States v. Carneglia*, 256 F.R.D. 384, 397 (E.D.N.Y. 2009) (Weinstein, J.). The District Court did not "carefully weigh the probative value of the evidence against the danger of *unfair* prejudice," a task of particular importance "[b]ecause of the fine lines that must be drawn when a cooperating witness is recording his conversations." *Id.* (emphasis added) (citing Fed. R. Evid. 403).

7. The District Court Wrongly Admitted Evidence about a Fraudulent Scheme Unconnected to the Foundation

Over Claimants' objection, the District Court permitted the Government to offer evidence of an irrelevant lawsuit between the Foundation and Hossein Mahallati, one of the Foundation's long-departed former presidents (the "*Hanif* litigation"). The suit involved the unsuccessful effort by the Foundation in 2003 to buy Assa's 40% stake in the Fifth Avenue Company. As described above, Mahallati, through Hanif, had offered to buy Assa, only to have the Foundation exercise its right of first refusal. After Hanif undermined the Foundation's attempt to buy Assa and the entire deal fell through, Hanif sued the Foundation. The action ended in a settlement in which the Foundation agreed to pay Mahallati $4 million. Over Claimants' objections, the Government was permitted to introduce evidence concerning Hanif's post-settlement distribution of some of the proceeds of the settlement to Iranian officials at the direction of the Iranian ambassador. (SPA-568-69.) This evidence had no value other than to associate the Foundation with allegations of corruption of which there was *no* evidence the Foundation was aware. Its prejudicial effect was considerable, as

evidenced by the amount of time the Government spent focused on the *Hanif* litigation in its summation. The prosecutor delivered a lengthy recounting of an Iranian ambassador's purported instructions to a witness, Massoud Modarres, who was never associated with the Foundation, to distribute funds received by Mahallati in the *Hanif* settlement to unidentified Iranian officials. (A-3624.) This was a sideshow, and the District Court's failure to protect Claimants against the prejudice and jury confusion attendant to this evidence was an abuse of discretion.

There was no foundation for the Government's implication that the Foundation knowingly schemed to transfer the *Hanif* settlement funds to benefactors in the Iranian government. Federal Rule of Evidence 401's relevance threshold is low, but it requires more than mere speculation. And "when speculation unsupported by evidence is necessary to conclude the hypothesis, the evidence is not relevant and will be inadmissible." *See* Weinstein's Federal Evidence § 401.04 (2017).

As for unfair prejudice, the District Court did not even address it. It simply endorsed the Government's threadbare relevance arguments and said only that it would not be "unduly confusing to the jury." (A-3295.) This prejudicial evidence was wrongly admitted solely because it was "relevant to [the Government's] theories." (A-3295.)

B. The District Court's Derisive and Disparate Treatment of Claimants Tainted the Proceedings

1. The District Court Misunderstood and Mocked the Defense

Throughout the proceedings below, the District Court's disdain for Claimants' case and their counsel was palpable, and it manifested itself in countless ways. While the court did not discuss its origin, even before the first appeal it had

ridiculed Claimants' central factual assertion as frivolous. As previously noted, Claimants contend that as a result of being informed that Bank Melli had transferred its ownership interest in the Partnership to two individuals in 1995, they no longer understood Bank Melli to be an owner of Assa. At trial, they did not dispute knowing that Bank Melli owned Assa in 1989 and continued to own it until 1995.

For some reason, the District Court thought Claimants were contending that in 1995 they suddenly *forgot* that Bank Melli owned Assa. It mocked that imagined defense when it granted summary judgment in 2013:

> Its premise is implausible: that, sometime after the conception and birth of Assa as the direct descendant of Bank Melli, and in a procedure in which Alavi was midwife, Alavi lost track of Bank Melli's previously clear control of Assa.
>
> The Government argues that Alavi asserts a sort of collective amnesia. The Court finds the analogy apt and its reality implausible. No rational juror could believe in such extraordinary amnesia . . .

(A-907.)

Claimants' actual contention is that after the ownership of Assa was transferred in 1995, Claimants not only did not know the new owners were fronts for Bank Melli, but their repeated efforts to learn more about the new owners were blocked by Assa and Bank Melli. Well into the trial on remand, during a colloquy about the appropriateness of a conscious avoidance charge, the District Court briefly realized this for the first time. When Claimants' counsel explained that the transfer of Assa's shares represented a "break" from the pre-1995 knowledge that Bank Melli owned Assa, the District Court responded that it "just now

understood part of your theory that I had not understood before":

> So this break business . . . you folks strongly believe that 1995 there's a before and after. . . . Now I'm putting together why you think that essentially what I think of as a book transfer of shares you think of as a substantive event. . . . I had never even contemplated such an argument, to tell you the truth, so that's interesting.

(A-3172-73.) Nevertheless, the District Court soon returned to dismissing the defense as an effort "to keep things out rather than trying to develop arguments about what the position of the claimants is once the evidence is in." (A-3343.)

2. The District Court Closed the Courtroom to Muslim Schoolchildren

The Government's opening statement accused the Foundation of providing charitable services at the direction and for the benefit of the government of Iran. (A-2807.) Claimants responded in their opening that the Foundation instead served communities here in the United States, and, using a small number of slides that had been shown in advance to the Government, visually depicted some of the schools and health clinics supported by the Foundation. There was no objection by the Government. (*See* A-2815-16.)

At the end of the trial day the District Court stated: "We will no more see pictures of schoolchildren on the screen. That's not going to happen again. We're no more going to see the pictures of the insides of medical facilities. That's not going to happen again. That's not what this case is

about." (A-2843.)[44] This was part of the District Court's decision to narrowly circumscribe evidence of the Foundation's charitable works on the ground that it could mislead the jury or prejudice the Government, as discussed above.

Late the following morning, the District Court summoned counsel to sidebar, where it announced that "there are 25 school children from the Farsi school that is supported by the Alavi Foundation who are prepared to enter the courtroom." The court wanted to "look at the law . . . about excluding people from an open courtroom" unless the parties were "content to send these folks away." (A-2875.) Neither side was content with that, so the District Court took an early lunch break to research whether the students could continue to be barred from the courtroom, but not before announcing that Claimants' counsel had engaged in "direct gamesmanship." (A-2875.)

[44] The District Court determined that the opening statement had overstepped the bounds of one of four orders it had entered on the docket that morning. Though the court acknowledged that it had "some of the responsibility for [the alleged overstepping] because the order had only come down this morning" (A-2842), and it should "allow folks to demonstrate that they were not ignoring the Court's decisions but were [sic] in fact just misunderstood how far they could go" (A-2843), the following morning it simply issued a written order declaring that Claimants' counsel had "ignored" "clear rulings," and intended "to proceed in a deliberate manner irrespective of the Court's rulings." (SPA-259-60.)

An hour later the session resumed. The District Court came armed with a case "directly on point for exclusion in certain circumstances." (A-2876 (citing *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005).) *Huminski* states that "[a] potential spectator may be excluded from a courtroom on a simple issue of propriety: reasonably unacceptable dress, unruly behavior . . . and the like." 396 F.3d at 87. When the Government objected to barring the students, the District Court relented. But it ordered Claimants to let it know in advance "if this is going to occur again" so it could decide whether to use an overflow courtroom with a video transmission to ensure "that the jury is appropriately focused on the issues on trial." (A-2876.)

Claimants' counsel pointed out to the District Court that an overflow courtroom should not be considered unless the capacity of the actual courtroom were exceeded. Counsel also noted that the only difference between the family members of the Iran Creditors who were present in the courtroom to support the Government and the barred Muslim school children who had wanted to be present to support Claimants was that the children were wearing headscarves—an observation the court deemed "offensive" and "so inappropriate that it is breathtaking." (A-2877.)

As for the summary finding that Claimants' counsel had engaged in "gamesmanship," it was baseless. No one on Claimants' trial team had anything to do with the students' visit to the courthouse. (*See* Dkt. 1785 at 3.) Of course, even if Claimants or their counsel had affirmatively invited the school to send the children, there would have nothing inappropriate about that.

3. The District Court's Misleading "Cross-Examination" of Hanieh Safakamal

Out of the blue, the District Court interrupted Claimants' direct examination of the Foundation's former financial

manager, Hanieh Safakamal. Having apparently conducted its own investigation of the Foundation's tax returns, the court sought to establish something that was not true and the Government has never even hinted at: that the Foundation owned property in Tehran into the late 1990s. (A-3523; *see also* EX-270-313.)

By drawing connections to Iran that even the Government had not, the court suddenly placed Claimants in an untenable position: either object before the jury to the trial court's impromptu foray into the tax returns, or try to correct the misimpression it created with an awkward "re-direct." Claimants chose the latter (*see* A-3523-24), but either one amounted to litigating against the court itself.

4. The District Court Disparaged Claimants' Counsel

Separate and apart from its accusation of "gamesmanship" described above, the District Court found that various members of Claimants' trial team engaged in misconduct. The circumstances varied, but in each instance the finding was made without notice or an opportunity to be heard, and in each instance the court was wrong.

One lawyer on Claimants' team was found to have misrepresented his own belief regarding whether the Government's cooperator, Hesami-Kiche, really had a legitimate, sudden need for a Farsi interpreter as his cross-examination was about to begin. Hesami-Kiche had testified in English, unaided by an interpreter, over two days of direct testimony. The same was true for his two days of pretrial deposition. He had spent the ten years preceding trial living in the United States and working exclusively in English with FBI agents and prosecutors, none of whom speaks Farsi. Hesami-Kiche has a bachelor's degree in Political Science from the University of Alabama in Huntsville. Yet on the morning his direct examination was about to end, the

Government brought a Farsi interpreter to court. (Hesami-Kiche continued to answer some questions in English before the interpreter could translate.) When Claimants' counsel objected to this as a "charade" intended to obstruct the cross-examination, the court immediately found that to be a strategic lie: "I actually am very surprised and can't believe that anybody in this courtroom would think that it would be a charade . . . I see that as a tactical statement more [than] an actual statement as to belief." (SPA-565.)

Another member of the trial team was found to have misled *this* Court. In denying the request on remand for statute of limitations discovery, the District Court dismissed this Court's holding that the record on that defense was "hardly developed at all," *In re 650 Fifth Ave.*, 830 F.3d at 97 & n.28, by concluding that Claimants' counsel had given this Court "a substantially incomplete (and misleading) picture of discovery" in the brief on the prior appeal. (SPA-40.) The District Court did not identify any basis for that belief, and there is none.

More bad faith was found by the District Court when Claimants' counsel objected to exhibits for which no proper foundation had been laid. In the District Court's view, as long as a foundation *could* be laid, any such objections amounted to bad faith. (SPA-567 ("I didn't think there was really a good faith basis to object to foundation. Could you require him to lay a foundation at trial? Yes. Do I think there was a good faith basis to object in the absence of all that additional work? I don't think so.").)

When counsel observed the following morning that foundation objections to decades-old documents in the absence of any facts about how they came into the witness's possession were in good faith, the District Court's response was to level an additional allegation of impropriety: "It is absolutely clear that the [C]laimants have proceeded on what I would consider to be a scorched-earth policy or practice

with this case. . . . There has been very little evidence of any material value that hasn't been vigorously contested to its admissibility, even evidence which, in the Court's view, as to which there was no real basis for lack of admissibility." (SPA-570.) This accusation was unfounded: more than 550 of the Government's trial exhibits were stipulated into evidence (*see* EX-1642-46; EX-1660-62; EX-1663-65), and Claimants agreed to various other, substantive stipulations as well. (*See* EX-1623-41.) Further stipulations were offered, but rejected *by the Government*. (*See* A-3382.) Claimants would have explained that to the District Court if given the opportunity, but these findings of impropriety were never the result of any process, and Claimants were never afforded meaningful opportunities to contest them.

Still more bad faith was found during Claimants' questioning of Misriya Chatoo, the Foundation's secretary for over 30 years, about her personal knowledge of the Foundation's efforts to learn more about Assa. Again *sua sponte*, the District Court simply cut off the questioning based on the following reasoning: "You have a woman here who has been a secretary for 30 years. Trying to elicit testimony from her about ultimate questions as to the ownership and whether or not she was has [sic] information on the ownership is not a good-faith line of questioning. I strike the line of questioning. Move on. That's it." (A-3547.)

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No one is entitled to a perfect trial, but everyone, including Claimants, is entitled to a fair one. The errors discussed above are "tile[s] in the mosaic" of a relentlessly unfair trial that resulted from "unfair judicial conduct." *United States v. Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973). We submit, respectfully, that this Court "must take care not to focus on isolated episodes, but to assess the trial court's inquiries in light of the record as a whole. Repeated

interference with the defense case may work to deprive the defendant of a fair trial." *United States v. Filani*, 74 F.3d 378, 386 (2d Cir. 1996). The only remedy for the extraordinary conduct of the trial court in this case is a reversal and a remand for a fair trial.

VI. The Forfeiture Judgment Is Constitutionally Excessive and Should Be Reduced

Under 18 U.S.C. § 983(g)(4), a claimant in a civil forfeiture action may petition the district court for a determination whether the forfeiture is constitutionally excessive and to "reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause." Upon such request, the statute requires a district court to conduct a hearing to evaluate whether forfeiture is grossly disproportional to the offense giving rise to forfeiture.[45] *Id.* § 983(g)(3). Here, the District Court erroneously decided the proportionality issue, and did so without holding a hearing. The resulting judgment, if unaltered, will result in what the Government has described as both "the largest civil forfeiture jury verdict" and "the largest terrorism-related civil forfeiture in United States history" (Dkt. 1998 at 7; Dkt. 2047 at 4), in a case that undisputedly has no connection to terrorism. The forfeiture is completely out of proportion with the gravity of the wrongful conduct and should be reduced. The Court should limit the forfeiture to the portions of the Defendant Properties attributable to criminal proceeds invested in each specific Property—11.4% of the Building; 15%, 44%, 7%, and 17% of the Texas, Queens, California, and Maryland

[45] Among other things, a hearing would be important to determine the specific values of the Defendant Properties, which was not settled in the District Court and is subject to competing evidence. (*Compare* EX-1366 *with* A-2534.1.)

Community Centers, respectively; and the bank accounts—which together have a value in excess of $65 million. Alternatively, this Court should vacate the forfeiture judgment and remand the case for the proportionality hearing required by § 983(g)(3).[46]

A. Forfeiture of the Building and the Foundation's Partnership Interest Is Punitive and Therefore Subject to the Eighth Amendment's Constraints

In rem forfeitures that are at least partially punitive are limited by the Eighth Amendment's Excessive Fines Clause. *Austin v. United States*, 509 U.S. 602, 621-22 (1993). Forfeitures are punitive if they "cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *Id.* at 621; *accord Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017). Non-punitive forfeitures, by contrast, are those that are *solely* "remedial," *e.g.*, designed to remove contraband from circulation or return property to its rightful owner. *See, e.g.*, *United States v. Sum of $185,336.07 United States Currency*, 731 F.3d 189, 194 (2d Cir. 2013).

The forfeiture in this action is plainly punitive, at least in part, and therefore is constrained by § 983(g) and the Eighth Amendment.[47] It does not "compensate the Government for

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[46] This Court reviews a district court's determination of whether a fine is constitutionally excessive *de novo*, with deference to factual findings unless clearly erroneous. *United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998); s*ee also von Hofe v. United States*, 492 F.3d 175, 181 (2d Cir. 2007).

[47] Although the Government has questioned whether the Eighth Amendment applies to corporations, this Court and others have repeatedly assumed that entity claimants can raise Eighth Amendment challenges to forfeiture. *See, e.g.*,

a loss" or "restore property to its rightful owner," *United States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016), but is instead tied "directly to the commission of" a criminal offense. *Austin*, 509 U.S. at 619-22. It could not have been ordered if Claimants had been found to be innocent owners. *See Bajakajian*, 524 U.S. at 332 (forfeiture is punitive where it "cannot be imposed upon innocent owners"); *United States v. Jalaram*, 599 F.3d 347, 354 (4th Cir. 2010) (same). The value of the Building and Partnership, moreover, bears "no correlation to any damages sustained by society or to the cost of enforcing the law." *Austin*, 509 U.S. at 621. Rather, their value is primarily a function of the Building's location in midtown Manhattan and the New York commercial real estate market. *See Sum of $185,336.07*, 731 F.3d at 194 (distinguishing forfeiture of drug proceeds, which "will always be directly proportional to the amount of drugs sold," from forfeiture of "real estate"). The forfeiture here is therefore punitive and subject to Eighth Amendment constraints.[48]

United States v. 143-147 E. 23rd St., 77 F.3d 648, 657-59 (2d Cir. 1996); *United States v. 141st St. Corp.*, 911 F.2d 870, 880-81 (2d Cir. 1990); *see also United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011); *United States v. Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949, 958 (10th Cir. 2001).

[48] The District Court erred in finding that the Foundation's interest in the Partnership is "guilty property" that is "proceeds of a crime" and, therefore, that "the 8th Amendment's prohibition on excessive fines does not apply." (SPA-502.) In doing so it mistakenly relied on *Sum of $185,336.07*, 731 F.3d at 194, a case confined to the "'drug proceeds' exception to the Excessive Fines Clause," *Viloski*, 814 F.3d at 109 n.7, which is of questionable validity in light of the Supreme Court's decision in *Kokesh*,

B. Forfeiture of the Building and the Partnership Interest Is Grossly Disproportional to the Gravity of the Alleged Offenses

In evaluating whether a forfeiture violates the Eighth Amendment, courts consider "the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct." *von Hofe*, 492 F.3d at 186. This Court also

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137 S. Ct. at 1643-44 (finding disgorgement of proceeds of securities law violations is punitive). Moreover, courts have expressly rejected the idea that forfeiture is necessarily constitutional if it involves only the proceeds of criminal conduct. *See Jalaram*, 599 F.3d at 355 n.7 ("[T]he Government['s] assert[ion] that . . . proceeds of an alleged illegal activity can *never* be excessive . . . is simply false."); *United States v. Corrado*, 227 F.3d 543, 552 (6th Cir. 2000) ("Though [RICO] appears to require total forfeiture of illegal proceeds, courts can reduce the forfeiture to make it proportional to the seriousness of the offense so as not to violate the Eighth Amendment); *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999) (reversing forfeiture of proceeds from false loan applications where the district court failed to consider whether the forfeiture was constitutionally excessive), *amended on denial of reh'g*, 172 F.3d 689 (1999). In any event, § 983(g) *required* the District Court to conduct a proportionality analysis in this civil forfeiture action. 18 U.S.C.§ 983(g)(2) ("[T]he court *shall compare* the forfeiture to the gravity of the offense giving rise to the forfeiture." (emphasis added)). Its failure to do so at all was error.

considers the effect of the forfeiture on the property owner, particularly when it would deprive the owner of its livelihood. *Viloski*, 814 F.3d at 111-12. Finally, courts look to the nexus between the defendant properties and the alleged offenses. *See von Hofe*, 492 F.3d at 185.

1. The Alleged Conduct Involved Commercial and Charitable Services, Not Terrorism

Although the IEEPA protects important national interests, Claimants' conduct here was commercial and charitable in nature. It was the continuation of a business relationship that was lawful when it began in 1989, but became unlawful when the United States imposed additional sanctions on Iran in 1995. Contrary to the repeated insinuations and references to terrorism financing at trial and the Government's description of the verdict as "the largest terrorism-related civil forfeiture in United States history," it is undisputed that Claimants have *never* been involved in or supported terrorist activity. (A-2835-36; A-2867-68; A-3122; A-3605; A-3690; Dkt. 2037 at 4.) As the Government acknowledged, the majority of Claimants' activities were not inherently wrongful; rather, the alleged services included "lawful services that were provided by Claimants in an illegal manner" because of Bank Melli's involvement. (*See* Dkt. 1902 at 324 cmt. 6.)

Moreover, there is no evidence that Claimants' conduct caused any particularized harm. *See Bajakajian*, 524 U.S. at 339 (reducing forfeiture where "[t]he harm that respondent caused was also minimal."). There is no evidence, for example, that Claimants operated the Building in order to fund Iran's improper goals or for a purpose that would otherwise jeopardize national security. To the contrary, the Foundation used the distributions it received from the Building to support its charitable mission, largely by making grants to U.S. colleges and universities, donations to Persian schools and Islamic community centers in the United States,

and grants to Persian art and literature programs. (*See, e.g.*, A-3508-09; A-3511; A-3524; EX-1121-23.) The nature of the conduct and lack of particularized harm indicate that the forfeiture is excessive. *See, e.g.*, *von Hofe*, 492 F.3d at 191 ("The government cannot justify forfeiture of Mrs. Van Hofe's interest in 32 Medley Lane, for the punishment bears no reasonable correlation either to her minimal culpability or any harm she caused.").

2. The Forfeiture Vastly Exceeds the Criminal Punishments Available and Other Relevant Forfeiture Awards

The penalty that likely would have been imposed had Claimants been convicted of a criminal offense is far smaller than the amount of the ordered forfeiture. Courts routinely look to the ranges set out in the U.S. Sentencing Guidelines to determine whether a forfeiture is constitutionally excessive. *See Bajakajian*, 524 U.S. at 338; *United States v. Castello*, 611 F.3d 116, 123 (2d Cir. 2010). Had Claimants been convicted of the criminal charges underlying the forfeiture, the Guidelines would have provided for a fine between $16.8 and $33.6 million. U.S.S.G. §§ 8C2.4, 8C2.6, 8C2.7.[49] In contrast, the value of Claimants' interests in the

[49] The Guidelines range is calculated in accordance with U.S.S.G. § 8C2.4, and was briefed by Claimants and the Government in the District Court. (*See* Dkt. 1998 at 5; Dkt. 2017 at 5 n.2; Dkt. 2037 at 6-7.) Adopting the Government's calculation, the applicable offense level is 30. (*See* Dkt. 2017 at 5 n.2.) Because the offense conduct occurred prior to November 1, 2015, the base fine amount must be determined using the fine table set out in the 2014 version of the Guidelines. U.S.S.G. § 8C2.4(e)(1). Under the 2014 Guidelines, a base offense level of 30 yields a base fine of $10,500,000. U.S.S.G. § 8C2.4(d) (2014). The applicable culpability score is 5, but even if the

Defendant Properties, according to Government records, is well in excess of $600 million. (*See* A-2534.1 (estimating the value of the Building alone at $600 million).) The forfeiture thus amounts to roughly *twenty times* (or more) of the appropriate criminal penalty.

The gross disproportionality of the forfeiture in this case is also illustrated by a review of other cases involving similar violations, which Claimants summarized in a chart submitted to the District Court. *Cf.* 18 U.S.C. § 3553(a)(6) (directing sentencing judges to consider sentences of "defendants with similar records who have been found guilty of similar conduct"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (directing courts to consider damages "imposed in comparable cases" when assessing constitutionality of civil punitive damages award). In those cases, the forfeiture was often *less than* the dollar value of the prohibited transactions. (*See* A-4185-89.) For example, Credit Suisse allowed sanctioned countries—including Iran—to move more than $1.6 billion dollars through the U.S. financial system, but forfeited only $536 million in

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Government's requested three-point addition for obstruction of justice were adopted (and it should not be), the resulting fine range is $16.8 million to $33.6 million. *See* U.S.S.G. § 8C2.6. The Government argued that the Building's net rental income of $102 million should be considered a "pecuniary gain" from the offense and used to calculate the Guidelines range under U.S.S.G. § 8C2.4. (Dkt. 2017 at 5 n.2.) But the Guidelines define pecuniary gain as "*additional* before-tax profit to the defendant *resulting from the relevant conduct of the offense.*" U.S.S.G. § 8A1.2 cmt. 3(H) (emphasis added). Because at least some of the Building's rental income is attributable to its legitimate, lawful operations, the rental income does not constitute pecuniary gain.

assets (33.5% of the transactions' value). (*Id.*) ING Bank moved more than $2 billion in assets illegally through the U.S. financial system on behalf of Cuban and Iranian entities subject to sanction; it was required to forfeit $619 million in assets (31% of the transactions' value). (*Id.*) Likewise, Barclays "knowingly and willfully moved or permitted to be moved" more than $500 million dollars of funds on behalf of banks from Cuba, Iran, Libya, Sudan, and Burma; as a result, Barclays forfeited $298 million in assets (59.6% of the transactions' value). (Dkt. 1998-2 at 19; A-4186.) In contrast, here, the Fifth Avenue Company transferred $26.9 million in partnership distributions to Assa since 1995, but the forfeiture involves properties valued at over $600 million—more than 2,000% of the transactions' value. The forfeiture is thus grossly disproportional to the conduct at issue, and to the penalties imposed on other entities that have committed similar violations.

3. The Forfeiture Judgment Will Force the Foundation to Cease Operations and Terminate Its Charitable Activities

Forfeiture of Claimants' interests in the Building and Partnership would permanently terminate the Foundation's charitable operations. While the criminal behavior here represents only a small fraction of the Foundation's activities during its forty-five-year history, its entire existence is at stake. The District Court opined that "Alavi may . . . continue its charitable works" (A-4199-4200), but without its funding source (the Building), the Foundation will have no choice but to end its operations. This factor, too, is a clear indication of the forfeiture's gross disproportionality. *Cf. Viloski*, 814 F.3d at 111 ("whether the forfeiture would deprive the defendant of his livelihood" is an "especially important" factor in determining proportionality of forfeiture under Eighth Amendment).

For the foregoing reasons, this Court should vacate the forfeiture judgment and instruct the District Court to limit forfeiture to the amount of criminal proceeds invested in or contributed to each Defendant Property since 1995, or, in the alternative, to conduct an evidentiary hearing and a proportionality analysis with respect to the Defendant Properties.

VII. The Court Should Reassign This Case on Remand

Reassignment, "while not an everyday occurrence, is not unusual in this Circuit." *In re Reassignment of Cases*, 736 F.3d 118, 128 (2d Cir. 2013) (collecting cases). When deciding whether to reassign a case, this Court considers: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007) (quoting *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977)). These factors favor reassignment here.

First, the District Court demonstrated on remand after the first appeal that it has "substantial difficulty in putting out of [its] mind previously-expressed views or findings determined to be erroneous." As detailed above, the court repeated its denial of statute of limitations discovery despite this Court's remand instructions, *see supra* at 36, and disregarded this Court's instructions as to the motion to suppress evidence. *See supra* at 56. This Court appropriately reassigns cases where the district judge demonstrates an inability to implement instructions or move

beyond prior erroneous decisions. *See, e.g.*, *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008); *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 147 (2d Cir. 2000) (granting reassignment where the "case . . . has been litigated for over eight years, and has involved two separate appeals—raising largely the same questions . . . "); *Robin*, 553 F.3d at 11 ("In the rare case where a judge has repeatedly adhered to an erroneous view after the error is called to his attention, reassignment to another judge may be advisable." (citation omitted)); *see also, e.g.*, *United States v. Gapinski*, 422 F. App'x 513, 521 (6th Cir. 2011) ("Because the district court judge was reluctant to follow our prior remand instructions, we have little reason to think that another remand would cause the judge to disavow his previously expressed views about this case."); *United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (similar).

Second, reassignment will preserve the appearance of fairness. The District Court has repeatedly expressed firm views about the appropriate outcome of this case, and has been consistently dismissive of Claimants' defense theory. *See supra* at § V.B.1. Under those circumstances, even absent any finding of bias,[50] reassignment is required to preserve the appearance of justice. *See Hispanics for Fair & Equitable Reapportionment v. Griffin*, 958 F.2d 24, 26 (2d Cir. 1992) (the "firmness of the district judge's already expressed views" required reassignment to preserve "the appearance of justice"); *see also Shcherbakovskiy*, 490 F.3d

[50] An appellant need not establish bias or prejudice in order to justify reassignment, but bias does offer an alternative basis to reassign a case. *See, e.g.*, *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 21 (2d Cir. 1996); *see also Robin*, 553 F.2d at 10 (noting that the factors for reassignment are applied "[a]bsent proof of personal bias requiring recusation [sic]," citing 28 U.S.C. § 144).

at 142 ("[T]he judge has rendered a visceral judgment on appellant's personal credibility . . . Whether any person can take an objective second look at testimonial evidence after reaching such a conclusion is questionable, but certainly the appearance of justice would be well-served by reassignment on remand."). Moreover, as noted above, the District Court was sharply critical of Claimants' counsel, which also establishes a need to preserve the appearance of justice by reassigning the case. *See, e.g.*, *United States v. Padilla*, 186 F.3d 136, 143 (2d Cir. 1999) ("In view of the district judge's statements, particularly regarding Padilla's counsel, the appearance of justice would best be preserved by reassignment.").

Third, preserving the appearance of fairness is well worth the price of another district judge's having to become familiar with this case's history and record. That burden is tolerable, and this Court has previously reassigned a case despite being complex and many years old, like this one is. *See Mackler Prods.*, 225 F.3d at 147. The District Court's "familiarity with a detailed factual record" is no bar to reassignment where, notwithstanding that familiarity, the court's decision was reversed "based on erroneous findings or the admission of prejudicial evidence that would be difficult to erase from the mind." *Robin*, 553 F.2d at 11. On this record, preserving the appearance of fairness is worth the cost of any resulting inefficiency. The Court should reassign this case on remand.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's April 18, 2018 Order, because it contains 39,549 words, calculated by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32.1(a)(2), and the type-style requirements of Fed. R. App. 32(a)(6), because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

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