No. 22-

IN THE
Supreme Court of the United States

HYUK KEE YOO, a/k/a "KEITH YOO,"

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Shawn P. Naunton
Counsel of Record
Zuckerman Spaeder LLP
485 Madison Avenue, 10th Fl.
New York, NY 10022
(212) 704-9600
snaunton@zuckerman.com

Counsel for Petitioner Keith Yoo

QUESTIONS PRESENTED

Article 6 of the United States-South Korea Extradition Treaty ("Treaty") provides that "[e]xtradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State." The rest of Article 6 explains that the period in which a person flees from justice does not count towards the running of the statute of limitations and that any acts or circumstances that would otherwise suspend the expiration of the limitations period of either state shall be given effect. Finally, Article 6 mandates that the requesting state provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

Petitioner Yoo Hyuk Kee ("Keith Yoo" or "Mr. Yoo") maintains that, consistent with Article 6, his extradition is barred under the Treaty because the statute of limitations has lapsed. The Government concedes that time has lapsed. Breaking with Supreme Court precedent on treaty interpretation, the U.S. Court of Appeals for the Second Circuit held below that, due to the word "may," Article 6 is a discretionary clause for the Secretary of State to implement as it so chooses, rather than a mandatory bar for the judiciary to implement uniformly.

The questions presented are:

A. Does interpreting Article 6 of the Treaty as a discretionary issue for the Secretary of State to

consider, rather than a mandatory bar for the judiciary to implement uniformly, conflict with Supreme Court precedent on treaty and statutory interpretation because such an interpretation undermines altogether the well-established purpose of limitations provisions, thus rendering all of Article 6 meaningless?

B. Does interpreting Article 6 of the Treaty as discretionary also conflict with Supreme Court precedent on treaty and statutory interpretation because it renders language in other articles of the Treaty superfluous?

C. Even if interpreting Article 6 of the Treaty as discretionary is one possible reading of the Treaty's language, is that interpretation permissible given that leaving the issue of timeliness to the Secretary of State dilutes the judiciary's role in extradition proceedings and is irreconcilable with protecting individual liberty?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. Neither the Petitioner nor any party is a nongovernmental corporation, and therefore there is not a parent corporation or any other company owning 10% or more of stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the federal trial court and appellate court identified below are directly related to the above-captioned case in this Court:

United States v. Hyuk Kee Yoo a/k/a, "Keith Yoo", No. 20 MAG. 2252, U.S. District Court for the Southern District of New York. Certification of Extraditability and Order of Commitment entered July 2, 2021.

Hyuk Kee Yoo a/k/a, "Keith Yoo" v. United States, No. 21-CV-6184 (CS), U.S. District Court for the Southern District of New York. Opinion and Order denying petition for a writ of habeas corpus entered November 1, 2021.

Hyuk Kee Yoo a/k/a, "Keith Yoo" v. United States, No. 21-2755, U.S. Court of Appeals for the Second Circuit. Opinion affirming the Order of the District denying a writ of habeas corpus entered August 1, 2022; and Order denying Mr. Yoo's petition for rehearing or rehearing *en banc* entered October 7, 2022.

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The Second Circuit affirmed the District Court's Order denying the Petitioner's petition for a writ of habeas corpus in an opinion appended as App. A at 1a–33a and reported at 43 F.4th 64. The opinion of the District Court is appended as App. B at 34a–77a and reported at 2021 WL 5054726. The District Court's Certification of Extraditability and Order of Commitment is appended as App. C at 78a–182a and reported at 2021 WL 2784836. The Second Circuit denied Petitioner's petition for rehearing or rehearing *en banc* in an Order appended as App. D at 183a–184a and reported at 43 F.4th 64.

JURISDICTIONAL STATEMENT

Mr. Yoo appeals from a Second Circuit Order dated August 1, 2022 affirming the District Court's Order denying his petition for a writ of habeas corpus. A petition for rehearing or rehearing *en banc* was denied on October 7, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within 90 days from the date of entry of Order denying petition for rehearing or rehearing *en banc*, which was October 7, 2022.

STATUTORY PROVISIONS INVOLVED

A. TITLE 18 U.S.C.A. § 3184

The statute provides as follows:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

B. UNITED STATES-SOUTH KOREA EXTRADITION TREATY

The pertinent portions of the Treaty are as follows:

Under Article 2, a judicial officer must determine that "the acts alleged . . . are punishable . . . in the requesting nation and under the criminal law of the United States." Extradition Treaty, U.S.-S. Kor., art. II., Treaty Doc. No. 106-2 (1999).

Under Article 6, "Extradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts or circumstances that would suspend the expiration of the statute of limitations of either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive." Extradition Treaty, U.S.-S. Kor., art. VI, Treaty Doc. No. 106-2 (1999).

STATEMENT OF THE CASE

Between 2014 and 2019, the Republic of Korea submitted six separate requests to the United States to extradite Mr. Yoo to South Korea to face criminal charges in his home country for seven embezzlement

crimes that allegedly occurred prior to March 2014. The Secretary of State authorized Mr. Yoo's arrest after the sixth request, and on July 22, 2020, Mr. Yoo was arrested at his home in Pound Ridge, New York. By that time, the five-year statute of limitations governing the charges against Mr. Yoo had expired — a fact that the Government concedes. Notwithstanding the lapse of time, Magistrate Judge Judith McCarthy certified the request for extradition. Mr. Yoo filed a habeas petition in the District Court. The District Court denied Mr. Yoo's petition, and a panel of this Court affirmed the District Court's judgment. How could Mr. Yoo be extradited when the statute of limitations had lapsed? The District Court found, and the Second Circuit affirmed, that use of the word "may" in Article 6 of the Treaty is permissive, and therefore timeliness is a matter of discretion for the Secretary of State to consider, and not a mandatory bar for the court to apply.

The Supreme Court has held that statutes and treaties must be interpreted in a manner such that "no clause, sentence or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). The Second Circuit's interpretation of Article 6 broke with this Court's fundamental rules of construction. As the purpose of statutes of limitations is to provide certainty and finality to the accused, the holding that the limitations clause is discretionary renders the entire clause superfluous and insignificant. The Second Circuit's interpretation also cannot be reconciled with Article 2 of the Treaty, which mandates that a judicial officer determine whether "the acts alleged . . . are punishable . . . under the criminal law of the United States." This is because

an act is not punishable in the United States if the limitations period has expired. Moreover, when Article 6 is viewed in concert with the rest of the Treaty, it is clear that the word "may" is not used consistently to confer discretion and that the drafters used other language to indicate discretion. The Second Circuit's holding that "may" alone confers discretion renders that other language in the Treaty superfluous. Finally, the Second Circuit's holding undermines the role of the judiciary under 18 U.S.C. § 3184 to ensure unbiased extraditions in the often politically-charged extradition process. At bottom, the Second Circuit's ruling is at odds with the Supreme Court's rules on treaty interpretation, and is dangerous to individual liberty.

I. FACTUAL BACKGROUND

Mr. Yoo is the son of Yoo Byeong-eun, a South Korean religious leader, businessman, inventor and photographer. In 1962, Yoo Byeong-eun converted to Christianity and became a key figure in the Evangelical Baptist Church of Korea, which now has more than 40,000 members worldwide. Yoo Byeong-eun got his start in business in 1976 and subsequently had interests in companies in an array of industries, including shipbuilding, electronics, toys, cosmetics, paint and health foods ("the affiliated companies").

One of the affiliated companies was Chonghaejin Marine, which operated a ferry, the Sewol. On April 16, 2014, the ferry sank, resulting in 304 deaths, many of them students on a school trip. Outrage followed, and the Yoo family became pariahs. Media coverage proclaimed that the Yoo family controlled

the ferry, which it did not. On April 23, Korean investigators raided the offices of Chonghaejin Marine and some twenty other affiliated companies.

Yoo Byeong-eun became a fugitive, and a manhunt ensued. On June 12, 2014, he was found dead in a plum orchard. Yoo Byeong-eun's death did not slow the Korean government's investigations. Nine senior executives of the affiliated companies were convicted of embezzlement and/or breach of trust for allegedly depleting their companies to funnel money to the Yoo family.

The Korean government's animus against the Yoo family cannot be overstated. In a statement issued on May 27, 2014, Park Geun-Hye, then Korea's President, announced that "[t]he family of Byeong Eun Yoo is the fundamental cause of this [ferry] disaster" and urged the authorities "to arrest them quickly, discover the truth, resolve suspicions, and punish them according to law." Similarly, Prime Minister Jung Hong-Won emphasized the "need to show that both oneself and one's family will be ruined if one causes an accident like this." Legislation was introduced to seize the Yoo family's assets.

In May 2014, Korea first requested the United States to extradite Mr. Yoo to face trial as an accomplice to alleged embezzlements. It was not until late 2019, however, after Korea made five supplemental submissions, that the Department of State authorized his arrest. Throughout this time, Mr. Yoo was a permanent resident of the United States residing openly at his family's home in New York; his home address was publicly available; and he was not a fugitive.

Although Mr. Yoo is charged only with embezzlement, the sixth Korean submission to the Secretary of State began this way:

> Tragedy struck the Republic of Korea on April 16, 2014, when 'Sewol Ferry' sank in the territorial waters of Korea, killing a total of 304 people, including students on a school trip. The ferry at issue was registered with Chonghaejin Marine Co., Ltd. ("Chonghaejin"), which was run by YOO Byeong Eyn and his family including [Mr. Yoo]. Chonghaejin purchased from a Japanese marine company this time-worn ferry, which had been already operated for 18 years at a low price and renovated the ferry inordinately in order to add more cabins for maximizing profits and overloaded cargo almost doubling the maximum capacity, resulting in this incident.

Omitted from the submission is the fact that the Korean courts have determined that the "evidence is not sufficient to establish a significant causal relationship between [any] embezzlement offense as the cause of the . . . sinking accident." See, e.g., Republic of Korea v. Yoo Dae-gyun, 2015 Ga Hap 561354 at 7 (available upon request). Mr. Yoo is not charged with embezzling from the ferry company, yet he has become a scapegoat for the tragedy.

II. PROCEEDINGS BELOW

In the District Court, Mr. Yoo argued that he was not extraditable because the statute of limitations had run, and the proposed evidence did not amount to probable cause. On July 2, 2021, Magistrate Judge

McCarthy rejected Mr. Yoo's challenges to extradition and certified his extraditability.

Mr. Yoo sought a writ of habeas corpus under 28 U.S.C. § 2241 before Judge Seibel in the District Court. Mr. Yoo renewed the argument that under the Treaty the statute of limitations had run, and that based on the history, language, and purpose of the Treaty, the time lapse provision constitutes a mandatory bar to extradition for the judiciary to apply. In November 2021, the District Court denied the writ. On the limitations issue, the District Court placed dispositive weight on the fact that Article 6 of the Treaty states that "extradition may be denied" when the prosecution is time-barred. The court held that timeliness is an issue for the Secretary of State not the court.

Pursuant to 28 U.S.C. § 2253, Keith Yoo appealed the denial of the writ of habeas corpus to the Second Circuit. The crux of Mr. Yoo's argument was that Article 6 of the Treaty is a mandatory bar to extradition if the applicable statute of limitations has expired. The court rejected that argument and held that the use of the word "may" in Article 6 is permissive, and that permissive determinations are for the Secretary of State, not the extraditing court. Mr. Yoo also argued that ceding decisions about timeliness to the Secretary of State would be dangerous to individual liberty. The court did not place great weight on Mr. Yoo's argument that statutes of limitations are designed to provide certainty and finality to the accused, and that interpreting the statute of limitations clause as

discretionary is contrary to the purpose of the provision and practical interpretation of the Treaty.

In affirming the judgment of the District Court, a panel of the Second Circuit held:

A. The use of the word "may" in the first sentence of the Treaty's time lapse provision makes it a discretionary decision to be made by the Secretary of State when the United States is the Requested State, rather than a mandatory determination for the court;

B. This interpretation does not undermine the judiciary's role in extradition proceedings even though the judiciary's role is to be the sole unbiased arbiter of whether the crime charged is covered by the relevant treaty and whether extradition would be a violation of the treaty;

C. This interpretation is consistent with the text of the Treaty because "may" implies discretion, even though courts have held that "may" can actually impose a mandatory directive if legislative intent and obvious inferences from the structure and purpose of the treaty suggest lack of discretion; and

D. While statutes of limitations provide protections for those accused of crimes, and diluting those protections would be dangerous to liberty, those reasons are not compelling enough to interpret the Treaty's time lapse provision as mandatory.

Mr. Yoo timely filed a petition for rehearing and rehearing *en banc* to the Second Circuit. The court denied the petition on October 7, 2022.

On November 2, 2022, Mr. Yoo filed with this Court an emergency application for stay of extradition or recall of the mandate pending the filing and disposition of the instant petition for writ of certiorari. Justice Sotomayor denied the emergency application on November 3, 2022.

REASONS FOR GRANTING THE WRIT

Certiorari may be granted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). The Second Circuit's holding in this case falls squarely within the types of courts of appeals decisions that are reviewed by the Supreme Court. The petition should be granted for several reasons.

First, the Supreme Court and courts around the country are in accord that the purpose of statutes of limitations are to provide certainty and finality to the accused. This is a pillar of our justice system. The Supreme Court has also cautioned against interpreting a statute or treaty in a manner that would render language superfluous. The Second Circuit's holding that the limitations clause in the Treaty is discretionary undermines the well-established purpose of limitations provisions and renders all of Article 6 superfluous.

Second, the Second Circuit's holding that the word "may" in the Treaty necessarily grants discretion is at odds with Supreme Court precedent that "may" does not always confer discretion, particularly where such interpretation renders other language in the statute or treaty insignificant or superfluous.

Third, the Supreme Court has long recognized the important role of the judiciary as the protector of individual liberty in extradition proceedings. By holding that timeliness is an issue for the Secretary of State to consider in its discretion, rather than a mandatory bar for the judiciary to enforce, the Second Circuit's ruling strips the judiciary of its power to ensure an unbiased extradition proceeding and places the determination of whether to overlook staleness in the hands of the executive branch—the same branch that is seeking to extradite in the first place.

I. THE SECOND CIRCUIT'S RULING CONFLICTS WITH SUPREME COURT PRECEDENT ON TREATY INTERPRETATION BY RENDERING ALL OF ARTICLE 6 SUPERFLUOUS.

Statutes of limitations are an issue of national importance, see, e.g., Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 505-06 (2007) ("Notwithstanding . . . the absence of any conflicting decisions . . . , the unusual importance of the underlying issue persuaded us to grant the writ."); Florida v. Nixon, 543 U.S. 175, 186 (2004) ("We granted certiorari . . . to resolve an important question of constitutional law."), because they are irretrievably connected to liberty and afford protections to the accused that are central to our

system of justice. In re Kaine, 55 U.S. 103, 113 (1852). That is especially true in the case of extradition proceedings, where individual liberty is at risk. The Second Circuit's holding that the Treaty's time lapse clause is an issue for the Secretary of State to enforce in its discretion undermines these critical protections that statutes of limitations afford to the accused.

The very inclusion of a statute of limitations provision "represents an important right of the accused." Caplan v. Vokes, 649 F.2d 1336, 1341 n.7 (9th Cir. 1981). They are designed to provide certainty and finality. Id. Courts have deemed statutes of limitations "vital to the welfare of society," Shain v. Sresovich, 104 Cal. 402, 406, 38 P. 51, 52-53 (1894) (*quoting* Wood v. Carpenter, 101 U.S. 135, 139 (1879)), and concluded that "even wrongdoers are entitled to assume that their sins may be forgotten." Wilson v. Garcia, 471 U.S. 261, 271 (1985). Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber [ ]." Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944). They provide "security and stability to human affairs." Wood, 101 U.S. at 139. And they protect against the bringing of stale charges and "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." United States v. Marion, 404 U.S. 307, 322 (1971).

The Supreme Court has explained that when interpreting a statute or treaty, "no clause, sentence or word shall be superfluous, void, or insignificant."

Andrews, 534 U.S. at 31. In violation of this basic rule of construction, the Second Circuit's interpretation of Article 6 turns the whole clause on its head. The inclusion of a time lapse clause imposes a bright-line rule that affords certainty and finality to the accused. The Second Circuit's interpretation that the clause is discretionary is antithetical to the purpose and inclusion of the clause, and ultimately renders the entire clause meaningless. Indeed, a discretionary limitations period is no limitations period at all.

The Second Circuit's decision also renders the rest of Article 6 superfluous. Consider the second half of Article 6:

> The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts of circumstances that would suspend the expiration of the statute of limitations of either State shall be given effect by the Requested State.

That language imposes rules to determine whether extradition is timely. The Second Circuit's interpretation effectively holds that these rules need not be enforced if the Secretary of State says so, and that the judiciary is powerless to enforce them.

But the language in the second half of Article 6 is mandatory, not discretionary. The fugitivity clause provides that the period during which a person flees from justice "*does not* count towards the running of the statute of limitations" (emphasis added). The suspension clause, for its part, provides that "[a]cts or circumstances that would suspend the expiration of

the statute of limitations of either State *shall* be given effect . . ." (emphasis added). The use of "shall" in the suspension provision indicates that it must be applied to determine whether the statute of limitations has run. But if the court is barred from considering timeliness, must the Secretary of State still give effect to the fugitivity and suspension clauses—despite ultimately having discretion to apply or disregard the statute of limitations? Or must the judiciary consider whether an individual was a fugitive and determine whether acts or circumstances suspended the expiration of the statute of limitations despite ultimately leaving the timeliness issue to the Secretary of State? It is difficult to imagine Congress intended the Treaty to memorialize such a protocol. If the Secretary of State has discretion to consider timeliness, then the fugitivity and suspension clauses can be rendered irrelevant and meaningless.

The Second Circuit's decision confuses a straightforward issue. Why would the parties have included the detailed directives in Article 6 describing when and how the limitations period must be tolled if the parties did not intend that they be followed? These rules are plainly intended to aid in determining whether a limitations period has expired in light of the specific circumstances of a given case. If the executive branch has *carte blanche* to extradite at any time, the rules on tolling (and all of Article 6) become superfluous. See Ysleta Del Sur Pueblo v. Texas, 213 L. Ed. 2d 221, 142 S. Ct. 1929, 1939 (2022) ("[W]e must normally seek to construe Congress's work so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.")

(quoting Corley v. United States, 556 U.S. 303, 314 (2009) (internal quotation marks omitted)).

II. THE SECOND CIRCUIT'S RULING CONFLICTS WITH SUPREME COURT PRECEDENT ON TREATY INTERPRETATION BY RENDERING OTHER LANGUAGE IN THE TREATY SUPERFLUOUS.

The Supreme Court has held that a statute or treaty's language must be interpreted in light of other sections of the statute or treaty. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 36 (1998). Again, the Court has repeatedly held that the various sections of a statute or treaty should be construed in concert so that "no clause, sentence or word shall be superfluous, void, or insignificant." Andrews, 534 U.S. at 31. The Second Circuit's holding conflicts with this Court's precedent requiring that treaties be interpreted as a whole and, in particular, in a manner that avoids rendering certain provisions superfluous.

The Second Circuit summarily concluded that the word "may" in Article 6 confers authority on the Secretary of State to apply the time lapse clause in its discretion. In 2015, the Ninth Circuit also addressed this issue and concluded that the word "may" at the beginning of Article 6 indicates that untimeliness is "a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition." Patterson v. Wagner, 785 F.3d 1277, 1281 (9th Cir. 2015). For both the Second Circuit and Ninth Circuit, the word "may" was talismanic. Its use meant that

untimeliness was merely a factor for the executive branch to consider (among others) at the final stage of the process.

Neither court placed appropriate weight on this Court's precedent on statutory interpretation addressing use of the word "may." This Court has explained that "the mere use of 'may' is not necessarily conclusive of [an] intent to provide for a permissive or discretionary authority." Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 198 (2000); accord United States v. Rogers, 461 U.S. 677, 706 (1983) ("[t]he word 'may' . . . usually implies some degree of discretion [but] [t]his . . . principle . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute"); Citizens & S. Nat. Bank v. Bougar, 434 U.S. 35, 38 (1977) ("[i]t is now settled that the statute's provision . . . despite the presence of what might be regarded as permissive language . . . is mandatory"); Farmers' & Merchants' Bank of Monroe N.C. v. Fed. Reserve Bank of Richmond, 262 U.S. 649, 662–63 (1923) ("the word 'may' is sometimes construed as 'shall' . . . where the context or the subject matter compels such construction").

The Second Circuit also failed to account for the obvious inferences that are necessarily drawn from the structure and purpose of the Treaty. First, Article 2 of the Treaty provides that it is the role of the *judiciary* to determine whether "the acts alleged . . . are punishable . . . under the criminal law of the United States." For good reason, an act is only punishable under the criminal law of the United

States if the prosecution is timely. Marion, 404 U.S. at 322. And Article 2 is clear that this is a determination entrusted to the judiciary to make, not to the Secretary of State. The Second Circuit's interpretation of Article 6 cannot be reconciled with the unambiguous language of Article 2.

Finally, a careful reading of the rest of the Treaty demonstrates that the drafters did not use "may" consistently to identify those issues that were for the Secretary of State to consider in its discretion. Article 2(4) of the Treaty, for example, provides that "the executive authority of the Requested State may, in its discretion," grant extradition for offenses committed outside of the territory of the Requested State in certain circumstances. If "may" always means discretion, then the words "in its discretion" would be surplusage. The word "may" would be enough. For its part, Article 3(1) provides that the Requested State "shall have the power to extradite such person if, in its discretion, it be deemed proper to do so." If "shall" always means that an issue is mandatory, then the words "in its discretion" would be contradictory. Given the paradoxical nature of deeming a time lapse clause discretionary, together with the usage of "may" throughout the Treaty, the proper reading of Article 6 is that the time lapse provision is a mandatory bar for the court to enforce.

III. THE COURT SHOULD CLARIFY THE JUDICIARY'S ROLE IN EXTRADITION PROCEEDINGS BECAUSE THE SECOND CIRCUIT'S RULING IS DANGEROUS TO INDIVIDUAL LIBERTY.

Even if this Court were to find merit in the Second Circuit's cramped reading of the word "may" in Article 6, it must consider the real consequences of that interpretation. Because statutes of limitations protect vital rights of the accused, the Second Circuit's holding that timeliness is for the Secretary of State to consider in its discretion dilutes the role of the judiciary and puts individual liberty at risk.

It is axiomatic that an individual has the right to an unbiased extradition hearing before an independent judiciary. This Court recognized almost 170 years ago that "extradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty and ought never to be allowed in this country." In re Kaine, 55 U.S. 103, 113 (1852). Indeed, this country's extradition scheme is designed to "giv[e] to judges, as members of relatively non-political departments, an important role in the avoidance of . . . threatened dangers to liberty." Gill v. Imundi, 747 F. Supp. 1028, 1038 (S.D.N.Y. 1990). The Second Circuit's decision strips judges of this critical role, and places discretion in the hands of the executive branch—the same branch that is seeking to extradite in the first place. Consider the implications for the accused. There would be no finality and the accused would face the possibility of extradition on even the stalest of charges. If the executive branch had a political motive to extradite, such as to placate

a key ally, it could do so at any time. This is certainly not what was contemplated by a Treaty that includes a time lapse provision, and also includes specific guidelines for calculating when time has lapsed.

The judiciary's fulfillment of its independent role is critical because the fingerprints of the executive branch are on every stage of an extradition proceeding. A complaint seeking extradition is filed by the Department of Justice at the behest of the Department of State. After a complaint is filed by the executive branch, it is the role of the judiciary to hold an unbiased hearing to determine whether to certify extradition. 18 U.S.C.A. §3184; see also Lo Duca v. United States, 93 F.3d 1100, 1103 (2d Cir. 1996) ("[t]he primary function of section 3184 is to interpose the judiciary between the executive and the individual"). If the court certifies extraditability, the case returns to the Department of State, which then exercises its discretion to authorize extradition based on "a variety of grounds, ranging from individual circumstances to foreign policy concerns [ ] to political exigencies." Blaxland v. Commonwealth Dir. Of Pub. Pros., 323 F.3d 1198, 1208 (9th Cir. 2003); Cheung v. United States, 213 F.3d 82, 88 (2d Cir. 2000) ("the question of the wisdom of extradition remains for the executive branch to decide"). In sum, the process of determining whether to extradite is necessarily divided between the executive branch and the judiciary, with the latter playing the key role of neutral arbiter within a process that is often driven by political and/or foreign policy concerns.

The Second Circuit's determination that timeliness is a discretionary matter for the Secretary

of State cedes to the executive branch a critical judicial function, and is dangerous to individual liberty.

IV. KEITH YOO'S CASE DEMONSTRATES WHY IT IS CRITICAL FOR THE COURT TO CLARIFY THE ROLE OF THE JUDICIARY IN EXTRADITION PROCEEDINGS.

After receipt of Korea's sixth submission in 2019, the Secretary of State authorized Mr. Yoo's arrest. By that time, the five-year statute of limitations that governs Mr. Yoo's alleged crimes had expired. The Government concedes this point.

Extraditing Keith Yoo now, after all of the embezzlement charges against him are indisputably time barred, is an affront to Mr. Yoo's liberty. Mr. Yoo has lived in the United States for 33 years. He attended high school and college here. He has been married since 2002, and he and his wife have raised their family in Pound Ridge, New York since 2007. Their children still attend school there. Moreover, the demonstrated animus in South Korea against the Yoo family and the church to which they belong is significant, making it likely that Mr. Yoo will not receive a fair trial there for the alleged embezzlement crimes related to his work. In light of the foregoing, it is critical for the Court to clarify the role of the judiciary in extradition proceedings, and hold that the time lapse provision in the Treaty is a mandatory bar for the courts to enforce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Shawn P. Naunton
Counsel of Record
Zuckerman Spaeder LLP
485 Madison Avenue, 10 Fl.
New York, NY 10022
(212) 704-9600
snaunton@zuckerman.com

Counsel for Petitioner
Keith Yoo

November 11, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 1, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 21-2755

HYUK KEE YOO, ALSO KNOWN AS KEITH YOO,

Petitioner-Appellant,

- v. –

UNITED STATES OF AMERICA,

Respondent-Appellee,

August Term, 2021

April 5, 2022, Argued
August 1, 2022, Decided

Before: CALABRESI, LYNCH, and LOHIER,
Circuit Judges.

GERARD E. LYNCH, *Circuit Judge*:

Hyuk Kee Yoo, also known as "Keith Yoo," appeals from a November 1, 2021 judgment of the United States District Court for the Southern District of New York (Cathy Seibel, *J.*), denying his petition for a writ of habeas

corpus. A magistrate judge (Judith C. McCarthy, *M.J.*) certified Yoo as extraditable to South Korea pursuant to an extradition treaty between that country and the United States. Yoo filed the habeas petition in the district court in an attempt to avoid extradition from the United States to South Korea to face seven charges of embezzlement related to his role in his family's business empire.

Both the magistrate judge and the district court held that whether the treaty's "Lapse of Time" provision bars extradition is a question for the Secretary of State to consider in deciding whether to extradite an individual, and not a mandatory determination for the extradition court to make in the first instance. Yoo argues that the district court erred in interpreting the treaty, and that the text of the treaty and its legislative history indicate that the federal courts must decide whether the statute of limitations bars extradition before issuing a certificate of extraditability. Yoo proceeds to argue that the statute of limitations has already lapsed and that his extradition should be barred on that ground.

Because the text of the treaty, on its most natural reading, makes clear that the issue of timeliness is a matter of discretion for the relevant executive authority of the country considering the extradition request, and not a mandatory bar that the courts must apply, we hold that the district court did not err in denying Yoo's petition for a writ of habeas corpus. We therefore AFFIRM the judgment of the district court.

Appendix A

BACKGROUND

Yoo is a South Korean-born businessman who, before these extradition proceedings began, lived with his family in Pound Ridge, New York. His father, Byeong-eun Yoo, was a prominent businessman in South Korea as well as the founder and former leader of a South Korean church known as the Evangelical Baptist Church of Korea. The Yoo family allegedly controls a holding company that has significant stakes in several large South Korean companies. Yoo himself is alleged to have been involved in his family's businesses and to have served as the de facto leader of his father's church since 2010.

On May 8, 2014, a judge of the Incheon District Court in South Korea issued a warrant for Yoo's arrest. South Korean prosecutors charged Yoo with seven counts of embezzlement in violation of Korean criminal law committed within South Korea's jurisdiction.

Shortly thereafter, starting in May 2014, the South Korean government sent several requests in the form of diplomatic notes to the United States government seeking the extradition of Yoo to South Korea, pursuant to an extradition treaty in place between that country and the United States (the "Treaty") and the federal extradition statute, 18 U.S.C. § 3184. On February 27, 2020, the United States Attorney for the Southern District of New York filed a sealed complaint in the district court before a magistrate judge, seeking a warrant for Yoo's arrest and a certification that Yoo was extraditable under the Treaty pursuant to § 3184. On July 22, 2020, the magistrate

judge issued an arrest warrant, and Yoo was subsequently arrested and detained without bail.

Drawing on South Korea's extradition requests, the government's complaint alleged that between January 2008 and March 2014, Yoo "leveraged his family's power as business and religious leaders in Korea to pilfer the assets of various companies," by "conspir[ing] with the chief executive officers of the [v]ictim [c]ompanies to enter into sham contracts that served as vehicles through which [Yoo] embezzled millions of dollars." J.A. at 6.[1] Yoo's alleged embezzlements were committed in three principal ways: first, by causing the victim companies to make payments to him based on fraudulent trademark licensing agreements; second, by causing the victim companies to make payments to him based on fraudulent agreements for business consulting services; and third, by causing the victim companies to fund an exhibition of his father's photography and "making disguised payments that were structured as advance payments for the purchase of the photographs at inflated values." *Id.* The South Korean government alleges that Yoo defrauded the victim companies of the equivalent of approximately $23 million.

On March 3, 2021, the magistrate judge held an extradition hearing. After finding that Yoo was extraditable, the magistrate judge issued a Certification of Extraditability and Order of Commitment (the "Certificate") on July 2, 2021. *In re Extradition of Hyuk*

1. The parties have filed a Joint Appendix in this appeal. Yoo has also filed a Special Appendix. We cite to the Joint Appendix as "J.A." and the Special Appendix as "S.A." throughout this opinion.

Kee Yoo, No. 20-MJ-2252, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *1 (S.D.N.Y. July 2, 2021). Yoo, who had opposed his extradition and moved to dismiss the complaint, argued that the allegations of criminal conduct were not supported by probable cause and that his extradition was barred by the applicable statute of limitations in the United States under the terms of the Treaty. *Id.* The magistrate judge found that the "extradition request demonstrat[ed] probable cause and satisfie[d] the relevant requirements," and that, under the terms of the Treaty, the court "lack[ed] authority to determine whether this prosecution is time-barred, as that inquiry is a discretionary matter reserved for the Secretary of State." *Id.*

On July 21, 2021, Yoo petitioned the district court for a writ of habeas corpus under 28 U.S.C. § 2241, challenging the magistrate judge's determination as to his extraditability and the issuance of the Certificate. As before the magistrate judge, Yoo argued that he could not be extradited to South Korea because the embezzlement charges he faces there are time-barred and not supported by probable cause.

On November 1, 2021, the district court denied Yoo's petition. *Yoo v. United States*, No. 21-cv-6184, 2021 U.S. Dist. LEXIS 210586, 2021 WL 5054726 (S.D.N.Y. Nov. 1, 2021). Agreeing with the magistrate judge, the district court interpreted the Treaty's relevant provisions to commit the determination of whether the South Korean charges are time-barred to the Secretary of State's discretion. 2021 U.S. Dist. LEXIS 210586, [WL] at *9. The

district court noted that the executive branch is the "final decision-maker and retains discretion to deny extradition," meaning that "discretionary determinations" under the Treaty are consigned to the authority of the Secretary of State while "mandatory determinations" are to be made by the extraditing court. 2021 U.S. Dist. LEXIS 210586, [WL] at *4 (quotation marks omitted). The district court found that, based on the text of the Treaty, any analysis of whether a charge faced by an extraditee was beyond the relevant statute of limitations was "a discretionary task assigned to the executive branch," and the district court therefore did not address the merits of Yoo's time-bar claim. 2021 U.S. Dist. LEXIS 210586, [WL] at *9. The district court proceeded to consider and reject Yoo's probable cause challenge. 2021 U.S. Dist. LEXIS 210586, [WL] at *9-17. Accordingly, the district court denied Yoo's petition. 2021 U.S. Dist. LEXIS 210586, [WL] at *17.

Yoo timely appealed the district court's denial of his habeas corpus petition. On appeal, Yoo has abandoned the probable cause argument and challenges only the district court's ruling as to the statute of limitations.

DISCUSSION

I. Standard of Review

"Our review of the denial of a petition for habeas corpus in extradition proceedings is 'narrow' in scope." *Sacirbey v. Guccione*, 589 F.3d 52, 62 (2d Cir. 2009), quoting *Murphy v. United States*, 199 F.3d 599, 601 (2d Cir. 1999). "A reviewing court can consider only three

issues: '(1) whether the judge below had jurisdiction; (2) whether the offense charged is extraditable under the relevant treaty; and (3) whether the evidence presented by the Government established probable cause to extradite.'" *Id.* at 63, quoting *Cheung v. United States*, 213 F.3d 82, 88 (2d Cir. 2000).

While we may not "second guess the determination of the magistrate judge to issue an order certifying a request for extradition," it is "nevertheless our duty . . . to ensure that the applicable provisions of the treaty and the governing American statutes are complied with." *Id.* (brackets and quotation marks omitted). We therefore "review the factual findings of the District Court for clear error and its legal determinations *de novo*." *Id.*

II. Analysis

This appeal centers on the meaning of the Treaty's Lapse of Time provision — specifically, whether the use of the word "may" in the first sentence of that provision is discretionary or mandatory in nature. The Lapse of Time provision appears in Article 6 of the Treaty and provides:

> Extradition *may* be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from

> justice does not count towards the running of the statute of limitations. Acts or circumstances that would suspend the expiration of the statute of limitations of either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

S.A. at 46 (emphasis added). The question on appeal is who decides whether the statute of limitations of the Requested State — here, the United States — applies to bar an extradition: the court, in making a mandatory determination before issuing a certificate of extraditability, or the Secretary of State, in making a discretionary decision in his capacity as part of the Executive Branch of the United States government.

Yoo argues that whether the applicable statute of limitations has run is a mandatory determination for the court — and not the Secretary of State — to make; that the untimeliness of those charges is a mandatory bar to his extradition; and that the magistrate judge therefore erred in issuing the Certificate. The government in turn argues that the application of the Treaty's Lapse of Time provision is a discretionary decision to be made by the Secretary of State when the United States is the Requested State, or by the relevant executive authority in South Korea when South Korea is the Requested State. Both parties draw on the federal courts' traditional role in extradition proceedings, the Treaty's text, and the

Treaty's legislative history to support their arguments. After our review of the Treaty's text and legislative history, as well as the parties' arguments, we agree with the government and find that the district court did not err in denying Yoo's habeas petition.

A. The Court's Role in Extradition Proceedings

Federal courts play an important role in extradition proceedings. The federal extradition statute, 18 U.S.C. § 3184, provides the legal framework for extradition proceedings, and that statute's "primary function" is to "interpose the judiciary between the executive and the individual." *Lo Duca v. United States*, 93 F.3d 1100, 1103 (2d Cir. 1996) (brackets and quotation marks omitted). Under § 3184, "any justice or judge of the United States, or any magistrate judge authorized to do so by a court of the United States," may hear and consider the "evidence of criminality" presented by a complaint seeking the extradition of an individual within that court's jurisdiction to the country where those criminal acts were allegedly committed. 18 U.S.C. § 3184.

During an extradition hearing, the "judicial officer's inquiry is confined to . . . whether a valid treaty exists; whether the crime charged is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof." *Cheung*, 213 F.3d at 88. If, after a hearing, the court "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention" between the United States and the

foreign state, 18 U.S.C. § 3184, the court shall "issue a certificate of extraditability to the Secretary of State, who has final and discretionary authority to extradite the fugitive." *Skaftouros v. United States*, 667 F.3d 144, 154 (2d Cir. 2011). An extradition hearing is "'essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.'" *Id.* at 155, quoting *Lo Duca*, 93 F.3d at 1104.

But unlike other court orders that are final decisions and appealable as of right under 28 U.S.C. § 1291, extradition orders are "regarded as preliminary determinations," and "may only be reviewed by a petition for a writ of habeas corpus under 28 U.S.C. § 2241." *Id.* at 157, citing *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976). That review is nevertheless limited. "Courts have consistently held that habeas corpus is available to an extraditee 'only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and . . . whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.'" *Id.*, quoting *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925). Like other decisions on habeas corpus petitions, the district court's habeas ruling may be appealed by the losing party to the appropriate court of appeals. *See* 28 U.S.C. § 2253(a) (providing that in a habeas corpus proceeding, "the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held").

In order to obtain habeas relief, the extraditee "must prove by a preponderance of the evidence that he is 'in custody in violation of the Constitution or laws or treaties of the United States,' which, in this context, will typically mean in violation of the federal extradition statute, 18 U.S.C. § 3184, or the applicable extradition treaty." *Skaftouros*, 667 F.3d at 158 (internal quotation omitted). It is the duty of the federal courts to "'ensure that the applicable provisions of the treaty and the governing American statutes are complied with.'" *Sacirbey*, 589 F.3d at 63, quoting *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562, 565 (2d Cir. 1963) (brackets omitted).

But the issuance of a certificate of extraditability and the denial of habeas relief are not the end of the story, as the courts are not the final arbiter in extradition cases. "If habeas relief is denied, the Secretary of State has sole discretion to weigh the political and other consequences of extradition and to determine finally whether to extradite the fugitive," *Cheung*, 213 F.3d at 88, citing 18 U.S.C. § 3186, because the "question of the wisdom of extradition remains for the executive branch to decide," *Murphy v. United States*, 199 F.3d 599, 602 (2d Cir. 1999) (citation and quotation marks omitted). The Secretary of State does not have a legal duty to extradite a fugitive and may ultimately refuse to do so, even if the district court issues a certificate of extraditability. *Lo Duca*, 93 F.3d at 1103-04. Owing to the Executive Branch's special role in handling the United States' foreign affairs, the Secretary of State may "reverse the judicial officer's certification of extraditability if she believes that it was

made erroneously" but may also "decline to surrender the [fugitive] on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997).

B. The Text of the Treaty

Yoo argues that under the terms of the Treaty, the embezzlement charges he faces in South Korea are time-barred. Yoo focuses primarily on the meaning of the word "may" in the first sentence of the Lapse of Time provision in Article 6, which states that "[e]xtradition *may* be denied under this Treaty when the prosecution or execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State." S.A. at 46 (emphasis added). Yoo argues that even if the use of the word "may" usually implies discretion, that reading "should not be controlling when other considerations point differently," as he argues they do in this case. Appellant's Br. 14-15. We disagree.

The interpretation of treaties is a familiar exercise in the federal courts: "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645, 207 L. Ed. 2d 1 (2020) (citation and quotation marks omitted). In interpreting both statutes and treaties, courts seek to "avoid readings that 'render statutory language surplusage' or 'redundant.'" *Sacirbey*, 589 F.3d at 66,

quoting *Filler v. Hanvit Bank*, 378 F.3d 213, 220 (2d Cir. 2004). But where the "language of a treaty is plain, a court must refrain from amending it because to do so would be to make, not construe, a treaty." *Georges v. United Nations*, 834 F.3d 88, 92 (2d Cir. 2016) (brackets, quotation marks, and citation omitted).

In addition to the treaty's text, courts have also "considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin v. Texas*, 552 U.S. 491, 507, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008), quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996). And while the matter of treaty interpretation is ultimately a question of law for the courts, "given the nature of the document and the unique relationships it implicates, the Executive Branch's interpretation of a treaty is entitled to great weight." *Georges*, 834 F.3d at 93 (quotation marks and citation omitted).

We are not the first Court of Appeals to consider the meaning of the word "may" in Article 6 of the Treaty between the United States and South Korea. In *Patterson v. Wagner*, 785 F.3d 1277 (9th Cir. 2015), the Ninth Circuit reasoned that because the "normal reading of 'may' is permissive, not mandatory," the "most natural reading of Article 6 . . . is that untimeliness is a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition." *Id.* at 1281. Under the Ninth Circuit's reading, "the Secretary 'may' decline to extradite someone whose prosecution would be time-

barred in the United States, but he or she is not required to do so," and "there is no mandatory duty that a court may enforce." *Id.*

Another of our sister Circuits has similarly read the language of Article 6's Lapse of Time provision as discretionary in nature. The Sixth Circuit, sitting en banc, discussed the U.S.-Korea Treaty, as well as several other treaties with similar provisions to which the United States is a party, in interpreting the lapse of time provision in the extradition treaty between the United States and Mexico. *Martinez v. United States*, 828 F.3d 451, 460-61 (6th Cir. 2016). The court cited Article 6 of the Treaty as an example of a provision that "*permits* the parties to deny extradition" in the relevant circumstances. *Id.* at 460 (emphasis added). The court contrasted the U.S.-Korea Treaty with the extradition treaty between the United States and France, noting that the latter "*forbids* extradition if prosecution is 'barred by *lapse of time*' in the requested State." *Id.* at 461 (citation omitted, first emphasis added, and second emphasis in original).

We agree with the conclusions of our sister Circuits in *Patterson* and *Martinez* that the most natural reading of the word "may" in Article 6 is permissive, not mandatory. The use of the word "may" - in contrast to words like "shall" or "must" - authorizes, rather than commands. *See N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n*, 991 F.3d 439, 446 (2d Cir. 2021); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) ("The word 'may' customarily connotes discretion."). On a plain reading of

Article 6's text, we see no reason to disagree with the reading given to that provision by the Ninth and Sixth Circuits.

Yoo objects to the district court's reliance on *Patterson* and its ultimate determination that the "natural reading of the first sentence [of Article 6] is that it is permissive rather than mandatory." *See Yoo*, 2021 U.S. Dist. LEXIS 210586, 2021 WL 5054726, at *5. Of course, the use of the word "may" is not "necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000). We have also acknowledged that "in some limited scenarios, the word 'may' can impose a mandatory directive," because "[a]lthough 'the word "may," when used in a statute, usually implies some degree of discretion, this common-sense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.'" *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 66 (2d Cir. 2021) (brackets omitted), quoting *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).

Yoo argues that a "careful reading of the Treaty demonstrates that the drafters did not use 'may' consistently to identify those issues that were for the Secretary of State to consider in the exercise of his discretion," Appellant's Br. 12. The Treaty does, of course, use the words "may" and "shall," along with related

terms in multiple places and with multiple variations. For instance, as Yoo points out, Article 2(4) of the Treaty, which addresses situations in which the charged offense was committed outside of the Requesting State's territory, provides that "[i]f the laws in the Requested State do not" provide for "punishment of an offense committed outside of its territory in similar circumstances" then the "executive authority of the Requested State *may, in its discretion*, grant extradition, provided that the requirements of this Treaty are met." S.A. at 44 (emphasis added). Yoo argues that if "'may' always means executive branch discretion, then the words 'executive authority' and 'in its discretion' would be surplusage" in Article 2(4), as "[t]he word 'may' would be enough." Appellant's Br. 12.

But Yoo's argument ignores the fact that the Treaty uses the word "may," standing alone, in several other provisions, including in Article 2(4) itself. For instance, Article 2(4) also states that "[e]xtradition *may* be refused when the offense for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part in its territory and a prosecution in respect of that offense is pending in the Requested State." S.A. at 44 (emphasis added). As another example, Article 2(7) provides that "[w]here the request for extradition relates to a person sentenced to deprivation of liberty by a court of the Requesting State for any extraditable offense, extradition *may* be denied if a period of less than four months remains to be served." *Id.* at 45 (emphasis added). Similarly, Article 4(4) provides that "[t]he executive authority of the Requested State *may* refuse extradition for offenses under military law which

are not offenses under ordinary criminal law." *Id.* at 46 (emphasis added). And Article 7(1) provides that "[w]hen the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State *may* refuse extradition" unless certain conditions are met. *Id.* at 47 (emphasis added). Yoo himself concedes that the use of the word "may" in Article 7(1) "implies a degree of discretion," Appellant's Br. 13, though he maintains that the use of the word "may" in Article 6 does not.

The Treaty also uses the word "shall" in several places. For example, Article 4(1) provides: "Extradition *shall* not be granted if the Requested State determines that the offense for which extradition is requested is a political offense." S.A. at 45 (emphasis added). And Article 5 provides: "Extradition *shall* not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested." *Id.* at 46 (emphasis added).

The Treaty's uses of both "may" and "shall" demonstrate that its drafters were well aware of the difference between permissive and mandatory determinations and how to provide for each of them when drafting the Treaty's text. Moreover, the Treaty uses the word "shall" in Articles 4 and 5, the Articles immediately preceding Article 6, to delineate instances in which extradition "shall not be granted" - that is, where the relevant offense is a political offense or where the person sought has already been convicted or acquitted of the relevant offense in the Requested State — but then uses

the word "may" in the very next Article to describe when extradition is available for offenses whose prosecution would have been barred by the Requested State's statute of limitations had the offense been committed within that State's jurisdiction. The mandatory refusals in Articles 4 and 5 sharply contrast with the permissive nature of Article 6, and it is difficult to escape the implication that the shift from using "*shall* not be granted" to "*may* be denied" in back-to-back Articles was deliberate.

The Supreme Court has "caution[ed] against ignoring contexts in which 'Congress' use of the permissive "may" contrasts with the legislators' use of a mandatory "shall" in the very same section,' and where 'elsewhere in the same statute, Congress use[s] "shall" to impose discretionless obligations.'" *Clinton Nurseries, Inc.*, 998 F.3d at 66 (brackets omitted), quoting *Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001). The Treaty does indeed use the words "may" and "shall," or similar phrases, within the same provision. For example, Article 2(4), which, as we previously noted, uses both "may" and the formulation "may, in its discretion," also provides that "[i]f the offense was committed outside the territory of the Requesting State, extradition *shall* be granted in accordance with this Treaty" under certain circumstances. S.A. at 44 (emphasis added). And Article 3(1) provides: "Neither Contracting State *shall* be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, *in its discretion*, it be deemed proper to do so." *Id.* at 45 (emphasis added).[2]

2. Yoo argues with regard to Article 3(1) that if "'shall' always means that an issue is mandatory, then the words 'in its discretion'

Both of those provisions — as well as others throughout the Treaty — demonstrate that the Treaty's drafters knew the difference between a mandatory determination and a discretionary consideration and drafted the Treaty's provisions accordingly. The fact that the Treaty's drafters sometimes used additional, perhaps superfluous, phrases like "in its discretion" in other provisions of the Treaty does not mean that the word "may," standing alone, lacks its customary meaning of being permissive or providing for discretion, absent compelling evidence to the contrary. As the Supreme Court has instructed, in some situations it is "appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007).

We think this is just such a situation. We conclude that the word "may" has it customary meaning when used in Article 6 and that it is, based on the plain text, permissive or discretionary in nature. There is nothing in the Treaty's text that indicates that the word "may" has any meaning other than its customary one.

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would be contradictory." Appellant's Br. 13. But in the context of this provision, the second "shall" in the sentence "Neither Contracting State shall be bound to extradite its own nationals, but the Requested State *shall* have the power to extradite such person if, in its discretion, it be deemed proper to do so," is plainly not used to imply any kind of mandatory meaning or directive. Rather, it simply provides that the Requested State has the (absolute) power to extradite its own national if, in the Requested State's discretion, it "be deemed proper to do so."

C. Legislative History

In addition to his textual argument, Yoo points to the Treaty's legislative history to argue that it "compels the conclusion that untimeliness bars extradition - *i.e.*, that it is a mandatory bar — and therefore the issue is for the court." Appellant's Br. 16. Yoo focuses on three pieces of legislative history: the Senate Report's introductory summary of the Treaty's "Key Provisions," prepared by the Senate Committee on Foreign Relations and submitted to the Senate in its consideration of the Treaty; the Technical Analysis to that same Senate Report, prepared by the U.S. treaty negotiators; and a colloquy between a United States senator and the then-Acting Director of the Office of International Affairs during the Congressional hearing on the Treaty. But on closer examination, none of these compels us to revisit our conclusion that Article 6 is discretionary in nature. In fact, the most reliable piece of legislative history — the Senate Report's Technical Analysis of Article 6 - actually confirms that conclusion.

Yoo first points to the Senate Report's summary of the Treaty's "Key Provisions." The section of the summary dealing with Article 6's Lapse of Time provision reads in its entirety as follows:

> The Treaty with the Republic of Korea precludes extradition of offenses barred by an applicable statute of limitations. However, time during which a fugitive has fled prosecution is not to be counted toward the applicable limitation period, or is any other time that would suspend

> the limitation period under the law of either the Requesting or Requested State.

S. Rep. No. 106-13 at 5 (1999); S.A. at 73. Yoo argues that "[a] summary section is intended to convey the gist of a provision, and the gist here is that Article 6 is mandatory," because the summary's use of the word "precludes" "does not allow for discretion." Appellant's Br. 16. Other sections of the summary, such as the summary of the "Death Penalty Exception," use words like "permits," S. Rep. No. 106-13 at 4; S.A. at 72, rather than the word "precludes," a difference that does support Yoo's argument. But the use of one word in a summary section of a Senate Report cannot hold the weight Yoo wishes to place on it, especially when it is directly contradicted by not only the Treaty's enacted language, but also that same Senate Report's more detailed treatment of Article 6 in its Technical Analysis section.

In relevant part, that Technical Analysis, which was prepared by the U.S. treaty negotiators for the Senate Committee on Foreign Relations, *see* S.A. at 74, reads as follows:

> Article 6 states that extradition may be denied when the prosecution would have been barred by lapse of time according to the law of the Requested State had the same offense been committed in the Requested State. Similar provisions are found in recent U.S. extradition treaties with Japan, France, and Luxembourg.

> Korea insisted on this provision because Korean law demands that extradition be denied if the statute of limitations would have expired in either Korea or in the Requesting State. However, the delegations were sensitive to the fact that U.S. and Korean statutes of limitations are so different that this provision could be very difficult to implement.

S. Rep. No. 106-13 at 14; S.A. at 82 (footnotes omitted). Contrary to Yoo's assertions, the Technical Analysis actually confirms our plain reading. That section's very first line provides: "Article 6 states that extradition *may be denied* when the prosecution would have been barred by lapse of time . . ." *Id.* (emphasis added). That first line both matches the Treaty's enacted language and contradicts the Senate Report's summary section, suggesting that the use of the word "precludes" in that section was an error. Thus, as the Ninth Circuit noted in *Patterson*,"[t]he more detailed technical analysis of the treaty . . . describes Article 6 in permissive terms." 785 F.3d at 1282.

But Yoo ignores that first line of the Technical Analysis. Instead, he focuses on the section's use of the words "insisted" and "demands," in describing South Korea's priorities in negotiating the Treaty, arguing that those words "bespeak lack of discretion." Appellant's Br. 17. He further asserts that "[i]f a country demands that extradition be denied under certain circumstances, it is not leaving the issue open to debate or negotiation." *Id.*

But the Technical Analysis's account of the Treaty's negotiation does not indicate that Article 6 itself is mandatory in nature. The fact that South Korea "insisted" on the Lapse of Time provision because of the specific "demands" of the Korean statute of limitations means only that South Korea, when acting as the Requested State, wanted the ability to deny extradition if the statute of limitations for the relevant offense had lapsed under Korean law. The fact that South Korea demanded a certain provision with the intent to apply its own statutes of limitations in most circumstances — or even in every circumstance — does not mean that the parties lack all discretion. Rather, South Korea simply insisted that the Treaty would provide it with the power to exercise its discretion to apply its own statutes of limitations. Neither the fact that the Treaty grants that power to both countries nor the putative intention of South Korea to exercise that power in most or all cases is inconsistent with the clear statement in the Treaty's language that the United States retains discretion to decide whether to extradite on that basis — discretion that, under United States law, is exercised by the Secretary of State.

Further, the Technical Analysis itself cites to three other extradition treaties — ones the United States negotiated around the same time it negotiated the Treaty with South Korea — as examples of treaties with "[s] imilar provisions." S.A. at 82. As the Ninth Circuit points out, "two of those treaties use the word 'shall,' and one uses the word 'may.'" *Patterson*, 785 F.3d at 1282. The Technical Analysis's citations to these other treaties demonstrate that the United States was well aware of

the different configurations of language it could use in a given treaty's provisions to achieve different outcomes. In other words, as the Ninth Circuit observed in *Patterson*, "[w]hen parties to a treaty intend to make an exception to extradition mandatory . . . they know how to state that it 'shall' apply." *Id.* Here, based on the plain language of the Treaty and the Technical Analysis, the parties intended to make the statute of limitations exception to extradition permissive, and knew how to state that it "may" apply.

Yoo's third piece of legislative history is a colloquy between U.S. Senator Rod Grams of Minnesota and John Harris, then the Acting Director of the Office of International Affairs in the Department of Justice's Criminal Division, that took place during the Congressional hearing on the Treaty. That colloquy went as follows:

> SENATOR GRAMS: Article 6 of the proposed treaty bars extradition in cases where the law of the requested State would have barred the crime due to a statute of limitations having run out.
>
> Now South Korea, unlike other treaty partners with similar commitments, also allows the time to continue running on the time limitation, even when charges are filed. Actions that would toll the statute of limitations, therefore, will apply under this treaty.

> So the question is are you confident that this article of the treaty adequately insures that fugitives cannot simply run out the clock by fleeing to Korea?
>
> MR. HARRIS: Senator, this article of the treaty was the subject of considerable negotiation. As you may recall, of the treaties that were before the Senate last fall, most of them had slightly different language. Many of our most modern extradition treaties flatly state that the statute of limitations of the requesting State will apply.
>
> We have a few in which it was not possible to reach that resolution. In this case, because of the specific provisions of Korean law, we did agree that the statute of limitations of the requested State would apply. But, as you have indicated, the specific language in the article is crafted so that those factors which toll the statute of limitations under the law of the requesting State would be given weight.
>
> So when the United States is making a request to Korea, there should be the ability to prevent a miscarriage of justice by the statute of limitations of Korea having expired before extradition can be accomplished.

S.A. at 104.

Yoo argues that Senator Grams "[p]lainly . . . believed that Article 6 was a mandatory provision" and that because Mr. Harris "said nothing, either directly or by implication, to contradict Senator Grams' statement that if the statute of limitations has expired, . . . 'the proposed treaty *bars* extradition.'" Appellant's Br. 20 (emphasis in original). In Yoo's view, if Senator Grams's understanding was incorrect and Article 6 was actually a permissive factor for the Secretary of State to consider in his or her discretion, Mr. Harris would have corrected him.

Like the Senate Report summary, the colloquy between Senator Grams and Mr. Harris cannot bear the weight Yoo wants it to. We agree with the Ninth Circuit in *Patterson* that the colloquy "only weakly supports [the] contention that the Senate understood the provision to be mandatory." 785 F.3d at 1282. We also agree with the district court that because the focus of the colloquy was on a scenario in which the *United States* requested extradition from *South Korea*, rather than the other way around, as it is in Yoo's case, the colloquy is "not particularly helpful in answering the question here." *Yoo*, 2021 U.S. Dist. LEXIS 210586, 2021 WL 5054726, at *8. In any case, one senator's misunderstanding of a treaty provision is not conclusive as to the understanding of the Senate as a whole or binding on us as a federal court.

After considering the legislative history, only two pieces cited by Yoo counsel weakly in his favor. The more reliable evidence — the Senate Report's Technical Analysis — actually points the other way. We credit that evidence in reaching our conclusion that whether Article

6 applies is a discretionary determination to be made by the Secretary of State.

D. Other Considerations

In addition to the legislative history, we consider the executive branch's own interpretation of the Treaty. Here, the evidence of that interpretation further confirms our interpretation of the plain language of Article 6. "We place great weight on the interpretation of a treaty by the Executive of our federal government." *Mora v. New York*, 524 F.3d 183, 204 (2d Cir. 2008) (quotation marks and citations omitted); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

With one minor exception highlighted by Yoo, it appears that the United States government's position on the permissive nature of Article 6 has been consistent. In presenting the Treaty it had negotiated to the President, the State Department made clear in its submittal letter that "Article 6 *permits* extradition to be denied when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State." S. Treaty Doc. No. 106-2 (emphasis added). And, as we noted above, in presenting the Treaty to the United States Senate, those responsible for negotiating the

Treaty made clear in the Technical Analysis that Article 6 was discretionary, and not mandatory, in nature. We find that the government's own consistent interpretation of the Treaty is entitled to great weight.

Moreover, "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am.*, 457 U.S. at 185. The government represented before the district court that the South Korean government shares its position that the word "'may' means 'may,' not 'must,'" in Article 6. *Yoo*, 2021 U.S. Dist. LEXIS 210586, 2021 WL 5054726, at *9 n.7. Absent evidence to the contrary, we see no reason not to defer to the parties' interpretation of their Treaty.

Yoo cites one prior extradition proceeding involving South Korea to argue that the government's position regarding Article 6 has not been consistent. In *Man-Seok Choe v. Torres*, 525 F.3d 733 (9th Cir. 2008), South Korea sought extradition of a Korean citizen living in California to face corruption charges. *Id.* at 736. There, the government did not present the extradition court with the position it has taken throughout this litigation, namely that the federal courts do not have the authority to deny extradition based on Article 6 of the Treaty because that provision uses discretionary language and only the Secretary of State may make that determination in his or her discretion. Instead, the government did not raise that argument until oral argument on appeal before the

Ninth Circuit. *Id.* at 740 n.9. The Ninth Circuit deemed this argument "waived" because it was raised for the first time only on appeal. *Id.*

Yoo relies on the Ninth Circuit's waiver finding in *Choe* to argue that if "may" really has the meaning the government argued it did during oral argument before the Ninth Circuit, the government would have taken that position from the beginning of the *Choe* litigation. The government represents that it has maintained the position it presents here in other similar extradition cases involving the Treaty. The government also argues that "a single inadvertent waiver by a different United States Attorney's Office should not detract from the deference owed to the Government's position." Appellee's Br. 17-18 n.3. We agree with the government. The fact that one United States Attorney's Office simply failed to raise an argument — as opposed to affirmatively taking the opposite position — and thereby forfeited it before one of our sister circuits does not hold much weight when compared to the government's otherwise consistent position, particularly where the government did in that very case eventually adopt the same position that it has otherwise consistently advocated.

Yoo finally argues that because statutes of limitations provide certain protections for those accused of crimes, leaving it to the Secretary of State to decide in his discretion whether the statute of limitations bars an extradition would "dilute[]" those protections and would be "dangerous to liberty." Appellant's Br. 22-23. We agree with Yoo that statutes of limitations serve important

purposes. But none of those purposes offer powerful reasons for us to interpret the Treaty in the way Yoo argues we should, given that the language of the Treaty and the government's intent in negotiating and signing the Treaty clearly points the other way.

Moreover, while the *concept* of a limitations provision requiring criminal cases to be brought within a specified period serves important purposes, the *specific* statute of limitations chosen by a jurisdiction for a given offense necessarily represents a somewhat arbitrary exercise in line-drawing. And the very arbitrariness of any given statute of limitations for any given crime makes the issue well-suited to discretionary determinations such as those provided for by Article 6. Indeed, there are any number of reasons why a country entering an extradition treaty might want to retain discretion in deciding whether to extradite, even if its own statute of limitations would be violated had the crime been committed within its jurisdiction. For example, consider a hypothetical financial crimes offense, similar to those Yoo faces, which has a six-year statute of limitations in the Requesting State but only a five-year statute of limitations in the Requested State. Suppose that the Requesting State indicted the offender five years and a month after the offense was committed, and only later located the offender, now a fugitive, in the Requested State. Even though the offender could not be prosecuted in the Requested State for the same offense had it happened there, he could still be prosecuted in the Requesting State. An extradition under those circumstances would hardly be outrageous given that the Requesting State's delay in bringing charges was still within its own statute of

limitations. But suppose the Requesting State has recently extended the statute of limitations to thirty years, in order to permit prosecuting a specific offender for a twenty-five-year-old financial crime. In that situation, the Requested State may reasonably hesitate to extradite, particularly in light of its own, much shorter statute of limitations and the nature of the offense. There is nothing absurd about a country's reserving discretion to consider whether applying its own statute of limitations would, in a given case, be overly protective or necessary to avoid injustice, rather than setting an invariant rule binding its courts to deny extradition.[3]

At bottom, bilateral treaties are the result of negotiations between the signatory parties. As the Sixth Circuit's survey of different extradition treaties in *Martinez* demonstrates, 828 F.3d at 460-61, different countries may well have different priorities when it comes to enforcing their own statutes of limitations. Moreover, as that survey demonstrates, the United States itself does not seem to have an inflexible position on the statute of limitations issue, as it has negotiated treaties with both mandatory and permissive provisions. That variety is

3. We do not suggest that our analysis of possible rationales supporting a country's decision to enter a treaty with a discretionary Lapse of Time provision is a reason, independent of the Treaty's text, to interpret the Treaty to provide for such discretion. Rather, we consider these possible rationales only to assess Yoo's argument that a discretionary provision would be so "dangerous to liberty" that it could not have been the intention of the Treaty's drafters to include one. For the reasons stated, that argument, in addition to being inconsistent with the Treaty's text, fails on its own terms.

instead likely the result of different priorities among the United States's treaty partners. The fact that there is no consistent approach to the statute of limitations issue among extradition treaties demonstrates that the permissive nature of this Treaty's Lapse of Time provision is not a deviation from a norm. Rather, it is simply a variation derived from the negotiations between the United States and South Korea.

E. Summary

Based on the customary meaning of the word "may" and its particular use in Article 6 of the Treaty; the Senate Report's Technical Analysis, the most authoritative item of legislative history cited by either party to this case; and the government's consistent position as to the meaning of the provision, we hold that the plain meaning of the word "may" in that provision is discretionary, and not mandatory, in nature. We further hold that because Article 6's Lapse of Time provision is discretionary, the decision whether to deny extradition on the basis that the Requested State's relevant statute of limitations would have barred prosecution had the relevant offense been committed within that State's jurisdiction is a decision consigned to that State's relevant executive authority, and is not a mandatory determination to be made by a federal court before issuing a certificate of extraditability. For Yoo, that means that the United States Secretary of State has the authority to determine whether the relevant statute of limitations would bar Yoo's prosecution had the charged offenses been committed in the United States

and, if so, whether to deny extradition on that basis.[4] For these reasons, the district court did not err in denying Yoo's petition for writ of habeas corpus.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

4. Because the effect of the Lapse of Time provision of the Treaty is a question to be addressed by the Secretary of State in his discretion, we have no occasion to comment on the merits of the parties' conflicting arguments as to whether prosecution in the United States would be barred by any applicable statute of limitations.

APPENDIX B — OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 1, 2021

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 21-CV-6184 (CS)

HYUK KEE YOO, A/K/A "KEITH YOO",

Petitioner,

- against –

UNITED STATES OF AMERICA,

Respondent.

November 1, 2021, Decided
November 1, 2021, Filed

CATHY SEIBEL, United States District Judge.

OPINION & ORDER

Seibel, J.

Before the Court is the petition of Yoo Hyuk Kee ("Yoo" or "Petitioner") for a writ of *habeas corpus* under 28 U.S.C. § 2241. Petitioner challenges Magistrate Judge Judith C. McCarthy's July 2, 2021 Order, (Ext. Dkt. No.

39 (the "Extradition Order")),[1] certifying Petitioner as extraditable pursuant to the Extradition Treaty Between the United States of America (the "United States" or "Government") and the Republic of Korea ("Korea"), signed on June 9, 1998 and entered into force on December 20, 1999. Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, K.-U.S., June 9, 1998, T.I.A.S. No. 12,962 (the "Treaty").

I. BACKGROUND

A. Procedural History

On May 8, 2014, after Petitioner was charged with seven counts of embezzlement, a judge of the Incheon District Court in Korea issued a warrant for his arrest. (Ext. Dkt. No. 2 ¶¶ 4-5.) Petitioner is located in the United States, and on May 28, 2014, the Korean government sent its first diplomatic note seeking his extradition. (Ext. Dkt. No. 2-1 ¶¶ 3, 6.) Over the next several years the Korean government made a number of supplemental submissions. (*Id.*) The Government filed a complaint on February 27, 2020, seeking a warrant for Petitioner's arrest under 18 U.S.C. § 3184 (the "Extradition Statute") and the Treaty. (Ext. Dkt. No. 2); *see In re Extradition of Hyuk Kee Yoo*, No. 20-MJ-2252, 2021 U.S. Dist. LEXIS

1. Docket entries from the extradition proceedings held before Judge McCarthy, No. 20-MJ-2252 (the "Extradition Court"), are cited as "Ext. Dkt. No. ."

124402, 2021 WL 2784836, at *1 (S.D.N.Y. July 2, 2021).[2] The Extradition Court issued the arrest warrant on July 22, 2020, and ordered Petitioner detained without bail. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *1. Petitioner's counsel moved to dismiss the Government's complaint on October 5, 2020; the Government filed a brief in support of extradition on December 8, 2020; and Petitioner filed his reply on December 21, 2020. *Id.* On January 7, 2021, the Government made a supplemental submission, to which Petitioner replied on January 25, 2021. *Id.*

The Extradition Court held an evidentiary hearing on March 3, 2021. 2021 U.S. Dist. LEXIS 124402, [WL] at *1-2. At the hearing, the Extradition Court admitted four exhibits submitted by the Government, without objection from Petitioner, and admitted nine of his proffered seventy-one exhibits, reserving decision on whether to admit the remaining sixty-two. (Ext. Dkt. No. 38.) Petitioner's exhibits to which the Government did not object were English translations of excerpts of transcripts of witness interviews conducted by Korean prosecutors. (*Id.*); *see In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *2.[3] The Korean government had submitted English summaries of

2. Citations to Judge McCarthy's July 2, 2021 Extradition Order are to the Westlaw version.

3. Petitioner also submitted these translated transcript excerpts to the Court as part of the instant *habeas* application. (*See* ECF No. 8 ("Petitioner's Br.") at 25 n.20.) Materials from this submission are cited as "Korean Interviews Binder Tab __."

these interviews but had not included direct translations of the transcripts. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836 at *11 n.16.

On July 2, 2021, the Extradition Court issued the eighty-page Extradition Order, ruling on the admissibility of all outstanding evidence and certifying Petitioner as extraditable pursuant to the Treaty. 2021 U.S. Dist. LEXIS 124402, [WL] at *1.

B. The Republic of Korea's Allegations

Petitioner is the son of a prominent religious and business leader in Korea, Yoo Byeong-eun. 2021 U.S. Dist. LEXIS 124402, [WL] at *2. Petitioner took over his father's church as *de facto* leader in 2010 and is also involved in the family businesses. *Id.* Petitioner's family controls I-One-I Holdings ("I-One-I"), which holds a controlling interest in a number of affiliated corporate entities (the "Affiliated Entities"). *Id.* The charges against Petitioner stem from three categories of alleged schemes to embezzle money from several of these entities: "(1) pretextual and fraudulent trademark licensing agreements with the Companies; (2) pretextual and fraudulent agreements for business consulting services with the Companies; and (3) a scheme to cause the Companies to make advance payments in support of a photography exhibition by Yoo's father at inflated values." *Id.* Korea alleges that, at Petitioner's direction, certain co-conspirator Chief Executive Officers ("CEOs") of the Affiliated Entities entered into contracts and arranged for payments from the Affiliated Entities to Petitioner or his private company Key Solutions. *Id.*

Appendix B

1. Trademark Schemes

Petitioner allegedly embezzled funds from three Affiliated Entities — Chonhaiji Co., Ltd. ("Chonhaiji"), Ahae Co. Ltd. ("Ahae"), and Onnara Shopping Co., Ltd. ("Onnara Shopping") — through schemes in which he registered trademarks used by the entities and then conspired with the CEOs to sign licensing agreements so he would be paid for the marks' use at above-market rates. 2021 U.S. Dist. LEXIS 124402, [WL] at *3. Payments were made to Petitioner under these agreements from January 2008 until June 2010 (Chonhaiji), January 2009 until December 2013 (Ahae), and January 2009 until December 2011 (Onnara Shopping). *Id.*

2. Consulting Schemes

Korea also alleges that Petitioner embezzled funds from three of the Affiliated Entities — Semo Co., Ltd. ("Semo"), Moreal Design Inc. ("Moreal"), and Chonhaiji — through sham consulting agreements. 2021 U.S. Dist. LEXIS 124402, [WL] at *3-4. Petitioner allegedly conspired with the CEOs to cause these entities to enter into consulting contracts with Petitioner's private company, Key Solutions, by which Key Solutions was paid monthly consulting fees but either did not provide the services or provided only limited services. *Id.* Payments were made to Key Solutions or to Petitioner directly by Semo from March 2010 until March 2014, by Moreal from April 2010 until December 2013, and by Chonhaiji from February 2011 until November 2011. *Id.*

3. Photography Scheme

Finally, in or around 2013, Petitioner allegedly coerced Chonhaiji to provide its own money, and money transferred to it by several other Affiliated Entities, ostensibly as advance payments for investment in unspecified photographs taken by Petitioner's father, but the payments allegedly greatly exceeded the value of any such photographs and much of the money was in fact used to fund an exhibition of his father's work at the Palace of Versailles. 2021 U.S. Dist. LEXIS 124402, [WL] at *4, 30.

II. STANDARD OF REVIEW

An extradition court has the limited task of determining whether there is sufficient evidence "to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. If the court finds that the request falls within the treaty and satisfies the Extradition Statute, it must issue a certificate of extraditability to the Secretary of State, who makes the ultimate decision whether to extradite the individual. *Id.*

> At an extradition hearing, the judicial officer's inquiry is confined to the following: whether a valid treaty exists; whether the crime charged is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof. An extradition hearing is not to be regarded as in the nature of a final trial by which the prisoner could be

> convicted or acquitted of the crime charged against him, and is not the occasion for an adjudication of guilt or innocence. Rather, it is essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.

Skaftouros v. United States, 667 F.3d 144, 154-55 (2d Cir. 2011) (cleaned up). Assuming that there is a valid treaty and the crimes charged fall within that treaty, the role of the extradition court is "in line with [a magistrate judge's] accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense." *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996) (cleaned up).

Review of a magistrate's determination that a person is extraditable is even more circumscribed. "Because extradition orders are regarded as preliminary determinations . . . they may only be reviewed by a petition for a writ of habeas corpus under 28 U.S.C. § 2241." *Skaftouros*, 667 F.3d at 157. *Habeas* review of an extradition order is confined to (1) "'whether the magistrate had jurisdiction,'" (2) "'whether the offense charged is within the treaty'" and, (3) "'whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.'" *Id.* (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925)). "Ultimately, 'in order to merit habeas relief in a proceeding seeking collateral review of an extradition order, the petitioner must prove

by a preponderance of the evidence that he is in custody in violation' of the statute authorizing extradition or the applicable extradition treaty." *Bisram v. United States*, 777 F. App'x 563, 565 (2d Cir. 2019) (summary order) (quoting *Skaftouros*, 667 F.3d at 158). Thus, "collateral review of an international extradition order should begin with the presumption that both the order and the related custody of the fugitive are lawful." *Skaftouros*, 667 F.3d at 158.

III. DISCUSSION

Petitioner does not challenge Magistrate Judge McCarthy's jurisdiction under 18 U.S.C. § 3184 and Local Criminal Rule 59.1(b), nor does he dispute that the Treaty between the United States and Korea is in force. *See In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *5. The Extradition Court also concluded that the embezzlement crimes satisfy the "dual criminality requirements" of the Treaty, 2021 U.S. Dist. LEXIS 124402, [WL] at *6, and Petitioner does not contend otherwise. But Petitioner argues that he is being held in violation of the Treaty and the Extradition Statute because the statute of limitations has run on the charges against him and, even if not time-barred, the charges are not supported by probable cause.

A. Statute of Limitations

The Extradition Court did not assess whether the charges against Petitioner are time-barred because it concluded that that the Treaty permits only the Secretary

of State to make that determination. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *35. Petitioner argues that this was in error.

While judicial officers are empowered to determine whether the legal requirements for extradition are met — that is, whether extradition is barred by the extradition statute or the applicable treaty — the executive branch is the final decision-maker and retains discretion to deny extradition. *Cheung v. United States*, 213 F.3d 82, 88 (2d Cir. 2000). Thus, under an extradition treaty "'discretionary' determinations are reserved for the Secretary of State, and 'mandatory' determinations must be addressed by the extraditing court." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *35 (citing *Patterson v. Wagner*, 785 F.3d 1277, 1281 (9th Cir. 2015)); *see Vo v. Benov*, 447 F.3d 1235, 1247 (9th Cir. 2006) ("[T]he statutorily imposed judicial functions encompass the entirety of a court's obligations in the extradition process, . . . the magistrate judge has no discretionary decision to make. Because discretionary decisions are within the province of the Secretary of State and not the extradition magistrate, . . . it is for the Secretary to decide what evidence might have a bearing upon a discretionary decision.") (cleaned up); *cf. Murphy v. United States*, 199 F.3d 599, 601-02 (2d Cir. 1999) ("The function of habeas review in this context is to test only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide.") (cleaned up). Accordingly, this Court may analyze whether the charges against Petitioner are timely only if consideration of the statute of limitations is a mandatory prerequisite to extradition under the Treaty.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008). A court must also look to other sources to ensure that its reading "give[s] the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air Fr. v. Saks*, 470 U.S. 392, 399, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985). "[C]ourts — including our Supreme Court — look to the executive branch's interpretation of the issue, the views of other contracting states, and the treaty's negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent." *Patterson*, 785 F.3d at 1281-82 (citing *Abbott v. Abbott*, 560 U.S. 1, 15-20, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010); *Medellin*, 552 U.S. at 508-13; *Vo*, 447 F.3d at 1246 n.13).

1. Text of the Treaty

Article 6 of the Treaty states:

> Extradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts or circumstances that would suspend the expiration of the statute

> of limitations of either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

Treaty, art. 6.

The Extradition Court correctly noted that the natural reading of the first sentence is that it is permissive rather than mandatory. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *31. This reading is consistent with the Ninth Circuit's decision in *Patterson v. Wagner*, which analyzed the same Treaty and addressed the same issue. *See* 2021 U.S. Dist. LEXIS 124402, [WL] at *32. The *Patterson* court explained:

> The normal reading of "may" is permissive, not mandatory. The most natural reading of Article 6, therefore, is that untimeliness is a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition. That is, the Secretary "may" decline to extradite someone whose prosecution would be time-barred in the United States, but he or she is not required to do so. Under this reading, there is no mandatory duty that a court may enforce.

Patterson, 785 F.3d at 1281. As the Extradition Court also observed, district court cases — including one from this

Circuit — that have analyzed "extradition treaties with identical language in lapse of time provisions" have also concluded that consideration of the statute of limitations is permissive rather than mandatory. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *32 (citing *Mirela v. United States*, 416 F. Supp. 3d 98, 110-11 (D. Conn. 2019), *appeal dismissed*, No. 19-3366, 2020 U.S. App. LEXIS 12371, 2020 WL 1873386 (2d Cir. Feb. 25, 2020); *United States v. Porumb*, 420 F. Supp. 3d 517, 527-28 (W.D. La. 2019)).

Petitioner asserts that the Ninth Circuit and the Extradition Court misread the first sentence of Article 6 and that there "may" is mandatory language that should be read as "must" or "shall" in light of the structure of the Treaty and its legislative history. (Petitioner's Br. at 5-15.) Petitioner cites several cases for the proposition that legislative intent and inferences drawn from the structure and purpose of a treaty can rebut the usual presumption that the word "may" is permissive rather than mandatory. (*Id.* at 8.) A close reading of the Treaty as whole, according to Petitioner, reveals that "may" is mandatory in this case: he contrasts Article 6, in which the word "may" stands alone, with Article 2(4), which says "the executive authority of the Requested State may, in its discretion," grant extradition in certain circumstances, and Article 4(4), which says "the executive authority of the Requested States may refuse extradition" in certain other circumstances. (Petitioner's Br. at 9.) Petitioner contends that if "may" standing alone is read as permissive, then the words "discretion" and "executive authority" in these other provisions would be surplusage. (*Id.*) Petitioner

also points to Article 3(1)'s use of "shall" to connote discretion (the Requested State "shall have the power to extradite such person if, in its discretion, it be deemed proper to do so") to bolster his argument that the Court must look beyond the mere use of "may" or "shall." (*Id.* at 10.) Finally, Petitioner points to Article 10(4) - which uses the word "may" but, he argues, "seems directed to the court, and . . . is likely mandatory"[4] - to highlight the lack of "semantic precision" in the Treaty. (Petitioner's Br. at 9-10.)

I am not persuaded. In addition to the ordinary meaning of "may," the Extradition Court correctly noted that the words "may" and "shall" appear alongside one another within Article 6, reinforcing the conclusion that "may" should be read as discretionary and "shall" as mandatory, absent context which would alter these natural meanings. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *31; *see Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) (connotation of "may" as discretionary is "is particularly apt where, as here, 'may' is used in contraposition to the word 'shall'"); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 91 L. Ed. 436 (1947) ("[W]hen the same Rule uses both 'may' and 'shall',

4. Article 10(4) provides: "A person who is provisionally arrested may be discharged from custody upon the expiration of two months from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 8." Petitioner does not explain why this provision is "likely mandatory."

the normal inference is that each is used in its usual sense — the one act being permissive, the other mandatory.").

Looking to other provisions of the Treaty, just because the drafters may in certain provisions have used words that were not strictly necessary ("may, in its discretion") does not mean that the Treaty does not mean what it says in the provision at issue here ("may"). Further, while certain provisions using "may" contain additional permissive language, several other provisions use the word "may" standing alone — as it is used in Article 6. *See* Treaty, art 2(7) ("extradition may be denied" where less than four months remain on a sentence of confinement in the Requesting State); *id.* art. 7(1) ("Requested State may refuse extradition" under certain circumstances where the crime is punishable by death in the Requesting State); *id.* art. 12(1) (if the person subject to extradition is serving a sentence in the Requested State for a different crime than that for which extradition is sought, "the Requested State may temporarily surrender the person sought to the Requesting State for the purpose of prosecution"); *id.* art. 17(1) ("Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State."). As the Extradition Court noted, the Technical Analysis section of the Senate Report on the Treaty — prepared by a U.S. Department of Justice official[5] - specifically explains

5. The Technical Analysis section was "prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, and is based on notes from the negotiations." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021

that several of these provisions are discretionary. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *33; *see* S. Rep. No. 106-13 at 15, 18, 20 (1999). Thus, in these provisions, the drafters of the Treaty used "may" to signal discretion without additional verbiage.

Petitioner attempts to refute this point, arguing that the Court need not read the word "may" as mandatory in all instances where the word stands alone — but should read "may" as mandatory in one such instance, in Article 6. (*See* Petitioner's Br. at 10.) But he provides no principled basis on which the Court could decide when "may" means "may" and when it means "must." His proposed reading would not only require the Court to ignore the plain text and ordinary meaning of the word "may," but also to grant it a different meaning in Article 6 than it has in other provisions of the Treaty. The drafters of the Treaty knew how to make provisions mandatory, *see Patterson*, 785 F.3d at 1282, and chose not to do so in Article 6.[6]

WL 2784836, at *33 n.46 (citing S. Rep. No. 106-13, at 8 (1999)). "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961).

6. For example, the provision immediately preceding Article 6 states "Extradition *shall not be granted* when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested." Treaty, art. 5 (emphasis added).

Thus, nothing in the plain text of Article 6 or in the structure or language of the Treaty as a whole allows the Court to draw an "obvious inference[]" to defeat the natural, "commonsense" reading of "may" as indicative of discretion. *See United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).

2. Legislative History

The legislative history likewise does not reflect any clear intent from which the Court can conclude that the Treaty mandates judicial consideration of the statute of limitations.

As Petitioner notes, the Summary of the Treaty in the Senate Report states that Article 6 "precludes extradition of offenses barred by an applicable statute of limitations," which supports Petitioner's reading. S. Rep. No. 106-13, at 5. But this mandatory language contrasts with the enacted language, as discussed above, and only appears in the Summary section.

The Technical Analysis section, in contrast, uses the term "may" to describe the authority granted to each state. S. Rep. No. 106-13, at 14-15. As the Ninth Circuit noted: "The more detailed technical analysis of the treaty, contained in the body of the Report, describes Article 6 in permissive terms, stating that extradition 'may be denied' and explaining that the Korean and U.S. statutes of limitations operate so differently that 'this provision could be very difficult to implement.'" *Patterson*, 785 F.3d at 1282; *see In re Extradition of Hyuk Kee Yoo*, 2021 U.S.

Dist. LEXIS 124402, 2021 WL 2784836, at *34 ("As with the other provisions noted above, the Technical Analysis section connects the word 'may' in the original text of Article 6 with discretionary authority through a detailed explanation of the provision's negotiating history.").

Petitioner pushes back against this reading, quoting other language in the portion of the Technical Analysis discussing Article 6: "'Korea *insisted* on this provision [Article 6] because Korean law *demands* the extradition be denied if the statute of limitations would have expired in either Korea or in the Requesting State.'" (Petitioner's Br. at 11 (quoting S. Rep. No. 106-13, at 8, 14) (emphasis in Petitioner's Br.)). He also points out that the Korean law footnoted in the Technical Analysis section provides that "[n]o criminal shall be extradited . . . [w]here the prescription of indictment or sentence against an extraditable crime is completed under the Acts of the Republic of Korea or the requesting state." (*Id.* at 11-12.) Petitioner then incorrectly asserts that the Extradition Court failed to address how this language can be squared with the common-sense reading that "may" is permissive. In fact, the Extradition Court did address this argument:

> Crucially, although Korea "insisted" that the first sentence comport with Korean law, the section explains that because "the delegations were sensitive" to the differences between Korean and United States statutes of limitations, "the Treaty provides that a request *may* be denied if it would be timebarred in the Requested State, *but* that acts or circumstances

> that would toll the statute of limitation in either state *would be applied* by the Requested State." Contrary to Yoo's assertions, this passage does not communicate that the provision adopts Korean law's "demand that extradition be denied if the statute of limitations would have expired in either Korea or in the Requesting State." .... Rather, through a combination of permissive and mandatory language mirroring Article 6 itself, the passage reflects a compromise between the delegations, allowing Korea to apply its own statute of limitations law when it is the requested State — as it wanted — and requiring consideration of the tolling rules of either State whenever statute of limitations is in play.

In re Extradition of Hyuk Kee Yoo, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *34 (cleaned up). The Court agrees with this reasoning. The mandatory language to which Petitioner points — when read in context — comports with the conclusion that each state has discretion whether to consider the timeliness of charges. The phrases that Petitioner quotes refer to requirements of Korean law, and Article 6 accounts for those requirements by allowing Korea to follow those mandates when it is the Requested State. In other words, that Korea insisted on the first sentence of Article 6 does not suggest that the application of the Requested State's statute of limitations is mandatory; that on which Korea "insisted," and which the Treaty provides, was that it have the discretion to apply the "demands" of its law when it was the Requested

State, while not requiring the United States to do the same.

Petitioner also argues that an exchange between Senator Rod Grams and John Harris, the Acting Director of the Office of International Affairs at the Department of Justice, during the Senate hearing, reflects both Senator Grams's and Mr. Harris's understanding that the statute-of-limitations bar was mandatory under the treaty. (Petitioner's Br. at 12-13.) The exchange is as follows:

> SENATOR GRAMS: Article 6 of the proposed treaty bars extradition in cases where the law of the requested State would have barred the crime due to a statute of limitations having run out. . . .
>
> . . .
>
> So the question is are you confident that this article of the treaty adequately insures that fugitives cannot simply run out the clock by fleeing to Korea?
>
> MR. HARRIS: Senator, this article of the treaty was the subject of considerable negotiation. As you may recall, of the treaties that were before the Senate last fall, most of them had slightly different language. Many of our most modern extradition treaties flatly state that the statute of limitations of the requesting State will apply. We have a few in which it

> was not possible to reach that resolution. In this case, because of the specific provisions of Korean law, we did agree that the statute of limitations of the requested State would apply. But, as you have indicated, the specific language in the article is crafted so that those factors which toll the statute of limitations under the law of the requesting State would be given weight. So when the United States is making a request to Korea, there should be the ability to prevent a miscarriage of justice by the statute of limitations of Korea having expired before extradition can be accomplished.

S. Rep. No. 106-13, at 37. The Ninth Circuit addressed this same exchange and noted that it only "weakly supports [the] contention that the Senate understood the provision to be mandatory" because Senator Grams — even if he believed the provision was mandatory and did not have this assumption corrected by Mr. Harris's response — was not speaking for the whole Senate. *Patterson*, 785 F.3d at 1282-83. The Court agrees. Further, the colloquy does not directly address Mr. Harris's understanding of the mandatory/permissive nature of the requirement. The focus of the exchange was the effect of Article 6 when the United States requests extradition of a fugitive from Korea, not the other way around. Mr. Harris was assuring the Senator that because Korea would have to respect U.S. tolling rules, a fugitive from U.S. justice could not "run out the clock" even if Korea applied its own statute of limitations when the United States was the Requesting State. He was not addressing whether the United States

would be required to apply Korea's statute of limitations when the United States was the Requested State. Thus, it is not particularly helpful in answering the question here, and certainly is not so conclusively persuasive as to warrant a departure from the natural reading of the enacted language.

Finally, Petitioner addresses the State Department's official submittal letter to President Clinton, which states that "Article 6 permits extradition to be denied when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State." S. Treaty Doc. No. 1062, at v (1999). Petitioner contends that "permits" here is best read as "authorizes," meaning that the Treaty authorizes "a court to consider whether a prosecution is time-barred," in contrast to treaties that bar consideration of timeliness. (Petitioner's Br. at 14.) But nothing in the text of the letter indicates that the State Department is purporting to explain to the President the scope of potential judicial review under the treaty: the much more natural reading is that the executive branch is speaking about what issues may permissively be considered. As the Ninth Circuit noted, if consideration of the statute of limitations were mandatory, the letter would use the word "requires." *Patterson*, 785 F.3d at 1283. Moreover, this reading is consistent with both the enacted text and the beliefs of the executive branch in the wake of treaty negotiations, as reflected in the Technical Summary. The Court agrees with the Extradition Court that this letter reinforces

the conclusion that the statute-of-limitations issue is for the Secretary of State, not the courts, and "is entitled to great weight, as it was drafted by Strobe Talbot of the Department of State, an office that played a key role in the Treaty's negotiation." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *35 (citing *Lozano v. Alvarez*, 697 F.3d 41, 50 (2d Cir. 2012)).[7]

In sum, the Court agrees that, under the Treaty, consideration of the statute of limitations is a discretionary task assigned to the executive branch. Thus, this Court will not analyze the issue of whether the charges are time-barred.

B. Probable Cause

Petitioner challenges the Extradition Court's probable cause finding on each of the seven embezzlement counts with which he is charged. Petitioner also asks this Court to consider certain evidence that was excluded by the Extradition Court.

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7. In addition, the Government takes the position that "may" means "may," not "must," in Article 6. *See Mora v. New York*, 524 F.3d 183, 204 (2d Cir. 2008) ("We place great weight on the interpretation of a treaty by the Executive of our federal government.") (cleaned up). The Government represents that this is Korea's interpretation as well, (*see* ECF No. 9 at 11 n.5), in which case this Court's deference is even greater, *see Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

Appendix B

This Court's *habeas* review of the Extradition Order "is limited and should not be converted into a *de novo* review of the evidence." *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981); *see Fernandez*, 268 U.S. at 312 ("[*Habeas* review of an extradition order] is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing . . . ."); *Suyanoff v. Terrell*, No. 12-CV-5115, 2014 U.S. Dist. LEXIS 167124, 2014 WL 6783678, at *2 (E.D.N.Y. Dec. 2, 2014) ("The parameters of habeas review of an extradition order are highly circumscribed.") (cleaned up). While the Court is not "expected to wield a rubber stamp" and must ensure compliance with the treaty provisions and Extradition Statute, the Extradition Order is afforded a "presumption of validity." *Skaftouros*, 667 F.3d at 158; *see Spatola v. United States*, 741 F. Supp. 362, 373 (E.D.N.Y.1990) ("A magistrate's finding that there is probable cause will not be overturned so long as there is *any* evidence warranting the finding that there was reasonable ground to believe the accused guilty.") (emphasis in original), *aff'd*, 925 F.2d 615 (2d Cir. 1991). Further, "[t]he credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extraditing magistrate." *Austin v. Healey*, 5 F.3d 598, 605 (2d Cir. 1993).

1. Statements of Park Seung-il

The Extradition Court cited statements made by Petitioner's alleged co-conspirator, Park Seung-il ("Park"), as support for a finding of probable cause on all seven charges brought by Korea. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL

2784836, at *8-30. Park ran the day-to-day operations of Key Solutions, Petitioner's private company that is at the center of many of the embezzlement charges, and was also employed by several companies affiliated with Petitioner's family's corporate empire, including as a director of I-One-I and Chonhaiji, and an auditor of Ahae. 2021 U.S. Dist. LEXIS 124402, [WL] at *2, *8 & n.6.

Because Park's testimony is relevant to all of the charged conduct, I address the arguments regarding his statements before addressing the other issues raised by Petitioner. Petitioner submits (as he did in the Extradition Court) his own translation of Park's statements to Korean prosecutors[8] and zeroes in on a few key passages that he argues render Park's statements innocuous.

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8. As noted above (*see* note 3 and accompanying text) the Korean government submitted summaries of witness interviews. *See In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *11 n.16, *20-21. Petitioner obtained — from associates who found them in Korean court files — what he asserts are the full transcripts of the witness interviews on which the summaries were based, (Petitioner's Br. at 23, 35 n.27), translations of which were admitted into evidence and considered by the Extradition Court, (Ext. Dkt. No. 38); *see In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *2. The Extradition Court addressed the discrepancies between the summaries and the translations, including the summaries' improper use of quotation marks, but found that overall, "the summaries and excerpts of Park's interview provided by Korea sufficiently align with Yoo's version to support a finding of probable cause." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *11 n.16.

First, Petitioner focuses on a colloquy in which Park — in response to a question whether he was "responsible for illegally collecting and managing funds from affiliated companies under the pretext of trademark fees, consulting fees, etc., as well as being responsible for the overall management of the Yu family's finances" — stated, "Yes, I admit to all of this. However, I didn't think that I was collecting money illegally." (Petitioner's Br. at 24.) In response to a follow-up question, Park conceded that, "[L]ooking back on it now I think I collected those funds illegally." (*Id.*) Petitioner argues that this exchange shows that Park believed he was acting legally at the time he was collecting trademark and consulting fees on Petitioner's behalf, (*id.* at 24-25), which undermines Korea's case because Park would have known he was doing something illegal at the time if the conduct constituted "the brazen embezzlement that Korea posits." (*Id.* at 27.) But while Park's after-the-fact description of his state of mind at the time could be helpful to Petitioner at trial, it does not rob the statements of evidentiary value: Park admits to collecting funds on behalf of Petitioner and his family, illegally, under the pretext of trademark and consulting fees. (Korean Interviews Binder, Tab E at 9.)[9]

9. Indeed, even if Park had adhered to the view that his actions were not illegal, his admission to siphoning money from the Affiliated Entities for Petitioner's benefit via pretexts would be powerful evidence of embezzlement. And, of course, any such belief on Park's part would be far from conclusive. It is not uncommon that an accused white-collar criminal admits to transactions but maintains that they were legitimate, or that he believed them to be legitimate, and is nevertheless thereafter convicted.

Next, Petitioner reiterates an argument he belatedly made below, that a Korean word translated by the Korean Government as "under the pretext of" can also mean "for," and is properly translated as "for" in several places in Park's transcribed interview. (*Id.* at 24-25.)[10] Both before the Extradition Court and here, Petitioner offers the affidavits of a former Korean judge and an experienced Korean/English translator in support of this translation. (ECF No. 8-3.) Petitioner argues that this distinction is key because it turns otherwise incriminating admissions — for example, that Park collected money "under the pretext" of trademark or consulting fees — into neutral, innocuous statements. (Petitioner's Br. at 25-26.)

Although the Extradition Court admitted both of Petitioner's proffered affidavits, it expressed skepticism regarding Petitioner's translation of the Korean term in question, noting that there was "little reason to believe that the linguistic analysis presented by Yoo is any more accurate than that submitted by Korea" and that a Korean factfinder would be better equipped to assess the issue. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *11. Regardless, the Extradition Court engaged with Petitioner's translation, finding that even if it accepted that translation, the substance of Park's statements still established probable cause:

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10. Petitioner concedes that an earlier translation he submitted to the Extradition Court translated the word at issue as "under the pretext" rather than "for," but says this was a "mistake[]." (Petitioner's Br. at 25 n.21.)

> Furthermore, even taking into account any ambiguity in the word "명목" the rest of Park's statements to prosecutors are sufficient to establish probable cause because they convey that under Yoo's direction, Park facilitated a sham trademark agreement whose only purpose was to extract money from Chonhaiji for the Yoo family's benefit. . . . According to both parties' submissions, Park expressly admitted, in sum and substance, to "illegally collecting money and managing funds from affiliated companies," (Korean Interviews Binder, Tab E at 9; *see also* [Ext. Dkt.] No. 27-1 at 59), and that the trademark fees were "unnecessarily" high and "actually a way for the Yoo . . . family to take the funds of affiliates," (Korean Interviews Binder, Tab E at 21; *see also* [Ext. Dkt.] No. 27-1 at 68-69). Park further admitted that he assumed "responsibility for the overall management of the Yoo family's slush fund." (Korean Interviews Binder, Tab E at 25; *see also* [Ext. Dkt.] No. 27-1 at 69-70).

In re Extradition of Hyuk Kee Yoo, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *11 (cleaned up). The Court agrees with this assessment. While some of the linguistic discrepancies Petitioner raises might make Park's statements less incriminating, his statements remain incriminating.[11] They thus constitute evidence

11. Further, as discussed below, Park's statements are not the only evidence that the payments were pretextual.

sufficient to support the Extradition Court's findings. *See Skaftouros*, 667 F.3d at 157.[12]

In addition to Park's statements, which the Extradition Court noted are entitled to "significant weight" as statements of an alleged accomplice, *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *12 (cleaned up), the Extradition Court cited additional evidence supporting its probable cause findings as to each of the seven embezzlement charges. Petitioner reiterates several arguments he made before the Extradition Court challenging these findings. In addition, Petitioner objects to some (but not all) of the Extradition Court's evidentiary rulings. Mindful of the procedural posture, this Court will not engage in *de novo* review of the evidence, but will address the arguments raised by Petitioner. *See Melia*, 667 F.2d at 302.

2. Trademark Licensing Allegations

a. Chonhaiji

The Extradition Court found that Park's statements, along with statements made by former Chonhaiji CEO Byeon Gi-chun and financial records reflecting payments made from Chonhaiji to Key Solutions, "constitute sufficient evidence to support a finding of probable cause." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS

12. Because my decision here does not turn on the proper translation of the disputed term, I decline Petitioner's suggestion to engage a court-certified translator. (*See* ECF No. 14 ("Petitioner's Reply") at 7.)

124402, 2021 WL 2784836, at *12. Petitioner attacks the probative value of Byeon Gi-chun's statements, citing the fact that he did not become CEO until after the alleged scheme had concluded. (Petitioner's Br. at 27.) But Petitioner concedes that Byeon Gi-chun joined Chonhaiji as a director in 2007, (*id.* at 24, 27), and the Extradition Court found the totality of his statements sufficiently demonstrated that he had personal knowledge of the trademark contract and the circumstances surrounding it, *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *12-13. Thus, while it is true that Byeon Gi-chun did not establish the contract at issue, it does not follow that he had no knowledge of the factors that caused the company at which he was a director to continue to pay the fee.

Petitioner also argues that Byeon Gi-chun's agreement with the prosecutor's statement that the trademark licensing fee was "actually a way for the Yoo Byung-Eon family to leak the funds of affiliates" should be disregarded as a response to a leading question that "adds little to the probable cause calculation." (Petitioner's Br. at 27.) This argument amounts to a dispute over the proper weight to give Byeon Gi-chun's statements, and it does not convince the Court that Judge McCarthy's determination was in error. *See Austin*, 5 F.3d at 605 (*habeas* review is not occasion for review of magistrate judge's findings regarding credibility or weight of evidence). Further, that the answer to a leading question may have less probative value than the answer to an open-ended question hardly means that its probative value cannot be significant. *See United States v. Thomas*, 282 F.2d 191, 195 (2d Cir. 1960)

("'Yes' and 'No' answers to leading questions may have less evidentiary weight but this is material for jury argument rather than appellate error.").

b. Ahae

In finding probable cause for the Ahae trademark embezzlement charges, the Extradition Court relied in part on statements made by Lee Seong-hwan, Ahae's former co-CEO, that the price of the trademark licensing agreement was too high and had been set unilaterally by Petitioner. (Petitioner's Br. at 29-30.) Park confirmed this statement. (*Id.* at 29.) While this exchange, standing alone, might be insufficient for probable cause, the statement stands alongside Park's other statements, including his admission that the trademark agreements were a way for Petitioner's family to enrich itself. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *15. Lee Seong-hwan's statement supports that theory of the crime. The same is true of the statement of the other co-CEO, Lee Gang-se, that the licensing fee was unnecessarily high, on which the Extradition Court also relied. *Id.* Petitioner's arguments, as above, largely go to weight and do not convince me that there is a lack of evidence supporting the Extradition Court's conclusion.[13]

13. I also do not agree that Petitioner's evidence — reflecting that the Korean government was wrong about the date on which Petitioner sought to register the Ahae trademark — "tears the heart from Korea's allegations." (Petitioner's Br. at 28-29.) As the Extradition Court explained, the timing of the trademark's registration is not the only evidence going to probable cause. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402,

c. Onnara Shopping

With regard to Onnara Shopping, Petitioner dismisses Park's evidence as "frail[]" and focuses his discussion on the Extradition Court's partial reliance, *see In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *17-18, on statements from Kim Chun-gyun, an auditor of I-One-I and some of its affiliates (but not Onnara Shopping), (Petitioner's Br. at 31). But, as discussed above, Park's evidence cannot be so easily discounted. The Extradition Court held that Park's statements alone were sufficient to support probable cause as to Onnara Shopping because Park "named Onnara Shopping as one of the affiliates from whom Yoo received money" for trademark fees, "asserted that such royalties were 'unnecessary' and a mechanism to take affiliates' funds to benefit the Yoo family's own wealth," and "confirmed that he received all of his instructions to facilitate such transactions from Yoo" as part of a scheme that he considered illegal in retrospect. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *17. This is sufficient for the minimal probable cause showing required at this stage.

2021 WL 2784836, at *14 ("In light of the consistent evidence that (1) the name "Ahae" was adopted in or about 1998, years before any trademark licensing agreement with Yoo; (2) Yoo did not own or create the subject mark; and (3) the royalty payments were disproportionate to the mark's value, Yoo's rebuttal evidence regarding the specific timing of the subject licensing transaction is ineffective.").

Petitioner argues that Kim Chun-gyun's statements — to the effect that he was generally aware, through his knowledge of Yoo's family's corporate structure, that the Affiliated Entities generated funds for the family by fraudulent means, *see id.* — should be disregarded because Kim Chun-gyun lacked personal knowledge and his statements were hearsay, (Petitioner's Br. at 31-32). But, as Petitioner acknowledges, the Federal Rules of Evidence do not apply in extradition proceedings and hearsay is admissible. *Melia*, 667 F.2d at 302. The Court thus defers to the Extradition Court's determinations of the proper weight to give these statements.

3. Consulting Services Allegations

a. Semo

In finding that there was probable cause that Petitioner was embezzling money from Semo through sham consulting agreements, the Extradition Court discussed the statements of five witnesses — Park, Kim Chun-gyun, Kim Gyu-seok (leader of Semo's Management Support Team), Go Chang-hwan (Semo's former CEO), and Jo Seon-ae (a Semo employee). *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *18-22. Petitioner first incorporates his arguments about Park and Kim Chun-gyun, (Petitioner's Br. at 33), which are unpersuasive, as discussed above.

Petitioner points to discrepancies between the Korean summaries of Kim Gyu-seok's statements and Petitioner's translation. As explained by the Extradition Court, this

discrepancy — regarding whether work product provided by Key Solutions was simply a Korean translation of information that was available on the internet — was an erroneous attribution of Park's statement to Kim Gyu-seok.[14] Petitioner also suggests that Kim Gyu-seok did not say that Petitioner only provided consulting services once or twice per year in the years in which he was being paid a monthly fee. (Petitioner's Br. at 33.) But Petitioner's own translation includes that statement: "As a management advisory consulting firm, Key Solution provides us with 1-2 data per year." (*See* Korean Interviews Binder, Tab A at 20.) Petitioner also points to Kim Gyu-seok's non-answer ("You can check it out with each department.") to a question whether the consulting fees paid by Semo to Petitioner were worth it. (Petitioner's Br. at 34.) But the fact that Kim punted on this question does not undermine his statements, confirmed in the transcript, that Key Solutions only provided services 1-2 times per year. (*See* Korean Interviews Binder, Tab A at 20.) Whether this is conclusive on its own is irrelevant in light of the other evidence on which the Extradition Court relied.

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14. According to the Extradition Court, during the proceedings below "Korea clarified that the 'internet' statement was misattributed, and was actually made by Park Seung-il," an assertion that Petitioner apparently did not question before the Extradition Court. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *18 n.27. Petitioner's submission to this Court reflects that Park did not say the exact words Korea attributed to Kim Gyu-seok, but did concede that Key Solutions had inexperienced employees providing a translated version of data available on the website of the U.S. Food and Drug Administration ("FDA"). (Korean Interviews Binder, Tab E at 17.)

Petitioner contends that when Korean prosecutors asked Go Chang-hwan whether he thought the limited services Key Solutions provided could have been procured on a one-time outsourcing basis (as opposed to via the monthly fees Semo paid), his response was not unequivocal: "That's right. But I can't be too sure." (Petitioner's Br. at 35.) But this is not the only inculpatory statement from Go Chang-hwan, as (based on Petitioner's translations) he also testified "I think so" in response to the question whether it was true that Petitioner only provided services one to two times per year. (Korean Interviews Binder, Tab B at 17.) These statements, though perhaps weak (or perhaps reflecting the reluctance of the witness), are consistent with the other evidence presented by Korea.

Petitioner also raises Korea's failure to disclose Go Chang-hwan's statements that it was "absolutely not the case" that Semo paid excessive consulting fees to Petitioner without any justifiable reason, and that Yoo provided talks on health and documents related to FDA and other certifications. (Petitioner's Br. at 35.) The Extradition Court concluded that Korea had no obligation to disclose this evidence, following other courts that have held that "there are no *Brady* obligations in an extradition proceeding precisely because, absent a full trial on the merits by the extraditing court, the extraditee has no rights that trigger *Brady*'s underlying purpose." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *22 (citing *Montemayor Seguy v. United States*, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004); *In re Extradition of Singh*, 123 F.R.D. 108, 112 (D.N.J. 1987); *Merino v. U.S. Marshal*, 326 F.2d 5, 13

(9th Cir. 1963)). I agree with the Extradition Court that, under the circumstances, the failure to disclose these statements does not negate probable cause. The bottom line at this stage is that the statements were before the Extradition Court, even if through Petitioner's efforts rather than Korea's, and were considered by that court as part of the totality of the circumstances. Korea's failure to disclose this information does not alter the conclusion that there is evidence supporting the Extradition Court's conclusion with regard to probable cause.

Petitioner's challenge to Jo Seon-ae's evidence — that Korea's summary of her statements was misleading and that she could not have had any knowledge of the value of the consulting provided by Petitioner — is immaterial because the Extradition Court determined that there was sufficient probable cause for the Semo charge "regardless of the weight afforded to Jo Seon-ae's statements." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *22.

Finally, Petitioner challenges the Extradition Court's decision to exclude the affidavits of Hwang Ho-eun (a Semo employee in charge of production) and Ryu Geun-ha (a Key Solutions employee), as well as reports prepared by Ryu Geun-ha. (Petitioner's Br. at 37-38.) Petitioner argues that the Extradition Court should have considered these materials because they negate Korea's charge that Key Solutions failed to provide and was incapable of providing consulting services. (*Id.*)

Appendix B

While defendants in extradition proceedings are afforded "the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause," *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978), contradictory evidence that merely "pose[s] a conflict of credibility" is inadmissible, *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir. 1973).[15] The "precise scope" of what is admissible is "largely" within the extradition court's discretion. *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562, 567 (2d Cir. 1963). The Extradition Court held that the documents in question were inadmissible because they "simply offer[] an alternative set of facts that stand at odds with the heart of Park Seung-il's testimony." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *22. This conclusion is not in error. Admission of this evidence would have put the Extradition Court in the position of evaluating the credibility of witnesses (not before it) with differing views on the value (or lack thereof) of Key Solutions's services, which would impermissibly expand the extradition hearing beyond its proper scope of determining if there is "any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976).

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15. "Evidence submitted in support of an extradition request is deemed truthful and its credibility generally may not be challenged at an extradition hearing. . . . Thus, a defendant challenging extradition is limited to evidence which explains or obliterates, rather than contradicts, the government's proof." *United States v. Hunte*, No. 04-M-0721, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *6 (E.D.N.Y. Jan. 4, 2006).

b. Moreal

The Extradition Court relied on the testimony of Park, Kim Chun-gyu, and Ha Myeong-hwa (co-CEO of Moreal),[16] as well as contracts implicating Petitioner and bank records reflecting the alleged payments, *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *24, and concluded that "the totality of the circumstances create a reasonable belief that Yoo utilized his relationship with his older sister, Moreal's co-CEO, to embezzle Moreal's funds through a fraudulent business consulting contract." 2021 U.S. Dist. LEXIS 124402, [WL] at 26. As he did before the Extradition Court, Petitioner argues that Ha Myeong-hwa would not have had relevant personal knowledge of Key Solutions's consulting work because she oversaw a different department. But Ha Myeong-hwa was co-CEO of Moreal with Petitioner's sister and testified that she looked for and was unable to locate official documents reflecting training Key Solutions was supposed to have provided. (Petitioner's Br. at 39-40.) The lack of official documentation may not be conclusive, but it is not irrelevant to probable cause. Nor is Petitioner correct that Ha Myeong-hwa's testimony that she was directed to sign the contract first by Park and then by Petitioner's sister — and did so without further investigation or consultation — clearly without

16. While the Extradition Court discussed the statements of Park Hwa-sun, a fourth witness whose statements Korea cited, and noted that Korea's summary of her testimony was consistent with the full transcript submitted by Petitioner, the Extradition Court did not explicitly rely on this testimony in its analysis. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *24-26.

any evidentiary value. Again, Petitioner's arguments go primarily to the weight of the evidence, an issue that is for the Extradition Court to examine and, ultimately, a factfinder at trial to determine. In sum, Ha Myeong-hwa's statements provide some evidence supporting probable cause for this charge.

Petitioner also challenges the Extradition Court's refusal to admit an affidavit from the leader of Moreal's Graphic Design team as well as a 93-page consulting report from Key Solutions. (Petitioner's Br. at 41-42.) For the same reasons stated above with regard to the Semo evidence, the Court does not agree that exclusion of this evidence was an error that negates probable cause.

c. Chonhaiji

While acknowledging that Petitioner may prevail at trial on the charge that the Chonhaiji consulting agreement was an embezzlement scheme, the Extradition Court nonetheless found that Korea had made the requisite "minimal showing" to establish probable cause. The bases for this conclusion were the statements of Park and Byeon Gi-chun. The Extradition Court pointed specifically to Byeon Gi-chun's statement that the consulting fees were an "alternative" to "replace" the trademark fees after the Korean government determined that the trademark fees were no longer tax deductible. *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *27. While the evidence going to probable cause is limited, this Court again cannot say the Extradition Court's conclusion was baseless.

Petitioner objects that the Extradition Court should have admitted as evidence the affidavit of Sung Min Park, a Chonhaiji employee. (Petitioner's Br. at 43-45.) Sung Min Park was allegedly encouraged by Petitioner over several years to pursue internships and education related to yacht-building, a field into which Petitioner was interested in having Chonhaiji expand, and had Sung Min Park create a database of research materials. (*Id.*) Petitioner argues that this demonstration of Petitioner's interest and activities "obliterate[s] probable cause" for the Chonhaiji consulting charges. (*Id.* at 44-45.) But even though the Extradition Court did not admit this affidavit (or other associated documents), it considered the impact of the evidence:

> [I]rrespective of Yoo's advisory work for Chonhaiji between 2007 and 2012, the submissions do not demonstrate that he performed any specific projects during the ten-month period in 2011 when Korea alleges the embezzlement took place. (*See* [Ext. Dkt.] No. 2 ¶ 7g). According to Sung Min Park's affidavit, Yoo's only 'work' during this time comprised of meeting with Park Seung-il while he was at [a Maine-based boat-building and design school], and such meetings occurred throughout his enrollment between September 2009 and April 2014. Simply because Yoo performed valuable work for Chonhaiji before and after the time period when the fees were paid does not mean that these fees were legitimate.

In re Extradition of Hyuk Kee Yoo, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *27 (cleaned up). This Court agrees that the Extradition Court was not required to admit this evidence, and that even if admitted it would be insufficient to alter the conclusion here that probable cause exists for this charge. Neither this Court nor the Extradition Court is charged with adjudicating Petitioner's guilt or innocence of the charged conduct, and neither court is permitted to stand in place of a factfinder.

4. Photography Exhibition Funding Allegation

The Extradition Court found that

> Korea's evidence is sufficient to support a reasonable belief that Yoo used his relationships with Park Seung-il and Byeon Gi-chun to extract monies from various affiliates to fund the Versailles exhibition in order to inflate the value of his father's photographs. Consistent with Park Seung-il's statements, Byeon Gi-chun's detailed testimony explains the specific transactions undertaken by Chonhaiji and the other affiliates to raise a total of KRW 19,862,077,987, which was transferred to Ahae Press and Ahae Press France, which Yoo and his father controlled. Byeon also admitted that the advance payment figures (1) were unilaterally set by Ahae Press, before the photographs had even been taken; (2) were used to cover substantial expenses associated

> with the exhibition; (3) and were not tied to any appraisal of the works in question. In addition, both of these witnesses confirmed that the instructions for these arrangements all came from Yoo.

2021 U.S. Dist. LEXIS 124402, [WL] at *29 (cleaned up).

Petitioner argues that the Extradition Court analyzed issues that are irrelevant to the charge, and suggests that, had the Extradition Court addressed only the merits of what was charged, Petitioner's evidence regarding the appraised value and artistic merit of the photographs would have properly been admitted to obliterate probable cause. The charge as framed by Petitioner was that Petitioner "conspired with Chonhaiji's CEO to embezzle money from the company by ordering it to purchase the photographs of his father, Yoo Byeong-eun, at inflated prices which could not be priced accurately because the photographs had never been sold in the market before." (Petitioner's Br. at 45 (cleaned up).) Petitioner suggests that the Extradition Court should have disregarded that the Affiliated Entities funneled funds to Chonhaiji for the photos through the pretext that the payments were for stock offerings, (Petitioner's Reply at 13), and should have accepted evidence regarding the value of the photographs, (Petitioner's Br. at 46-47).

It is true that the paragraph quoted by Petitioner from the Korean "Statement of Confirmation," (Ext. Dkt. No. 2-3), only mentions Chonhaiji as the entity that paid Ahae Press and Ahae Press France for the photographs and

does not name or mention other affiliates that contributed to the total KRW 19,862,077,987 that Petitioner is charged with embezzling. (*Id.* at EX-YOO-00088.) But this does not mean that Judge McCarthy erroneously considered the evidence pertaining to other affiliates, as the charge incorporates those entities by virtue of their having paid into the total funds Petitioner is alleged to have stolen. (*Id.*) Moreover, a later paragraph within the same section of the "Statement of Confirmation" refers to the collection of money from multiple Affiliated Entities for the photograph purchase. (*Id.* at EX-YOO-00089 to 90.) Further, even if Chonhaiji were the only "victim" from which Petitioner is charged with embezzling, evidence such as the fact that transfers were disguised as stock transactions still is some "circumstantial evidence that, regardless of Chonhaiji's own business plans, the advance payments had a nefarious purpose that needed to be disguised on the affiliates' books as legitimate stock purchases." *In re Extradition of Hyuk Kee Yoo*, 2021 U.S. Dist. LEXIS 124402, 2021 WL 2784836, at *30.

In short, the underhanded way Chonhaiji raised the money, as well as the circuitous routing of it (from the Affiliated Entities to Chonhaiji to the Ahae Press entities and then (largely) toward the exhibition costs rather than the photographs), support Park Seung-il's and Byeon Gi-chun's testimony that — regardless of what the photos might have eventually turned out to be worth — Chonhaiji collected the money and funneled it to the exhibition on Yoo's orders, without the company undertaking any consideration of what the photos might be worth or whether or not they were a good investment.

For probable cause to exist here, the photographs did not need to be, as Petitioner suggests, "essentially worthless," (Petitioner's Br. at 46), nor is that what the Korean government alleged. Korea's allegation is that the prices were artificially inflated. (*See* Ext. Dkt. No. 2-3 at EX-YOO-00088) (alleging that Chonhaiji bought the photographs "at a high price" despite the fact they had never been put up for sale other than to followers of the Yoo family's church and corporate affiliates). That Petitioner's father was getting some positive attention from the art world for his photographs does not "obliterate" the charge that Petitioner's family used its position of influence to have the Affiliated Entities and Chonhaiji pay inflated prices for these photographs. Nor does it negate evidence that many of the funds that were supposed to go to buying photographs — an asset the value of which could conceivably appreciate — were actually sunk into an exhibition at Versailles designed to raise the profile of the photographer and the price of the photos.[17]

For these reasons, the Court concludes that some evidence supports the Extradition Court's probable cause finding for the charge related to the photography purchases, and that contradictory evidence regarding

17. In his reply, Petitioner argues that the conduct charged "does not involve . . . the Versailles exhibition." (Petitioner's Reply at 13.) But the first line of the Korean charge, omitted from Petitioner's reproduction in his opening brief, (Petitioner's Br. at 45), is "As suspect YOO Hyuk Kee needed a significant sum of money to exhibit photographs taken by his father YOO Byung Eyn at Chateau de Versailles, he decided to withdraw company funds from Chonhaiji." (Ext. Dkt. No. 2-3 at EX-YOO-00088.)

alleged business justifications for the purchase from Chonhaiji's perspective were properly excluded and would fail to obliterate probable cause.

IV. CONCLUSION

For the foregoing reasons, the Court denies the petition for a writ of *habeas corpus*. The Clerk of Court is respectfully directed to terminate the pending motion, (ECF No. 1), and close the case.

SO ORDERED.

Dated: November 1, 2021
White Plains, New York

/s/ Cathy Seibel
CATHY SEIBEL, U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 2, 2021

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

20 Mag. 2252

IN THE MATTER OF THE EXTRADITION
OF HYUK KEE YOO

July 2, 2021, Decided;
July 2, 2021, Filed

CERTIFICATION OF EXTRADITABILITY AND ORDER OF COMMITMENT

In this action, the United States Government (the "Government"), acting at the request of the Government of the Republic of Korea, seeks a certification that Hyuk Kee Yoo ("Yoo") is extraditable pursuant to the Extradition Treaty Between the United States of America (the "United States" or the "Government") and the Republic of Korea ("Korea"), signed on June 9, 1998 and entered into force on December 20, 1999 (the "Treaty"). Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, K.-U.S., June 9, 1998, S. TREATY DOC. No. 106-2 [hereinafter "Extradition Treaty"]. Yoo opposes extradition, arguing that (1) there is insufficient evidence for a finding of probable cause; and (2) it is barred by the applicable statute of limitations. For the reasons set forth below,

the Court finds that the extradition request demonstrates probable cause and satisfies the relevant requirements. Furthermore, the Court lacks authority to determine whether this prosecution is time-barred, as that inquiry is a discretionary matter reserved for the Secretary of State. Accordingly, the Court certifies that Yoo is extraditable pursuant to the Treaty.

I. BACKGROUND

A. Procedural History

On or about February 27, 2020, the Government filed a complaint (the "Complaint") requesting the issuance of a warrant for the arrest of Yoo pursuant to 18 U.S.C. § 3184 and the Treaty, and attaching various documents submitted by Korea in support of its extradition request. (Docket No. 2). The Court issued an arrest warrant, and the Government arrested Yoo on or about July 22, 2020. During the initial presentment, at which Yoo appeared with counsel, the Court ordered that Yoo be detained without bail pending the outcome of the proceeding, and set a briefing schedule for any motion to dismiss. On October 5, 2020, counsel for Yoo moved to dismiss on the grounds that Yoo is not extraditable, (Docket Nos. 17, 18), and after being granted a six-week extension,[1]

1. On October 19, 2020, the Court granted the Government a six-week extension in filing its opposition. (Docket No. 21). At a second bail hearing on November 5, 2020, counsel for Yoo argued that this extension, and the resulting delay of the extradition hearing, constituted special circumstances justifying release on bail. (*See* Nov. 5, 2020 Minute Entry). The Court again ordered that Yoo be detained without bail pending the outcome of the proceeding.

on December 8, 2020, the Government filed a brief in support of extradition attaching additional materials to supplement Korea's extradition request, (Docket Nos. 27, 27-1, 27-2). On December 21, 2020, counsel for Yoo filed a brief in reply. (Docket No. 30). On January 7, 2021, the Government submitted further supplemental materials from the Republic of Korea in support of its request for extradition, (Docket Nos. 31, 31-1), and counsel for Yoo filed a response to that submission on January 25, 2021, (Docket Nos. 34, 34-1, 34-2).

On March 3, 2021, the Court held an evidentiary hearing pursuant to 18 U.S.C. § 3184. (*See* March 3, 2021 Minute Entry). At the hearing, the Government submitted the following documentary evidence, which the Government had previously provided to the Court:

- Government Exhibit A: Declaration from the Department of State, the applicable extradition treaty, and the various submissions Korea made in support and clarification of its extradition request, (Docket Nos. 2-1-2-8);

- Government Exhibit B: Supplemental submission from Korea dated November 23, 2020 and authenticated by the State Department on December 17, 2020, (Docket No. 27-1);

- Government Exhibit C: Supplemental submission from Korea dated August

11, 2020, and authenticated by the State Department on January 29, 2021, (Docket No. 27-2); and

- Government Exhibit D: Supplemental submission from Korea dated January 6, 2021, and authenticated by the State Department the same day, (Docket No. 31-1).

Counsel for Yoo submitted seventy-one additional exhibits, which they had also previously provided to the Court. (*See* Docket No. 38). Pursuant to 18 U.S.C. § 3190, the Court admitted the Government's exhibits into evidence, with no objection from Yoo, as well as Defense Exhibits 5 and 8 through 15, with no objection from the Government. However, the Government objected to admission into evidence of the remainder of Yoo's exhibits, and the Court reserved ruling on that issue. (*Id.*). The Court also heard argument from the Government and counsel for Yoo for and against extradition.

B. Allegations against Yoo

The Complaint summarizes the allegations underlying Korea's charges against Yoo as follows. Yoo is the son of Byung Eyn Yoo, the prominent founder and former leader of a religious group in Korea called the Evangelical Baptist Church (the "Church"). (Docket Nos. 2 ¶ 6a; 2-3 at 21, EX-YOO-00099).[2] Yoo became the de facto leader

2. All citations refer to the ECF page numbers on the docket unless otherwise noted. When available, the Court also provides the Bates page numbers associated with Korea's submissions, identified by the prefix "EX-YOO".

of the Church in 2010. (Docket No. 2 ¶ 6a). Yoo's family collectively controls a company called I-One-I Holdings ("I-One-I"), which in turn holds a controlling interest in a number of commercial entities. (Docket Nos. 2 ¶ 1.6b; 2-4 at 21-25, EX-YOO-S1-00021-25; *see also* Docket No. 2-8 at 4-5, EX-YOO-S5-00004-5). Between January 2008 and March 2014, Yoo leveraged his family's power as business and religious leaders in Korea to take the assets of a number of these entities (the "Companies"). (Docket No. 2 ¶¶ 6-7).

Specifically, Yoo conspired with the chief executive officers ("CEOs") of the Companies to enter into sham contracts through which Yoo embezzled millions of dollars from the Companies to the detriment of their shareholders. (*Id.* ¶ 6). To do so, Yoo used his stature in the Church, his connection with his father, and the overlapping leadership structure between the Companies and I-One-I to cause the executives to enter into contracts for fraudulent goods or services in exchange for payments to him or his private company, Key Solutions. (*Id.* ¶¶ 6c-e; *see also* Docket No. 2-3 at 21, EX-YOO-00099). A number of executives of the various Companies with whom Yoo conspired are officers or directors of I-One-I, including Park Seung-il, who was a Director of I-One-I as well as Chonhaiji Co., Ltd., ("Chonhaiji"), and an auditor of Ahae. (Docket Nos. 2 ¶ 6c; 2-8 at 7, EX-YOO-S5-00007). In addition, a number of these executives, as well as employees and shareholders of each Company, are followers of the Church. (Docket No. 2 ¶ 6c). Yoo and his co-conspirators' embezzlement schemes took three forms: (1) pretextual and fraudulent trademark licensing agreements with the Companies;

(2) pretextual and fraudulent agreements for business consulting services with the Companies; and (3) a scheme to cause the Companies to make advance payments in support of a photography exhibition by Yoo's father at inflated values. (*Id.* ¶ 6e).

Through these schemes, Yoo defrauded the Companies of over KRW 29 billion, causing their shareholders' investments to suffer because Yoo was plundering the assets of the companies in which they held an interest. (*Id.* ¶ 6g). The details of these schemes, which make up seven counts of embezzlement, are described as follows. (*See generally id.* ¶ 7a-g).

1. Trademark Licensing Schemes

i. Chonhaiji

In or around January 2008, Yoo conspired with Byeon Gi-chun, the CEO of Chonhaiji, to sign a contract requiring Chonhaiji to pay Yoo 1% to 5% of its revenue using the company's existing corporate name, which Yoo registered as a trademark even though the name had no brand value. (Docket Nos. 2 ¶ 7a; 2-3 at 5, 9, EX-YOO-00083, 87). The payments under the contract were trademark royalty payments "in name only," and "actually" were "a means to embezzle money from [Chonhaiji]." (Docket No. 2 ¶ 7a) (internal quotation marks omitted). The payments continued until June 2010, totaling approximately KRW 1,235,426,711. (*Id.*).

ii. Ahae

In or around January 2009, Yoo conspired with Lee Jae-yeong, the CEO of Ahae Co. Ltd. ("Ahae"), to enter into a "sham" trademark licensing agreement requiring Ahae to pay .8% to 1.6% of its monthly revenue to Yoo in royalty payments for a trademark Yoo had previously registered. (Docket No. 2 ¶ 7b; *see also* Docket No. 2-3 at 5, 8-9, EX-YOO-00083, 86-87). However, Ahae had already been using the mark for approximately ten years before Yoo registered it and demanded the fee. (*See* Docket No. 2 ¶ 7b). Moreover, the fee amount was not based on "common market pricing" and was "unilaterally" set by Yoo. (*Id.*). The payments, which continued until December 2013, amounted to approximately KRW 5,346,311,045 in total. (*Id.*).

iii. Onnara Shopping

Also in or around January 2009, Yoo conspired with Lee Ho-seop, the CEO of Onnara Shopping Co., Ltd. ("Onnara Shopping"),[3] to sign an Exclusive License Contract (the "Exclusive License Contract"), which required the company to pay Yoo a percentage of its revenue as "purported compensation" for using its existing name, which Yoo registered as a trademark. (Docket Nos. 2 ¶ 7c; 2-3 at 23, EX-YOO-00101; 2-4 at 30, EX-YOO-S1-00030). Again, Yoo unilaterally set the fee amount. (Docket No.

3. In Korea's first supplemental submission, it clarified that its original request mistakenly identified Byeon Gi-chun as Onnara Shopping's CEO, instead of Lee Ho-seop. (Docket No. 2-4 at 30, EX-YOO-S1-00030).

2 ¶ 7c). Moreover, these payments were not in Onnara Shopping's financial interest, but rather, were "disguised as trademark royalties . . . to transfer . . . funds to Y[oo]'s family." (*Id.*) (internal quotation marks omitted). Onnara Shopping made the payments until December 2011 and they amounted to approximately KRW 328,436,704. (*Id.*).

2. Business Consulting Services Schemes

i. Semo

In or around March 2010, Yoo conspired with Go Chang-hwan, the CEO of Semo Co., Ltd. ("Semo"), to sign a Business Consulting Service Contract (the "Business Consulting Service Contract") pursuant to which Key Solutions promised to provide Semo with risk management advice. (Docket Nos. 2 ¶ 7d; 2-3 at 21-22, EX-YOO-00099-100). The contract provided that in exchange, Semo would pay Key Solutions KRW 25,000,000 every month. (Docket No. 2 ¶ 7d). However, Key Solutions only provided business consulting services in written form "once or twice per year," and the payments were made to Yoo's personal bank account. (*Id.*). Go Chang-hwan and Park Seung-il, Yoo's associate, negotiated the contract terms, including this fee, without evaluating the company's need for business consulting services, comparing pricing estimates from other companies, or evaluating Key Solutions' expertise, past performance or reliability. (Docket Nos. 2 ¶ 7d; 2-3 at 12, EX-YOO-00090). The payments continued until March 2014, amounting to approximately KRW 1,225,000. (Docket No. 2 ¶ 7d).

ii. Moreal Design

In or around April 2010, Yoo's sister, Yoo Chong Somena, and Ha Myeong-hwa — both CEOs of Moreal Design Inc. ("Moreal") — conspired with Yoo to sign a Consulting Service Contract (the "Consulting Service Contract") on behalf of Moreal, pursuant to which Key Solutions would provide management consulting, business valuation, marketing strategies, policy development and international training programs. (Docket Nos. 2 ¶ 7e; 2-3 at 22, EX-YOO-00100; 2-4 at 28-29, EX-YOO-S1-00028-29). Although Moreal paid Key Solutions a monthly fee until December 2013, the consulting services were never provided. (Docket No. 2 ¶ 7e). The fees totaled approximately KRW 990,000,000. (*Id.*).

iii. Chonhaiji

In or around February 2011, Yoo and Byeon Gi-chun of Chonhaiji conspired to pay Yoo fraudulent consulting fees instead of the trademark licensing fees under their original contract. (Docket Nos. 2 ¶ 7f; 2-3 at 10, EX-YOO-00088; *see supra* Section I.B.1.i.). Byeon Gi-chun had "no choice" but to follow Yoo's instructions to do so. (Docket No. 2 ¶ 7f) (internal quotation marks omitted). They "turned to consulting fees" because the trademark licensing fees were no longer tax deductible. (*Id.*) (internal quotation marks omitted). These payments continued monthly until November 2011 and amounted to approximately KRW 200,000,000. (*Id.*).

3. Inflated Advanced Payments for Photography Exhibition

In or around 2013, Yoo coerced several of the Companies into funding an exhibition of his father's photographs, when it was not in their financial interest to do so, embezzling approximately KRW 19,862,077,987. (*See id.* ¶ 7g). Yoo "ordered" these Companies to "purchas[e]" his father's "photographs through capital increase by consideration" or stock subscriptions, and the Companies had "no choice" but to comply because of his father's position. (*Id.*) (internal quotation marks omitted). The Companies made the subject payments to a U.S.-based entity, Ahae Press Inc. ("Ahae Press"), of which Yoo was the CEO. (Docket Nos. 2 ¶ 7g; 2-3 at 10, EX-YOO-00088; 2-6 at 7-8, EX-YOO-S3-00007-08). The Companies were not in the business of purchasing photographs — one sold dietary supplements, and one sold car parts — and they "had no idea about [Yoo's father's] works." (Docket No. 2 ¶ 7g) (internal quotation marks omitted). The Companies also "didn't decide what works they would buy," and "follow[ed] what Yoo . . . told them to do." (*Id.*) (internal quotation marks omitted).

II. LEGAL STANDARDS

"In the United States, extradition is governed by the federal extradition statute." *Cheung v. United States*, 213 F.3d 82, 87 (2d Cir. 2000) (citing 18 U.S.C. §§ 3181-3196). That statute provides that a magistrate judge may issue a warrant for the arrest of someone whose extradition is sought, so that the person charged may be brought before

the Court "to the end that the evidence of criminality may be heard and considered." 18 U.S.C. § 3184. If, on such hearing, a magistrate judge "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," the magistrate judge "shall certify the same" to the Secretary of State. *Id.* "The judicial officer's inquiry is confined to the following: whether a valid treaty exists; whether the crime charged is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof." *Cheung*, 213 F.3d at 88 (citing *Lo Duca v. United States*, 93 F.3d 1100, 1103-04 (2d Cir. 1996)).

"An extradition hearing is not the occasion for an adjudication of guilt or innocence." *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981). "Instead, it is 'essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.'" *Lo Duca*, 93 F.3d at 1104 (quoting *Ward v. Rutherford*, 921 F.2d 286, 287, 287 U.S. App. D.C. 246 (D.C. Cir. 1990)). "The judicial officer . . . 'thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense.'" *Lo Duca*, 93 F.3d at 1104 (quoting *Ward*, 921 F.2d at 287).

Neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure are applicable in extradition proceedings. *See* Fed. R. Crim. P. 1(a)(5)(A); Fed. R. Evid. 1101(d)(3). Instead, admissibility is governed by 18 U.S.C. § 3190, which provides:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Accordingly, hearsay evidence is admissible. *Melia*, 667 F.2d at 302.

III. DISCUSSION

The three issues in dispute are whether (1) sufficient evidence exists for a finding of probable cause; (2) the Court has authority to deny extradition based on the running of the applicable statute of limitations; and (3) if the answer to the second question is yes, the charges brought by Korea are time-barred. For completeness, however, the Court addresses the relevant requirements in turn.

A. Authority and Jurisdiction

The extradition statute authorizes proceedings to be conducted by "any magistrate judge authorized so

to do by a court of the United States." 18 U.S.C. § 3184. In addition, Local Criminal Rule 59.1(b) specifically authorizes magistrate judges to exercise the jurisdiction set forth in 18 U.S.C. § 3184. Consequently, this Court has authority to conduct these proceedings. Furthermore, this Court has jurisdiction over Yoo, as he was located and arrested in the Southern District of New York. *See* 18 U.S.C. § 3184 (authorizing a magistrate judge to conduct extradition proceedings with respect to "any person found within his jurisdiction").

B. The Treaty

The extradition statute provides for extradition in instances in which a treaty or convention is in force between the requesting State and the United States. *See* 18 U.S.C. § 3184. Here, the Government has submitted the Declaration of Tom Heinemann of the Department of State, which attests that there is a treaty in full force and effect between the United States and Korea, and a copy of the Treaty. (Docket No. 2-1 at 1, ¶ 2; 12-28). Yoo does not challenge that the Treaty is in force. Accordingly, this Court concludes that the Treaty is in full force and effect.

C. The Alleged Crime

Yoo has been charged in Korea with seven counts of embezzlement, in violation of Article 355(1) of the Criminal Act and Article 3(1)(1) and 3(1)(2) of the Act on the Aggravated Punishment, Etc. of Specific Economic Crimes. (*See* Docket Nos. 2 ¶¶ 4-5; 2-3 at 1, 13-14, EX-YOO-00079, 91-92). Article 2 of the Treaty provides

for extradition based on an offense that is "punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty." Extradition Treaty art. 2(1) at 2. The Treaty specifies that when determining whether an offense is extraditable, "the totality of the conduct alleged against the person whose extradition is sought shall be taken into account, and an offense shall be . . . extraditable": (a) "whether or not the laws [of both] . . . Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;" (b) whether or not the relevant offenses of each State contain the same elements, as long as the offenses are "substantially analogous;" and (c) regardless of whether the relevant offense under U.S. law requires a showing of certain elements for the purpose of establishing jurisdiction in federal court. *See* Extradition Treaty art. 2(3)(a)-(c) at 2.

In construing such extradition treaty provisions — known as dual criminality requirements — the Supreme Court has held that "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 312, 42 S. Ct. 469, 66 L. Ed. 956 (1922). When determining whether dual criminality exists, the extradition court "may look to federal law or the law of the state where the extradition proceeding is being held." *See In re Extradition of Sacirbegovic*, No. 03 CR. MISC.

01PAGE1, 2005 U.S. Dist. LEXIS 707, 2005 WL 107094, at *17 (S.D.N.Y. Jan. 19, 2005) (citing *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 918 (2d Cir. 1981)).

Here, the relevant embezzlement charges are punishable by more than one year in prison in Korea. (Docket No. 2-3 at 13-14, EX-YOO-00091-92). Moreover, Yoo's alleged taking of KRW 29 billion — which amounted to approximately $23 million on the date of the Complaint[4] — through various sham agreements and inflated fees, could be charged as a number of offenses punishable by more than one year in prison under New York state or U.S. federal law. Under New York law, such conduct qualifies as larceny under Penal Law § 155.05(2)(a). *See* N.Y. Penal Law § 155.05(2)(a) (2021) ("Larceny includes a wrongful taking, obtaining or withholding of another's property, with the [requisite] intent prescribed in subdivision one . . . by . . . embezzlement . . . ."). Because this conduct involves property worth over $1,000, it could be charged as grand larceny in the fourth degree, a Class E felony, which is punishable by one to four years in prison. *See* N.Y. Penal Law §§ 70.00(1)-(3), 155.30(1)-(3). Yoo's conduct could also be charged as wire fraud under 18 U.S.C. § 1343, which constitutes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," and is punishable by a maximum sentence of 20 years in prison. *See* 18 U.S.C. § 1343.

4. (Docket No. 2 ¶ 6g).

Appendix C

Larceny, embezzlement and fraud fall within the same category of crimes such that they satisfy dual criminality for purposes of extradition. *See In re Extradition of Sacirbegovic*, 2005 U.S. Dist. LEXIS 707, 2005 WL 107094, at *17. Moreover, both federal and state courts have found that evidence of conduct similar to Yoo's supports convictions for these crimes. *See, e.g., United States v. Kelly*, No. 3:11-cr-192 (JCH), 2014 U.S. Dist. LEXIS 97486, 2014 WL 3565957, at *3-5 (D. Conn. July 18, 2014) (finding sufficient evidence for wire fraud conviction based on, among other things, documentary evidence of fake leases bearing defendant's signature and contract addenda "showing purchase prices significantly less than those reported"); *People v. DiCarlo*, 293 A.D.2d 279, 741 N.Y.S.2d 508, 509 (1st Dep't 2002) (finding legally sufficient evidence for grand larceny conviction based on "fraudulent devices" that enabled defendants to "inflate[] the cost of renovating a building, thereby obtaining reimbursement in excess of their contractual entitlement"); *People v. Williams*, 250 A.D.2d 429, 673 N.Y.S.2d 113, 114 (1st Dep't 1998) (holding there was sufficient evidence for grand larceny conviction based on agreement to receive payment in exchange for certain business and payroll transmittal sheets containing "substantially inflat[ed]" services); *People v. Headley*, 37 Misc. 3d 815, 951 N.Y.S.2d 317, 322-27 (Sup. Ct. Kings Cnty. 2012), *opinion adhered to on reargument*, 36 Misc. 3d 1240[A], 960 N.Y.S.2d 51, 2012 NY Slip Op 51764[U] [Sup. Ct. Kings Cnty. 2012] (collecting cases regarding larceny by false pretenses based on fraudulent takings via contractual relationships).

Accordingly, the Court finds that the crimes for which Yoo is charged are extraditable offenses within the terms of the Treaty.

D. Probable Cause

The first issue in dispute is whether Korea's submissions are sufficient to support a finding of probable cause. The Korean authorities obtained evidence from multiple witnesses, including Park Seung-il, Byeon Gi-chun, Lee Seong-hwan, Lee Gang-se, Kim Chun-gyun, Lee Ho-seop, Go Chang-hwan, Jo Seon-ae, Park Hwa-sun and Ha Myeong-hwa. (*See generally* Docket Nos. 2-3-2-8; 27-1). Yoo's counsel alleges that this evidence is insufficient to establish probable cause because the Korean authorities "grossly distorted" these witnesses' statements to Korean prosecutors by either (a) fabricating admissions that do not appear in the original transcripts of their interviews; or (b) omitting exculpatory statements from the Republic of Korea's submissions in support of extradition. (Docket No. 18 at 23). Yoo's counsel further argues that in evaluating the sufficiency of Korea's submissions, the Court should also admit into evidence and consider various documents, including affidavits, consulting reports and agreements, that further exculpate Yoo and/or his alleged co-conspirators by showing that the relevant services or goods provided in each alleged scheme were legitimate. (*See id.* at 30-43; Docket No. 30 at 9-20). The Government responds that Korea's evidence is sufficient to establish probable cause, and with the exception of the witness interview transcripts Yoo has

submitted,[5] it would be improper for the Court to consider Yoo's proposed exhibits. (Docket Nos. 27 at 18-35; 38).

After reviewing the legal standards applicable to these issues, the Court addresses the evidence offered for and against each embezzlement charge in turn. For the reasons set forth herein, the Court finds that there is probable cause for all seven counts.

1. Applicable Law

Probable cause exists where "[t]he evidence presented . . . 'support[s] a reasonable belief that [the fugitive] was guilty of the crimes charged.'" *Austin v. Healey*, 5 F.3d 598, 605 (2d Cir. 1993) (quoting *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) (hereinafter "*Ahmad II*")). To determine whether there is probable cause, courts use a "flexible, common sense standard" taking into account the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). This standard permits a finding of probable cause based on "knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *United States v. Howard*, 489 F.3d 484, 491 (2d Cir. 2007) (quoting *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006)). Such information may be based on "unsworn statements of absent witnesses." *Collins*, 259 U.S. at 317. Because

5. The transcripts are listed as Defense Exhibits 5 and 8 through 15. (*See* Docket No. 38).

hearsay evidence is admissible, *Melia*, 667 F.2d at 302, courts conducting this analysis must "closely examine the requesting country's submissions to ensure that any hearsay bears sufficient indicia of reliability to establish probable cause." *In re Extradition of Ben-Dak*, No. 06 Mag. 1540(GWG), 2008 U.S. Dist. LEXIS 29460, 2008 WL 1307816, at *4 (S.D.N.Y. Apr. 11, 2008) (quoting *United States v. Pena-Bencosme*, No. 05-M-1518 (SMG), 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *2 (E.D.N.Y. Nov. 13, 2006)). On the other hand, the Court need not delve into questions of the weight of the evidence offered by the demanding country, *In re Marzook*, 924 F. Supp. 565, 592 (S.D.N.Y. 1996), nor credibility, *United States v. Hunte*, No. 04-M-0721(SMG), 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *6 (E.D.N.Y. Jan. 4, 2006), as those issues are reserved for trial. Indeed, the extraditing magistrate judge's task is only to determine whether there is "competent legal evidence which . . . would justify [the defendant's] apprehension and commitment for trial if the crime had been committed in th[e] state." *Collins*, 259 U.S. at 315.

In addition, a defendant's right to present evidence in the context of an extradition hearing is significantly limited. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984). The defendant "has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor." *Id.* (citing *Charlton v. Kelly*, 229 U.S. 447, 462, 33 S. Ct. 945, 57 L. Ed. 1274 (1913)). He or she may introduce "testimony which explains rather than contradicts the demanding country's proof," *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562, 567 (2d Cir. 1963), whose "intention is to afford [him or her] the

opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause." *See In re Extradition of Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978); *see also Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir. 1973) (hereinafter "*Shapiro II*").

The distinction between these two categories is far from obvious. However, the Supreme Court has explained that whereas "contradict[ory] evidence" "relat[ing] strictly to the defense" is inadmissible, a defendant's evidence may be admitted when it "might . . . explain[] ambiguities or doubtful elements in the *prima facie* case made against the defendant" — *i.e.*, probable cause — or other "matters referred to by the witnesses for the government." *See Collins*, 259 U.S. at 315-17 (quoting *Charlton*, 229 U.S. at 461) (finding that evidence offered in support of insanity defense was inadmissible because it did not relate to the issue of probable cause) (internal quotation marks omitted); *see also Shapiro II*, 478 F.2d at 905 (noting that an extraditee may only introduce evidence that "explain[s]" or "obliterate[s]," rather than contradicts, the government's proof); *In re Extradition of Berri*, No. 07-M-1205(VVP), 2008 U.S. Dist. LEXIS 77857, 2008 WL 4239170, at *3 (E.D.N.Y. Sept. 11, 2008) (distinguishing between evidence that "seek[s] to cast a different light on the proof submitted in support of the extradition request by offering a compelling alternative view of the evidence," which is admissible, and "contradictory proof that [the extraditee] is innocent," which is inadmissible). The extent to which explanatory evidence is received is subject to the extraditing court's discretion. *See In re Extradition of*

Sindona, 450 F. Supp. at 685. Furthermore, the defendant cannot use this exception to "turn the extradition hearing into a full trial on the merits." *Id.*

2. Trademark Licensing Schemes

i. Chonhaiji

(a) Evidence in Support of Extradition

In support of its allegations regarding the Chonhaiji trademark scheme, Korea relies on statements from Park Seung-il, who ran the day-to-day operations of Key Solutions,[6] as well as Chonhaiji's former director and CEO, Byeon Gi-chun. (Docket Nos. 27 at 20-25; 2-4 at 30-31, EX-YOO-S1-00030-31). According to Korea's submissions, Park Seung-il was found guilty for criminal charges in Korea for embezzling from the Yoo affiliate companies for the Yoo family's benefit via fraudulent trademark royalties as well as consulting fees. (Docket Nos. 27 at 20-21; 27-1 at 41-42). Moreover, Park Seung-il told prosecutors that the "trademark royalties" paid by these entities to Yoo were mere "disguise[s]" and "in fact a means to transfer affiliates' funds to Y[oo]'s family,"[7] (Docket No. 2-7 at 9,

6. The fact that Park Seung-il ran Key Solutions' day-to-day operations is not in dispute. (*See* Docket Nos. 18 at 23; 27 at 20).

7. The full quotation from Korea's submission reads: "This is, disguised as trademark royalties, was in fact a means to transfer affiliates' funds to Y[oo]'s family." (Docket No. 2-7 at 9, EX-YOO-S4-00009).

EX-YOO-S4-00009), and admitted to "manag[ing] the funds of the Yoo . . . family . . .[,] as well as collecting funds from group affiliates in an illegal manner on the pretext of trademark fees, consulting fees, etc.," through Key Solutions, (Docket No. 27-1 at 59-60, 67). Similarly, without objection from the Government, Yoo's counsel submitted a translated excerpt of Park Seung-il's May 8, 2014 interview with Korean prosecutors in which he stated that Key Solutions "collect[ed] funds from affiliated companies" — including Chonhaiji — "under the pretext of trademark fees, consulting fees, advisory fees, etc.," (Korean Interviews Binder, Tab E at 5, 18; Docket No. 38 at 2), that the trademark fees were "unnecessary" and "actually a way for . . . Yoo['s] family to take the funds of affiliates," (Korean Interviews Binder, Tab E at 21), and that he was responsible for managing that activity, (*id.* at 9). He also reported that he did not make an independent assessment of the value of the subject trademarks and "just did what [Yoo's family] told [him] to do," which included transferring the money to Yoo's personal bank account. (*See id.* at 19-20, 22).

According to Korea's submissions, Byeon Gi-chun also told Korean prosecutors that he had "no . . . choice but to accept [Yoo's] request" to "offer money as trademark royalties" because of Yoo's father's position. (Docket Nos. 2-4 at 31, EX-YOO-S1-00031; *see also* Docket No. 2-7 at 10, EX-YOO-S4-00010). When Chonhaiji executed the contract in 2008, Byeon was a director, managing accounting and personnel affairs, and became CEO in January 2011. (Docket Nos. 2-3 at 9, EX-YOO-00087;

27-1 at 74).[8] He admitted that the payments under the contract were trademark royalty payments "in name only," and "actually" were "a means to embezzle money from Chonhaiji." (Docket No. 2-4 at 31, EX-YOO-S1-00031). He also admitted that the trademark fees were not "not right," "way too much money," "something that doesn't make sense," and merely a "scheme to funnel the affiliates' funds to [the] Yoo . . . family" because the relevant trademark was worth little and Chonhaiji could have registered it without Yoo's aid. (*See* Docket No. 27-1 at 71-74).[9] Like Park Seung-il, Byeon Gi-chun was found guilty in Korea for assisting in embezzling affiliate funds and transferring them to the Yoo family "in the name of" trademark royalties, advisory fees and consulting fees. (*Id.* at 38-40).

In further support of these statements, Korea has submitted account records showing regular payments from Chonhaiji to Key Solutions between January 2008 and June 2010. (*E.g.*, Docket No. 2-5 at 64-65, EX-YOO-S2-00064-65).

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8. *See also* Korean Interviews Binder, Tab H at 29-30, 32.

9. Although they are translated slightly differently, interview excerpts submitted by Yoo largely corroborate these admissions. (*See* Korean Interviews Binder, Tab H at 31-33). The only notable difference is that whereas Korea's version describes the Chonhaiji trademark operation as a "scheme to funnel . . . funds to [the] Yoo family," Yoo's version describes it as "actually a way for the Yoo . . . family to leak the funds of affiliates," (Korean Interviews Binder, Tab H at 32).

(b) Yoo's Response

Yoo alleges that there is insufficient probable cause for several reasons. With regard to Park Seung-il's statements, Yoo contends that (1) the word "명목" in both versions of Park's interview was mistranslated; and (2) Park never told prosecutors that trademark royalties were "in fact a means to transfer affiliates' funds to Y[oo]'s family." (Docket Nos. 18 at 35-36; 30 at 11-12; 34 at 5-8; *see also* Docket No. 27-3 at 9, EX-YOO-S4-0009). With regard to Byeon Gi-chun's statements, Yoo argues that (1) Byeon Gi-chun's admissions should be discounted because they were "fed" to him by Korean prosecutors; and (2) Byeon Gi-chun lacks sufficient personal knowledge of any trademark scheme because he was not made CEO until 2011, after the relevant trademark royalty payments ended. (Docket Nos. 18 at 37-38; 30 at 19).

In support of his first argument, Yoo offers affidavits of Jong-Min Jeon, a former judge in Korea, as well as Fran S. Yoon, a Korean/English interpreter with twenty years of experience, attesting that the word "명목" should have been translated as "for" instead of "under the pretext of."[10] (Docket Nos. 30 at 11; 30-1; 34 at 6-7; 34-2). According to both affidavits, the word only means "under the pretext of" when it has a negative connotation. (*See* Docket Nos. 30-1 at 2; 34-2 at ¶¶ 5-7). Therefore, Yoo contends, Park Seung-il's statements to Korean prosecutors do not incriminate Yoo because, absent any indication that the questions

10. These affidavits are listed as Defense Exhibits 2 and 7. (Docket No. 38 at 1).

Park was asked had a negative connotation, he admitted to collecting money from affiliates "*for* trademark fees, consulting fees, etc.," rather than "*under the pretext* of" such fees. (Docket Nos. 30 at 11; 34 at 7-8) (emphasis added). Yoo argues that this corrected translation corroborates Park's assertion that at the time of the trademark royalty payments, he did not believe that he was "collecting money illegally," such that there is no probable cause for this charge. (Docket No. 30 at 11). In addition, Yoo argues that his own translation of Park's interview with prosecutors does not reflect that Park admitted that the trademark royalties for various affiliates were a "disguise" and "in fact a means to transfer affiliates' funds to Y[oo]'s family," even though that statement appears in Korea's January 2018 submission.[11] (Docket No. 18 at 35; *compare* Korean Interviews Binder, Tab E, *with* Docket No. 2-7 at 8-9, EX-YOO-S4-00008-9). To support his objection regarding Byeon's personal knowledge, Yoo offers corporate registration documents listing Byeon's start-date as CEO of Chonhaiji as January 2011, arguing that this timing forecloses the possibility that Byeon knew of any embezzlement occurring beforehand. (*See generally* Docket No. 18 at 38; Other Companies' Documents Binder, Tab 12). He also urges the Court to consider a "Registered Trademark User Agreement (4)" between Yoo, Yoo Dae-gyun and Chonhaiji CEO Shin Jaejik dated January 10, 2009, and Chonhaiji's logo photos. (*See* Other Companies' Documents Binder, Tabs 11, 13).[12]

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11. Yoo further contends that because this statement is absent from Korea's June 2014 submission, it must have been fabricated. (Docket No. 18 at 35-36).

12. The agreement, corporate registration documents and logo photos are listed as Defense Exhibits 60-62. (Docket No. 38 at 4-5).

(c) Analysis

Even taking Yoo's exhibits into account, Korea's evidence is sufficient to establish probable cause with respect to the alleged Chonhaiji trademark scheme. The specific translation issues identified by Yoo do not neutralize the serious incriminatory statements elsewhere in Park Seung-il's interview affirming that the trademark fees were out of proportion to the value of the trademarks, and therefore, a mechanism to transfer funds from affiliates such as Chonhaiji for the Yoo family's personal use. (*See* Korean Interviews Binder, Tab E at 21). Moreover, Yoo's objections regarding the foundation and/or reliability of Byeon Gi-chun's statements are insufficient to defeat probable cause at this procedural posture.

As an initial matter, the Court finds that the Jeon and Yoon affidavits are admissible as explanatory evidence of the proof offered by the Korean authorities, as well as the excerpts of Park Seung-il's May 8, 2014 interview that are already in evidence. *See Collins*, 259 U.S. at 315-17. Because Park Seung-il's statements are themselves translated versions of interviews conducted in Korean, Yoo deserves a limited "opportunity to explain" the nuances of Park's original words from a Korean speaker's perspective, and to assist the Court in understanding any ambiguities in the Government's evidence supporting probable cause. *See generally In re Marzook*, 924 F. Supp. at 592 n.18 (admitting extraditee's evidence for purpose of explaining alleged mistranslation of Arabic interviews, including affidavit of Arabic translator); *see also Shapiro II*, 478 F.2d at 904-05; *In re Extradition of Ben-Dak*,

2008 U.S. Dist. LEXIS 29460, 2008 WL 1307816, at *7 (considering "documentary evidence partially quoted" in prosecutor's affidavits).

On the other hand, the Chonhaiji documents that Yoo offers to challenge Byeon Gichun's personal knowledge are not admissible because, even assuming that they "explain" rather than "contradict" Byeon's statements to prosecutors, any doubt that they shed on his reliability would not "obliterate" probable cause. *See Shapiro II*, 478 F.2d at 905 (quoting *Petrushansky*, 325 F.2d at 567) (internal quotation marks omitted); (*see also* Other Companies' Documents Binder, Tab 12). Whereas accomplice statements must be "made with[] . . . personal knowledge" to support probable cause, the totality of Byeon Gi-chun's admissions contain sufficient detail of the interworkings of Chonhaiji and the Yoo corporate empire "to demonstrate that [he] was indeed [speak]ing from personal knowledge." *See In re Extradition of Tang Yee-Chun*, 674 F. Supp. 1058, 1062 (S.D.N.Y. 1987) (citing *Rice v. Ames*, 180 U.S. 371, 375-76, 21 S. Ct. 406, 45 L. Ed. 577 (1901)). Moreover, the weight assigned to testimony of the Government's witnesses "is solely within the province of the extraditing magistrate [judge]," *Austin*, 5 F.3d at 605 (quoting *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 479 U.S. 882, 107 S. Ct. 271, 93 L. Ed. 2d 247 (1986)) (internal quotation marks omitted), and "evidence that merely raises doubts about the reliability of the government's proof is insufficient to defeat an extradition request," *Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9. Here, the evidence already before the Court provides adequate foundation for Byeon Gi-

chun's admissions — regardless of the timing of his tenure as CEO — for the limited purpose of establishing probable cause. Since Byeon Gi-chun told Korean prosecutors that he joined Chonhaiji in 2007, (Korean Interviews Binder, Tab H at 30), and "tacitly approve[d]" of the alleged scheme while acting as Executive Director, (Docket No. 27-1 at 73),[13] the fact that he was not promoted to CEO until after the subject trademark payments stopped does not foreclose the possibility that he had knowledge of their existence and purpose. Moreover, to the extent that Yoo alleges that Byeon's statements are based on hearsay, that objection is inappropriate because "hearsay evidence, including multiple hearsay and the unsworn statements of absent witnesses, is admissible at extradition hearings and may support a finding of extraditability."[14]*See In re Extradition of Chan Hon-Ming*, No. 06-M-296(RLM), 2006 U.S. Dist. LEXIS 88326, 2006 WL 3518239, at *8

13. Yoo's translation of this admission has a similar implication. According to Yoo's translation, Byeon was asked: "Is there any reason that you, the general managing director of [Chonhaiji] had no choice but to turn blind eyes to the fact that tens of millions of won was paid for the monthly trademark fee?" (Korean Interviews Binder, Tab H at 32). Byeon responded, "It was unavoidable for me because [Yoo's father] had me join [Chonhaiji], and [the current CEO] tolerated this and paid the trademark fee as requested by the Yoo . . . family." (*Id.*).

14. The Court will not admit the rest of the Chonhaiji documents submitted by Yoo relating to this charge, as he has not provided any information regarding what aspect of Korea's submissions they are meant to "explain," or how they would "obliterate" probable cause. *See Shapiro II*, 478 F.2d at 905 (quoting *Petrushansky*, 325 F.2d at 567) (internal quotation marks omitted); (Other Companies' Documents Binder, Tabs 11, 13; *see generally* Docket Nos. 18 at 37-38; 30 at 19).

(E.D.N.Y. Dec. 6, 2006) (citing *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980)).

Turning to whether the evidence before the Court supports probable cause, the totality of the circumstances support a reasonable belief that through Park Seung-il, Yoo used the subject trademark licensing agreement to embezzle funds from Chonhaiji from January 2008 to June 2010. *See Illinois*, 462 U.S. at 238; *Austin*, 5 F.3d at 605. First, whatever meaning Yoo now attaches to Park Seung-il's use of the word "명목," (Docket Nos. 30 at 11-12; 34 at 5-8), the Court is not convinced that this connotation is the only reasonable interpretation of his testimony. The fact that Yoo's own translators initially interpreted this word to have the definition he now asserts is incorrect makes clear that its meaning is not straightforward, and there is little reason to believe that the linguistic analysis presented by Yoo is any more accurate than that submitted by Korea. *Cf. Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; (Docket No. 30 at 11; Korean Interviews Binder, Tab E at 9). For this reason, there is sufficient evidence to believe that Park Seung-il indeed meant that he assisted in collecting money from affiliates "under the pretext of" trademark, consulting and advisory fees. (Korean Interviews Binder, Tab E at 9). Yoo may challenge this interpretation of Park Seung-il's testimony before a factfinder in Korea, which will have greater insight into these subtleties than this Court.

Furthermore, even taking into account any ambiguity in the word "명목," the rest of Park's statements to prosecutors are sufficient to establish probable cause

because they convey that under Yoo's direction, Park facilitated a sham trademark agreement whose only purpose was to extract money from Chonhaiji for the Yoo family's benefit. The same is true with regard to the "disguised as trademark royalties" admission that Yoo argues never took place. (Docket Nos. 18 at 35-36; 2-7 at 9, EX-YOO-S4-00009). According to both parties' submissions, Park expressly admitted, in sum and substance, to "illegally collecting money and managing funds from affiliated companies,"[15] (Korean Interviews Binder, Tab E at 9; *see also* Docket No. 27-1 at 59), and that the trademark fees were "unnecessary[ily]" high and "actually a way for the Yoo . . . family to take the funds of affiliates," (Korean Interviews Binder, Tab E at 21; *see also* Docket No. 27-1 at 68-69). Park further admitted that he assumed "responsib[ility] for the overall management of the Y[oo] family's slush fund." (Korean Interviews Binder, Tab E at 25; *see also* Docket No. 27-1 at 69-70). In addition, the excerpts of Park's interview provided by Yoo himself reflect that per Yoo's instructions, Park received and managed the funds through Yoo's personal bank account. (Korean Interviews Binder, Tab E at 10, 22). Therefore, regardless of the semantic disparities noted above, the rest of Park's statements are sufficiently incriminating to support a charge against Yoo for this alleged scheme.[16] *See In re Marzook*, 924 F. Supp. at 592

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15. Although Park initially stated that he did not "think that [he] was collecting money illegally," upon further questioning, he admitted that "looking back on it . . . [he] collected those funds illegally." (Korean Interviews Binder, Tab E at 9; *see also* Docket No. 27-1 at 59-60).

16. Yoo's complaint that the "disguised as trademark royalties" quotation did not appear in Korea's original submission or the

(finding probable cause despite "*de minimis*" semantic differences in translations of witness testimony offered as explanatory evidence) (emphasis in original).

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underlying interview transcript is well-taken. (Docket Nos. 18 at 35-36; 2-7 at 9, EX-YOO-S4-00009). Upon its initial review, the semantic disparities between the excerpts submitted by Korea and Yoo gave the Court pause. However, Korea has explained that its earlier submissions were "summari[es of] . . . testimony for better understanding of readers[,] without intend[ing] to mislead." (Docket No. 27-1 at 38). In similar contexts, courts have held that absent specific evidence of a deliberate intent to mislead, partial omission of witness statements in an extradition request is not reason to question the credibility of the requesting State's submissions. *See, e.g., In re Extradition of Vukcevic*, No. 95CRIM.MISC.1P.1, 1995 U.S. Dist. LEXIS 16981, 1995 WL 675493, at *9 ("The Swiss Government has no obligation under the Treaty to supply the entire transcript of the Mutapcic arraignments, and it may choose to edit those portions not relevant to the current extradition application."). Furthermore, the requesting State need not submit exact quotations; as long as the State identifies its sources of information, summaries of hearsay statements by relevant witnesses in an affidavit of a foreign official "are admissible and may be sufficient to warrant a finding of probable cause." *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; *see also United States v. Samuels*, No. 08-MJ-445 (RLM), 2009 U.S. Dist. LEXIS 9616, 2009 WL 367578, at *7 (E.D.N.Y. Feb. 10, 2009). Here, where the Korean submissions contain sworn statements attesting to the accuracy of the information contained therein by the prosecutors who collected it, and identifying the specific witnesses who provided such information, the Court is entitled to accept the witnesses' statements as true. *See Samuels*, 2009 U.S. Dist. LEXIS 9616, 2009 WL 367578, at *7. The Court is cognizant of the inherent difficulty in rendering exact English-language translations, and finds that taken as a whole, the summaries and excerpts of Park's interview provided by Korea sufficiently align with Yoo's version to support a finding of probable cause. *See In re Marzook*, 924 F. Supp. at 592.

Even on its own, Park Seung-il's personal involvement in managing Yoo's finances per Yoo's direct orders gives his testimony "significant weight." *See In re Extradition of Vukcevic*, No. 95CRIM.MISC.1P.1, 1995 U.S. Dist. LEXIS 16981, 1995 WL 675493, at *8 (S.D.N.Y. Nov. 14, 1995). It is well-established that in extradition proceedings, a single "[a]ccomplice['s] testimony, whether corroborated or not, is competent evidence to support a finding of probable cause." *Id.*; *see also Ahmad v. Wigen*, 726 F. Supp. 389, 400 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990) (hereinafter "*Ahmad I*") ("As a matter of law, accomplice testimony is sufficient even without corroboration to demonstrate probable cause to certify the accused for extradition."). Such evidence based on firsthand knowledge is "particular[ly] importan[t] in extradition cases where all the alleged criminal activity occurred in a distant country." *See In re Extradition of Vukcevic*, 1995 U.S. Dist. LEXIS 16981, 1995 WL 675493, at *8 (quoting *Eain v. Wilkes*, 641 F.2d 504, 510 (7th Cir. 1981)). Park Seung-il's statements are especially reliable in light of the fact that they also constitute admissions against his own penal interest, which ultimately led to a conviction for charges similar to Yoo's.[17] *See In re Extradition of Atta*,

17. The Court, however, cannot consider the specific factual findings of the Korean courts that convicted Park Seung-il or Byeon Gi-chun, (*see* Docket No. 27-1 at 38-39; 41-42), because the evidence supporting those conclusions has not been provided. Courts within this District have declined to rely on such findings by foreign courts as substantive evidence in its own right supporting probable cause. *See, e.g., In re Extradition of Ribaudo*, No. 00 CRIM.MISC.1PG. (KN, 2004 U.S. Dist. LEXIS 1456, 2004 WL 213021, at *5-7 (S.D.N.Y. Feb. 3, 2004) (finding evidence insufficient to support probable cause where "[n]one of the documents concerning [extraditee] that are

No. 87-0551-M, 1988 U.S. Dist. LEXIS 6001, 1988 WL 66866, at *5 (E.D.N.Y. June 17, 1988).

In addition, "[w]here accomplice testimony is corroborated by other reliable evidence, it will, *a fortiori*, support a finding of probable cause." *Ahmad I*, 726 F. Supp. at 400. Although it is unclear how direct of a role Byeon Gi-chun played in facilitating the alleged Chonhaiji trademark scheme while serving as a director, his confirmation that (1) the company had used the Chonhaiji mark before Yoo registered it in 2007; (2) the mark was not worth the agreed-upon fees; (3) the fees were paid pursuant to the "trademark right holder['s]" request; and (4) the fees were "actually a way" to enrich the Yoos, is consistent with Park's statements. (Korean Interviews Binder, Tab H at 30-33; *see also* Docket Nos. 2-7 at 10-11, EX-YOO-S4-00010-11; 27-1 at 71-74). Both witnesses' statements are also consistent with the account records provided by the Korean government showing regular payments from Chonhaiji to Key Solutions between January 2008 and June 2010, in accordance with Korea's allegations. (Docket No. 2-5 at 64-65, EX-

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mentioned" by appellate decision attached to requesting State's submission had been "presented to th[e] Court"); *In re Extradition of Ernst*, No. 97 CRIM.MISC.1 PG.22, 1998 U.S. Dist. LEXIS 10523, 1998 WL 395267, at *10 (S.D.N.Y. July 14, 1998) (hereinafter "*In re Extradition of Ernst II*") (finding no probable cause based on decision by Zurich Supreme Court that "d[id] not, for the most part, describe the evidence on which its decision is based"). Absent disclosure of the foreign court's evidentiary sources, the extraditing court cannot "make the required independent determination as to whether probable cause exists." *See In re Extradition of Ernst II*, 1998 U.S. Dist. LEXIS 10523, 1998 WL 395267, at *10.

YOO-S2-00064-65). These objective records, combined with the two witness statements expressly implicating Yoo, constitute sufficient evidence to support a finding of probable cause. *See Germany v. United States*, No. 06 CV 01201(DLI), 2007 U.S. Dist. LEXIS 65676, 2007 WL 2581894, at *8 (E.D.N.Y. Sept. 5, 2007) (finding probable cause where "[e]ach witness testified that Petitioner was the head of a global cocaine conspiracy"); *In re Extradition of Neto*, No. 00 CRIM.MISC.1THK., 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *3-4 (S.D.N.Y. Feb. 3, 2004) (concluding there was probable cause based on, among other things, wiretap records and hearsay testimony of convicted co-conspirators).

The Court finds Yoo's remaining arguments with regard to the alleged Chonhaiji trademark scheme meritless. (Docket Nos. 18 at 37-38; 30 at 19). As demonstrated by Yoo's own submissions, Korean prosecutors gained much relevant information from Byeon Gi-chun through open-ended questions to which Byeon responded in full sentences, in his own words. (*E.g.*, Korean Interviews Binder, Tab H at 29-32). Even if the prosecutors "fed words" to Byeon at some moments in his interview, it is completely permissible to use leading questions to establish probable cause. *See United States v. Torres*, No. 93 Cr. 673 (KMW), 1994 U.S. Dist. LEXIS 1554, 1994 WL 48820, at *4 (S.D.N.Y. Feb. 16, 1994), *aff'd*, 48 F.3d 1214 (2d Cir. 1994), (citing *United States v. Weiss*, 752 F.2d 777, 786 (2d Cir. 1985)); (Docket No. 18 at 37). Furthermore, Byeon Gi-chun's responses contain sufficiently detailed information to establish personal knowledge of the alleged scheme, and therefore, support

probable cause, even if they are partially based on what others told him. *See In re Extradition of Tang Yee-Chun*, 674 F. Supp. at 1062; *see also In re Extradition of Neto*, 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *4 (finding that witness statements containing multiple hearsay were sufficiently reliable to support extradition based on consistency with other evidence and because witnesses were "in a position to have received reliable information" from others). Yoo may explore any gaps or inconsistencies in Byeon Gi-chun's knowledge at a full trial in Korea, which may ultimately lead to a finding that he is innocent. *See In re Extradition of Sindona*, 450 F. Supp. at 690. However, that exercise is inappropriate at this stage, and in light of the multiple sources implicating Yoo, there is probable cause to support this charge. *See id.*

ii. Ahae

(a) Evidence in Support of Extradition

In support of its allegations regarding the Ahae trademark scheme, in addition to Park Seung-il's statements noted above, Korea relies on statements from Lee Seong-hwan and Lee Gang-se, Ahae's former CEOs. (Docket Nos. 2-4 at 29-30, EX-YOO-S1-00029-30; 2-7 at 20, 24-25, EX-YOO-S4-00020, 00024-25; 27 at 20-25). According to Korea's submissions, Park Seung-il specifically confirmed that in 2009:

> Y[oo] . . . ordered [him] to receive 1.6% of revenue from Ahae as a royalty payment for

> its trademark, so [he] told Lee Seong-hwan, the CEO of Ahae, that [they] should follow the order of Y[oo] [due to his father's position]. [They] signed a contract and the company paid trademark royalties. The royalty payment was decided not based on a general way of estimation [or common market pricing], but based on Y[oo]'s unilateral direction.[18]

(*See* Docket Nos. 2-4 at 29-30, EX-YOO-S1-00029-30; 2-7 at 8-9, EX-YOO-S4-00008-9). In turn, Lee Seong-hwan told prosecutors that although company staff "created" the "Ahae" trademark in 1998, "Yoo . . ., through Park . . ., made a directive to pay trademark royalties, saying that he registered it in 2009." (Docket No. 2-7 at 9, EX-YOO-S4-00009). Due to Yoo's father's position, "it was hard not to follow [Yoo's] words so we couldn't help but pay the fees." (*Id.*). Furthermore, Lee Gang-se, who acted as co-CEO alongside of Lee Seong-hwan between July 2009 and May 2012, admitted that "paying [Yoo] that much in royalties was unnecessary." (*Id.* at 20, 24, EX-YOO-S4-00020, 00024). He asserted that he complained about the price to Ahae's auditor, but was told that "there was nothing he could do because it was the management's decision." (*Id.* at 24-25, EX-YOO-S4-00024-25). Korea has also submitted records of bank transactions between Ahae and Key Solutions reflecting payments made pursuant to the subject contract between January 2009 and December 2013. (*E.g.*, Docket No. 2-5 at 59-61, EX-YOO-S2-00059-61).

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18. This summary is supported by multiple portions of Yoo's transcription of Park's interview. (*See* Korean Interviews Binder, Tab E at 12-14).

(b) Yoo's Response

In addition to the above-mentioned semantic objections to Park Seung-il's statements, Yoo responds that the subject trademark agreement was legitimate because "there was not a ten-year period when the company used the Ahae name without making payments." (Docket No. 18 at 35; *see also* Docket No. 30 at 18). In other words, Yoo applied to register the "Ahae" mark in March 1998, *before* the company took that name in September 1998, and well-before the 2009 agreement that forms the basis of the relevant charge. (*See* Docket No. 18 at 35; *see also* Other Companies' Documents Binder, Tab 1 at 1, 8; Docket No. 2 ¶ 7.b). Moreover, Yoo and Ahae entered into a trademark licensing agreement permitting Yoo to use the relevant mark as early as 2001, and again for an increased fee in 2009. (Docket No. 18 at 35; *see also* Other Companies' Documents Binder, Tabs 2-4). In support of these contentions, Yoo has submitted Ahae's corporate and trademark registration documents, the contracts reflecting these transactions, and a "product photo."[19] (*See* Other Companies' Documents Binder, Tabs 1-5).

Yoo also claims that an excerpted translation of Lee Seong-hwan's interview does not support Korea's allegations because it does not establish that Ahae staff created the company's mark in 1998, or reflect that Lee Seong-hwan admitted that the relevant contract was signed under pressure from the Yoo family. (Docket

19. These documents are listed as Defense Exhibits 50-54. (Docket No. 38 at 4).

Nos. 30 at 17-18; 30-4; *see also* Docket Nos. 2-7 at 9, EX-YOO-S4-00009; 2-4 at 29-30, EX-YOO-S1-00029-30). Rather, in Yoo's words, according to the translation, Lee Seong-hwan told prosecutors that "many staff members favored Ahae Co. for the company's name and the name was eventually chosen." (Docket Nos. 30 at 17-18; 30-4 at 5). Moreover, there are no statements in the excerpt mentioning the status of the Yoo family as a reason why Lee Seong-hwan felt compelled to sign the agreement. (*See* Docket Nos. 30 at 17-18).

(c) Analysis

As with Chonhaiji, there is probable cause for the alleged Ahae trademark scheme, even considering Yoo's exhibits that "explain" the evidence submitted by Korea. *See Collins*, 259 U.S. at 315-16. In light of the consistent evidence that (1) the name "Ahae" was adopted in or about 1998, years before any trademark licensing agreement with Yoo; (2) Yoo did not own or create the subject mark; and (3) the royalty payments were disproportionate to the mark's value, Yoo's rebuttal evidence regarding the specific timing of the subject licensing transaction is ineffective. (*See* Other Documents Binder, Tab 1; Docket Nos. 2-7 at 9, 20, 24, EX-YOO-S4-00009, 00020, 00024; 30-4 at 5-6). Although the Court is disquieted by some discrepancies in the Government's proof identified by Yoo, such doubts are insufficient to overcome the totality of the rest of the evidence against him at this stage. *See Illinois*, 462 U.S. at 238.

In arriving at this conclusion, the Court admits as explanatory evidence Ahae's corporate and trademark

registration documents, as well as the 2009 trademark licensing agreements between Ahae and Yoo that form the basis of the Ahae trademark scheme in the complaint. *See Shapiro II*, 478 F.2d at 905; (Other Documents Binder, Tabs 1, 3-4; Docket No. 2 ¶ 7.b). As Korea relies on witness statements that expressly reference the company's inception, the creation and registration of its mark, and the agreements at issue, these exhibits are admissible for the purpose of explaining any inconsistencies or doubtful elements in the Government's affirmative proof. *See Collins*, 259 U.S. at 315-16. In addition, rather than contradicting the Government's assertions, the corporate and trademark registration documents "cast a different light" on the Government's proof by clarifying that Yoo applied for the Ahae trademark registration before the company was officially established in 1998, and the registration was completed a few months thereafter, in December 1998. *See In re Extradition of Berri*, 2008 U.S. Dist. LEXIS 77857, 2008 WL 4239170, at *3.

On the other hand, the 2001 trademark licensing agreement is not admissible because it represents defensive evidence containing wholly new facts meant to establish that the subject trademark fees were part of a legitimate business relationship between Ahae and Key Solutions — *i.e.*, that Yoo is innocent. *See Collins*, 259 U.S. at 315-16; (Other Companies' Documents Binder, Tab 2). Even if it were not contradictory, this agreement is insufficient to "negat[e] a showing of probable cause." *See In re Extradition of Sindona*, 450 F. Supp. at 685. The mere fact that the relevant trademark payments started earlier and at a lower price than alleged does

not defeat the heart of Korea's claims, corroborated by multiple witnesses, that the subject fees were higher than appropriate and therefore a mechanism to enrich the Yoos.[20]*See id.*; (Docket Nos. 2-7 at 9, EX-YOO-S4-00020, 24; Korean Interviews Binder, Tab E at 21).

Considering the exhibits in evidence, the Court finds that Korea has provided enough support for its allegations against Yoo to satisfy the low threshold for probable cause. *See generally United States v. DiNapoli*, 8 F.3d 909, 915 (2d Cir. 1993). In addition to his admissions that he helped Yoo use exorbitant trademark royalties to embezzle affiliate funds, *see supra* Section III.D.2.i.(a), Park Seung-il specifically told prosecutors that Yoo ordered him to carry out the subject trademark licensing agreement with Ahae and that the fee was not based on market pricing. (*See* Docket Nos. 2-4 at 29-30, EX-YOO-S1-00029-30; 2-7 at 8-9, EX-YOO-S4-00008-9). Furthermore, Lee Gang-se admitted that "paying [Yoo] that much in royalties was unnecessary." (Docket No. 2-7 at 20, 24, EX-YOO-S4-00020, 24). And according to Yoo's own submissions, Lee Seong-hwan also stated that the "price" was "too much" and "decided by Yoo." (Docket No. 30-4 at 5). Taking these statements together, along with the bank records tracking the relevant payments directly to Yoo, there is sufficiently consistent evidence to support a finding of probable cause for Yoo's involvement in the alleged scheme. *See In re Extradition of Atta*, 1988 U.S. Dist. LEXIS 6001, 1988 WL 66866, at *5.

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20. Similarly, the "product photo" is inadmissible because Yoo does not explain how it clarifies any of Korea's evidence and it does not undermine the core allegations. *See id.*; (Other Companies' Documents Binder, Tab 5).

That said, the Court is struck by certain significant discrepancies between Yoo's version of Lee Seong-hwan's interview and the summaries provided by Korea. (*Compare* Docket No. 30-4, *with* Docket Nos. 2-7 at 9, EX-YOO-S4-00009, *and* 2-4 at 30, EX-YOO-S1-00030). Unlike the *de minimis* translation issues revealed by Park Seung-il's testimony, here there are substantive gaps between the discussions reflected in Yoo and and Korean prosecutors' renditions of them. *Cf. In re Marzook*, 924 F. Supp. at 592. For example, a review of the entire interview excerpt submitted by Yoo demonstrates that Lee Seong-hwan did not tell prosecutors that Ahae staff "create[d]" the company's name in 1998, as Korea's submissions attest. (*See* Docket Nos. 2-4 at 30, EX-YOO-S1-00030; 2-7 at 9, EX-YOO-S4-00009). To the contrary, he explained that although many staff supported it as the company name, "Ahae" is Yoo's father's pen name and was also the name of another company before it was chosen for Lee Seong-hwan's new company in 1998. (*See* Docket No. 30-4 at 5-6). Therefore, his testimony simply does not reflect that the "trademark . . . was created . . . by company staff." (Docket No. 2-4 at 30, EX-YOO-S1-00030). Additionally, the transcript is devoid of any indication that Lee Seong-hwan told prosecutors that the licensing transaction was prompted by pressure to obey Yoo's family, as Korea indicates. (Docket No. 2-7 at 9, EX-YOO-S4-00009). Rather, when asked why he entered into the contract, Lee Seong-hwan only explained that he and Yoo discussed potential consulting services that were never provided. (Docket No. 30-4 at 4-5). The Government has not explained nor fully acknowledged these discrepancies.[21]

21. The Court notes that the transcript provided by Yoo is only an excerpt, and is dated one day earlier than the interview

These discrepancies are concerning because rather than merely reflecting poor word choice or grammar, they call into question the legitimacy of Korea's proof. However, this concern is insufficient to defeat probable cause. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9. Even assuming that Ahae's mark existed and was used by affiliated companies before becoming the company's name in 1998, such facts do not change Korea's core allegation — which is supported by multiple witness statements, and consistent with objective records — that Yoo forced Ahae to pay an exorbitant fee for a trademark that Yoo did not create. *See In re Extradition of Atta*, 1988 U.S. Dist. LEXIS 6001, 1988 WL 66866, at *5. Similarly, irrespective of Lee Seong-hwan's statements, Park Seung-il's testimony that Yoo used his father's position to cause Ahae and other executives to accede to his demands stands unchallenged. (Docket Nos. 2-4 at 29-30, EX-YOO-S1-00029-30; 2-7 at 8-9, EX-YOO-S4-00008-9). Under such circumstances, "evidence that merely raises doubts about the reliability of the government's proof is insufficient to defeat an extradition request." *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; *see also Desautels v. United States*, 782 F. Supp. 942, 944 (D. Vt. 1991), *aff'd*, 970 F.2d 896 (2d Cir. 1992) (finding that inconsistency in affidavit was insufficient to defeat probable cause given "other evidence

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date noted in Korea's submission. (*Compare* Docket Nos. 2-4 at 30, EX-YOO-S1-00030 *and* 2-7 at 9, EX-YOO-S4-00009, *with* Docket No. 30-4 at 3). Although it is possible that Lee Seong-hwan gave prosecutors the relevant information supporting the summaries in other portions of his interview that were not transcribed, there is no indication in this record that that is the case.

before the magistrate [judge]" establishing that petitioner was guilty of the crimes charged). The factual disputes regarding the origin of the Ahae mark, as well as the inconsistencies between various witnesses' testimony, are issues most appropriate for trial in Korea, when Korea's witnesses are actually present. *See Shapiro II*, 478 F.2d at 905.

iii. Onnara Shopping

(a) Evidence in Support of Extradition

Korea proffers statements from Park Seung-il and Kim Chun-gyun, an auditor for I-One-I, as evidence supporting its charge involving Onnara Shopping. (Docket Nos. 2-3 at 9, 11-12, EX-YOO-00087, 89-90; 2-7 at 10, EX-YOO-S4-00010; 27-1 at 50-57, 67-70). In addition to telling prosecutors that as a general matter, trademark royalties for affiliate entities were an illegitimate means for enriching the Yoo family, *see supra* Section III.D.2.i.(a), according to Korea's submissions, Park Seung-il specifically admitted that "a total of KRW 9,050,174,540 was provided by . . . Onnara [Shopping and other affiliates] . . . in the name of trademark royalty . . . through Key Solutions between around January 30, 2009 and around December 31, 2013," (Docket No. 27-1 at 67; *see also* Docket No. 2-7 at 10, EX-YOO-S4-00010). Further, Park Seung-il "never evaluated" the value of Onnara Shopping's trademarks and simply followed Yoo's instructions.[22] (*See* Docket No. 27-1 at 68).

22. Yoo's translation of Park Seung-il's May 2014 interview corroborates this testimony. (*See* Korean Interviews Binder, Tab E at 20).

Kim Chun-gyun also told prosecutors that "[u]nder the order of Y[oo] . . ., each affiliate company raises funds using many excuses and the slush funds are transferred to the Y[oo] . . . family via I-One-I Holdings Co., Ltd. They also restructure the corporate governance so as to better obtain such funds. . . . Every year, affiliate companies pay certain percentages of their revenues to . . . Key Solution [sic] . . . for consulting and the use of trademark [sic]."[23] (Docket No. 2-3 at 11-12, EX-YOO-00089-90; *see also* Docket No. 27-1 at 55-56). Korea also asserts that, as with Chonhaiji and Ahae, bank records from the relevant period further corroborate its claims by showing monthly payments from Onnara Shopping directly to Key Solutions between January 2009 and December 2011. (*E.g.*, Docket No. 2-5 at 62-63, EX-YOO-S2-00062-63).

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23. Kim Chun-gyun stated that he became aware that "contracts and payments between affiliates w[ere] intended to establish slush funds of [sic] the Y[oo] family" when he and a colleague at his audit group realized that Yoo's family received funds from another affiliate company and certain of its trademark rights were registered under Yoo and his brother's names. (Docket No. 27-1 at 55-56). The affiliate's management "knew about this," and when Kim Chun-gyun and his colleague reported the issue as potential embezzlement, the management expressed "that they could not help it." (*Id.*). According to Yoo's rendition of the interview, although Kim Chun-gyun admitted that he could "not be sure" that "all other affiliates sen[t] money to the Yoo . . . family" in the same way, he "guess[ed]" that "it must have been the same for those companies." (Korean Interviews Binder, Tab D at 13). Kim also explained that I-One-I held multiple "meeting[s]" with the "presidents of [each of the] affiliated companies . . . to exchange opinions with each other on how to raise funds" for Yoo's father. (*Id.* at 8-9).

In further support of this charge, Korea claims that Lee Ho-seop, the former CEO of Onnara Shopping, failed to respond to a summons and "the fact that no actual activities under the trademark license contract between Key Solution and other companies were found prove that Onnara Shopping made the royalty payments to Y[oo] . . . although there was no use of trademark in a normal way." (Docket No. 2-4 at 30, EX-YOO-S1-00030). In its supplemental submission dated November 25, 2020, Korea also states that "the trademarks registered by Y[oo]'s family do not have any brand awareness in Korea and nothing was paid for the creation and registration of the trademarks other than a registration fee of KRW 300,000. Hence, the trademarks have no objective value." (Docket No. 27-1 at 71).

(b) Yoo's Response

Yoo argues that the Government's evidence is deficient because on top of the semantic disparities in Park Seung-il's statements, Kim Chun-gyun's statements are based on hearsay rather than the requisite personal knowledge to incriminate Yoo. (Docket No. 18 at 27-28, 36-37). In support of this contention, Yoo alleges that according to the translated version of Kim Chun-gyun's interview, Kim Chun-gyun did not work for Onnara Shopping or any of the affiliated companies. (*See id.*; *see also* Korean Interviews Binder, Tab D at 4). Although Kim Chun-gyun explained to prosecutors that he was an auditor for a number of entities in the Yoo corporate empire, including I-One-I, he did not audit Onnara Shopping. (*See* Docket No. 18 at 27-28, 36-37; Korean Interviews Binder, Tab D at 4-5).

Moreover, when asked whether he "kn[e]w about the [Yoo] family's corporate ownership structure," he stated that he "d[id] not know the exact corporate structure, but [was] also a member of the same sect" and "[b]ecause there [we] re many members of the congregation around [him], [he] kn[e]w a little about the bottom line." (Korean Interviews Binder, Tab D at 5). Yoo maintains that this testimony is insufficient to render Kim Chun-gyun a competent witness because "repeating" what other church members said "is unreliable proof." (Docket No. 18 at 28).

Furthermore, Yoo contends that Korea cannot rely on Lee Ho-seop's failure to appear or its own conclusory assertions regarding Onnara Shopping's brand value as affirmative evidence of Yoo's guilt. (Docket No. 18 at 37). Yoo also asserts that the subject contract between Onnara Shopping and Yoo was signed in 2001, not 2009, and "[t]hree of the four trademarks" covered by the contract "were for logos that are used on popular Onnara products." (*Id.* at 36 n.25). To support this last contention, Yoo offers into evidence Onnara Shopping's corporate and trademark registration documents; the relevant contract, dated December 1, 2001; and "[p]roduct and logo photos" of the relevant marks.[24] (Other Companies' Documents Binder, Tabs 6-9).

(c) Analysis

Although there is less evidence to support the alleged Onnara Shopping scheme than the other two alleged

24. These documents are listed as Defense Exhibits 55-58. (Docket No. 38 at 4).

trademark schemes, Korea's submissions meet the minimal requirements of probable cause for this charge as well. *See DiNapoli*, 8 F.3d at 915. Kim Chun-gyun's testimony and Park Seung-il's accomplice statements, combined with the bank records of Onnara Shopping's payments to Yoo, provide just enough detail and objective evidence to support a reasonable belief that Yoo used his family's stature to cause Onnara Shopping to pay him spurious trademark fees that were not in the company's financial interest. *See Austin*, 5 F.3d at 605. The Court agrees that certain of Korea's submissions must be disregarded, (*see* Docket No. 18 at 37), but excision of these materials does not negate the sufficiency of the rest of Korea's evidence.

Before addressing probable cause, the Court admits as explanatory evidence the 2001 trademark licensing agreement, (Other Companies' Documents Binder, Tab 8), but excludes the remaining documents offered by Yoo, (*id.*, Tabs 6-7, 9). Given that Korea alleges that Yoo used a fraudulent trademark licensing agreement with Onnara Shopping to extract funds for his family, the Court permits Yoo to use that contract as explanatory evidence clarifying the specifics of the subject transaction. *See Collins*, 259 U.S. at 315-16. However, neither the product photographs nor registration documents are admissible because they do not explain any aspect of Korea's proof with respect to this charge. *See id.* Although Yoo seems to argue that the photographs demonstrate that the relevant trademarks were "used on popular Onnara products," and therefore, were worth the fees set by the contract, (*see* Docket No. 18 at 36 n.25), evidence offered for this purpose — to contradict the allegations of the requesting State — is

inadmissible in an extradition proceeding.[25] *See Shapiro II*, 478 F.2d at 905.

Even considering Yoo's explanatory evidence, the Court finds that Korea's submissions provide enough evidence in support of its allegation that through Park Seung-il, Yoo utilized the subject licensing agreement with Onnara Shopping to enrich his family by charging excessive fees, as he allegedly did with Chonhaiji and Ahae. (*See* Docket No. 2 ¶ 7c). Although Korea has no statements from Lee Ho-seop, by both parties' accounts, Park Seung-il — who, as Yoo's admitted accomplice, had firsthand knowledge of Yoo's operation — named Onnara Shopping as one of the affiliates from whom Yoo received money "in the name of trademark royalties," (Docket No. 27-1 at 67; *see also* Korean Interviews Binder, Tab E at 18),[26] and asserted that such royalties were "unnecessary" and a mechanism to take affiliates' funds to benefit the Yoo family's own wealth, (Korean Interviews Binder, Tab H at 21; *see also* Docket No. 2-7 at 9, EX-YOO-S4-00009). Park also confirmed that he received all of his instructions to facilitate such transactions from Yoo, and that looking back, the operation was illegal. (Docket No. 27-1 at 59-60, 67; Korean Interviews Binder, Tab E at 8-9). Therefore, Park Seung-il's testimony is sufficient on its own to

25. Yoo does not cite any specific purpose for introducing the registration documents. (*See generally id.*; Other Companies Documents Binder, Tabs 6-7). Therefore, the Court denies this request as well.

26. Per Yoo's translation of this portion of the interview, Park Seung-il stated that the money was paid "as trademark fees." (Korean Interviews Binder, Tab E at 18).

establish probable cause. *See Ahmad I*, 726 F. Supp. at 400. It is also consistent with the account records provided by Korea, the subject contract implicating Yoo, and Kim Chun-gyun's testimony, which generally affirms that based on his knowledge of the Yoo family's corporate structure, he was aware that affiliates of I-One-I generated funds for the Yoo family using fraudulent means. *See id.*; (Other Companies' Documents Binder, Tab 8; Docket Nos. 2-3 at 11-12, EX-YOO-00089-90; 2-5 at 62-63, EX-YOO-S2-00062-63; 27-1 at 55-56; *supra* n.23).

The fact that Kim Chun-gyun's testimony may be based on hearsay is of no moment in this extradition proceeding. (*See* Docket No. 18 at 27-28, 36-37). Although "the hearsay character of a statement is . . . a factor in determining [its] weight," *In re Extradition of Neto*, 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *4 (quoting *U.S. ex rel. Klein v. Mulligan*, 50 F.2d 687, 688 (2d Cir. 1931)) (internal quotation marks omitted), the weight "accorded [to a witness's] testimony is solely within the province of the extraditing magistrate [judge]," *Austin*, 5 F.3d at 605. Here, Kim Chun-gyun's testimony is not exceptionally detailed, but it is explicit about the origins of his knowledge and consistent with Park Seung-il's statements regarding the purpose of the Onnara Shopping transaction and similar trademark licensing agreements spearheaded by Yoo. *See In re Extradition of Neto*, 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *6 (finding sufficient evidence for probable cause though witness statement "contain[ed] multiple hearsay," as it was "sufficiently corroborated to be reliable"); (Docket No. 2-3 at 11-12, EX-YOO-00089-90; *see also* Docket Nos.

27-1 at 55-56, 67, 71-74; 2-7 at 10, EX-YOO-S4-00010). Furthermore, as an auditor for I-One-I and some of its affiliates, it is conceivable that Kim Chun-gyun would have at least some knowledge of the Yoo family's business structure, and in turn, the way that it handles its finances. (*See* Korean Interviews Binder, Tab D at 5, 8, 12-13).

Korea's conclusory assertions regarding the relevant trademarks' brand value and Onnara Shopping's questionable use of them cannot support probable cause, because Korea does not identify the source(s) for these statements. *See In re Extradition of Ben-Dak*, 2008 U.S. Dist. LEXIS 29460, 2008 WL 1307816, at *6. Indeed, to establish probable cause, "the materials submitted [in support of an extradition request] must set forth facts from which both the reliability of the source and probable cause can be inferred." *In re Extradition of Ernst II*, 1998 U.S. Dist. LEXIS 10523, 1998 WL 395267, at *9; *see also Illinois*, 462 U.S. at 239 ("[T]he magistrate [judge's] . . . action cannot be a mere ratification of the bare conclusions of others."). Furthermore, Lee Ho-seop's refusal to potentially incriminate himself by partaking in a consensual encounter with the Korean authorities is a far cry from meeting this standard. *Cf. Tom v. Voida*, 963 F.2d 952, 959 n.8 (7th Cir. 1992).

These arguments do not negate the sufficiency of the rest of Korea's submissions, however. Therefore, the Court finds that there is probable cause for the alleged Onnara Shopping trademark scheme as well.

3. Business Consulting Services Schemes

i. Semo

(a) Evidence in Support of Extradition

Korea proffers statements from five witnesses in support of its charge regarding the alleged consulting scheme involving Semo. These witnesses include Park Seung-il; Kim Gyu-seok, the leader of Semo's Management Support Team; Go Chang-hwan, Semo's former CEO; Jo Seon-ae, a Semo employee; and Kim Chun-gyun, identified above as an auditor of a number of affiliate companies. (*See generally* Docket No. 27-1 at 43-60).

In essence, Korea argues that Park Seung-il's statements are corroborated by the testimony of multiple Semo insiders. (*See id.*). According to Korea, in addition to his statements above regarding the illegitimate consulting fees charged to various affiliates, (*see supra* Section III.D.2.i.(a)), Park Seung-il asserted that there were only three to five Key Solutions employees including himself, none of whom had "any academic or professional background in business consulting," (Docket Nos. 2-4 at 26, EX-YOO-S1-00026; 27-1 at 58). Furthermore, the consulting services the company provided were "mere translations of general information that could be obtained through the internet." (Docket No. 27-1 at 44). Korea also asserts that according to Park Seung-il, "[a] business consulting fee was merely a means to collect money illegally from Semo, Moreal Design, and Chonhaiji.

[Yoo] was behind all this." (Docket No. 2-4 at 26, EX-YOO-S1-00026). In line with this testimony, both Kim Gyu-seok and Go Chang-hwan told Korean prosecutors that despite being paid a large consulting fee each month, Yoo provided business consulting services only once or twice a year,[27] (Docket Nos. 2-2 at 27, EX-YOO-S1-00027; 27-1 at 43-44, 47; 2-7 at 6, EX-YOO-S4-00006), and Go Chang-hwan asserted that Semo paid KRW 250,000,000 in 2010 and KRW 300,000,000 in 2011, 2012 and 2013 to Key Solutions at Park Seung-il's "request." (Docket No. 2-3 at 12, EX-YOO-00090; *see also* Docket No. 27-1 at 45). Go Chang-hwan further explained that he and Park Seung-il "decided on [the subject] business consulting fee without having estimates from other companies compared and taking into account Key Solution[s]'[] level of expertise, performance records, reliability, and the need for two-way consulting service, etc." (Docket Nos. 2-3 at 12, EX-YOO-00090; 2-4 at 26-27, EX-YOO-S1-00026-27; *see also* Docket No. 27-1 at 45). He also admitted that "the quality of the report was not enough given that an expensive fee was paid on a regular basis and you could get that quality of service if you hire another company." (Docket No. 2-7 at 6, EX-YOO-S4-00006; *see also* Docket No. 27-1 at 47). Go

27. In its submission dated June 24, 2014, Korea also quoted Kim Gyu-seok as stating that Yoo's business consulting services "could have easily [been] found on the internet." (Docket No. 2-2, EX-YOO-S1-00027). After Yoo argued in his opening brief that neither quotation appeared in his actual interview, Korea clarified that the "internet" statement was misattributed, and was actually made by Park Seung-il. (Docket Nos. 27 at 26; 27-1 at 44). Because Yoo concedes that "[w]hat Kim said may be true," and does not question the accuracy of the "internet" quotation from Park Seung-il, (Docket No. 30 at 12), the Court does not address this initial discrepancy.

Chang-hwan was convicted in Korea for paying excessive consulting fees to Yoo through Semo. (Docket Nos. 2-7 at 7, EX-YOO-S4-00007; 27-1 at 39-40, 48).

As additional support, Korea points to statements from Jo Seon-ae that Semo paid "excessive" consulting fees to Key Solutions every year, even though its operating profits were in decline and its liabilities surpassed its equity. (Docket No. 2-3 at 12, EX-YOO-00090; *see also* Docket No. 27-1 at 49). Jo Seon-ae also asserted that Semo's performance did not improve after receiving such consulting fees, yet Semo did not replace Key Solutions, which was "far from normal." (Docket No. 2-3 at 12, EX-YOO-00090; *see* aso Docket No. 27-1 at 49-50).

Finally, Korea relies on Kim Chun-gyun's testimony that generally, the I-One-I affiliates raised "slush funds" for Yoo's family. (Docket No. 27-1 at 55; *see supra* Section III.D.2.iii.(a)). According to Korea's submissions, Kim Chun-gyun also stated that the consulting "advice" provided by Key Solutions to various affiliates was "suspicious since there were no consulting reports." (Docket No. 27-1 at 55, 57). Korea provided bank account records showing monthly payments from Semo to Yoo between March 2010 and March 2014, amounting to KRW 1,225,000,000. (*E.g.*, Docket No. 2-5 at 54-55, EX-YOO-S2-00054-55).

(b) Yoo's Response

Yoo mounts several objections to Korea's evidence regarding Semo, challenging Korea's summaries and

translations of various witnesses' statements as well as its witnesses' reliability. (Docket Nos. 18 at 24-31; 30 at 13). He also complains that Korea failed to disclose certain exculpatory statements by Go Chang-hwan and Kim Gyu-seok, and offers additional documents and affidavits from non-witnesses to demonstrate that the services Key Solutions provided to Semo were legitimate. (Docket Nos. 18 at 25-27, 30-31; 30 at 12 n.9).

With regard to Park Seung-il's statements, in addition to the objections noted in Section III.D.2.i.(b), Yoo argues that this testimony cannot support probable cause because Park Seung-il never told prosecutors that "[a] business consulting fee was merely a means to collect money illegally from Semo, Moreal Design, and Chonhaiji" and that Yoo was "behind all this." (Docket No. 18 at 28; *see also* Docket No. 2-4 at 26, EX-YOO-S1-00026). Indeed, these words are absent from Yoo's translated excerpt of Park Seung-il's interview. (Korean Interviews Binder, Tab E). Yoo also argues that contrary to Korea's representations in its initial submissions, (Docket No. 2-4 at 26, EX-YOO-S1-00026), rather than three employees, Park Seung-il told prosecutors that Key Solutions employed three to five employees, and that Korea's misstatement "exemplifies [its] penchant to misquote to make [its] case." (Docket No. 18 at 28-29).

Also according to Yoo, Kim Gyu-seok's interview transcript reflects that he made certain denials not noted by Korea's submissions that further undermine probable cause. (Docket No. 18 at 24-25). For example, Kim Gyu-seok told Korean prosecutors that he did not know whether

or not the services Key Solutions purportedly provided were worth the subject consulting fees. (Docket No. 18 at 24-25; Korean Interviews Binder, Tab A at 20). In addition to the interview excerpt reflecting this testimony, (Korean Interviews Binder, Tab A at 20), Yoo urges the Court to consider an affidavit from Kim Gyu-seok stating he never told Korean prosecutors that Key Solutions' consultation services were "not valuable," (Docket No. 18 at 25; Semo Documents Binder, Tab 1).[28] The affidavit also describes approximately ten written reports as well as services Key Solutions provided to Semo such as assistance in obtaining FDA and Hazard Analysis and Critical Control Point ("HACCP") certifications, "which were necessary for exporting [Semo's] products." (Semo Documents Binder, Tab 1).

With regard to Go Chang-hwan's statements, Yoo complains that Korea's summaries constitute improper quotations of this witness's testimony. (Docket No. 18 at 25-26). Specifically, Yoo claims that the transcript of Go Chang-hwan's April 24, 2014 interview does not reflect that "[he] and P[ark] Seung-il decided on [Key Solutions'] business consulting fee without having estimates from other companies compared and taking into account Key Solution's level of expertise, performance records, reliability, and the need for two-way consulting service, etc.," as claimed by Korea in its initial submissions. (Docket No. 18 at 25; *see also* Docket Nos. 2-3 at 12, EX-YOO-00090; 2-4 at 26-27, EX-YOO-S1-00026-27; 2-7 at 6,

28. This affidavit is listed as Defense Exhibit 16. (Docket No. 38 at 2).

EX-YOO-S4-00006). Similarly, Go Chang-hwan's May 6, 2014 interview does not indicate that he told prosecutors that Key Solutions only "provided business consulting services once or twice a year in writing," or that the services could have been "outsourced" and "did not deserve a large amount of consulting fees." (Docket No. 18 at 25-26; *see also* Docket Nos. 2-4 at 27, EX-YOOS1-00027; 2-7 at 6, EX-YOO-S4-00006; Korean Interviews Binder, Tab B). Yoo further asserts that Korea improperly failed to disclose that in his interview on the same date, Go Chang-hwan told prosecutors that Key Solutions provided Semo advice regarding HACCP and "data related to the US FDA," and refused to admit that "excessive consulting fees were paid without any justifiable reasons." (*See* Docket No. 18 at 26; Korean Interviews Binder, Tab B at 16-17). Yoo directs the Court to a translation of Go Chang-hwan's interview from May 6, 2014, but has not submitted a translation of the April 24, 2014 interview. (Docket No. 18 at 25-26; Korean Interviews Binder, Tab B).

Yoo makes similar arguments regarding Korea's rendition of Jo Seon-ae's testimony. (Docket No. 18 at 26-27). For example, rather than telling prosecutors that the subject consulting fees were "excessive" or "far from normal," as Korea's submissions reflect, Yoo's version of Jo Seon-ae's interview transcript shows that she said the fees may have been "a little too much," but "did not think about it seriously." (Docket No. 18 at 26-27; *compare* Docket No. 2-3 at 12, EX-YOO-00090, *with* Korean Interviews Binder, Tab C at 8-9). Yoo further claims that because Jo Seon-ae identified herself as an "office worker," she had little knowledge of the relevant consulting contract. (Docket

No. 18 at 26-27; Korean Interviews Binder, Tab C at 7). In support of this argument, Yoo offers into evidence an affidavit from Jo Seon-ae stating that she lacks knowledge of what services were provided under the contract and whether the fees were reasonable.[29] (Docket No. 18 at 27; Semo Documents Binder, Tab 2).

As to Kim Chun-gyun's statements, Yoo launches arguments that are identical to those addressed in Sections III.D.2.iii.(b) and (c).

To buttress all of these arguments, Yoo offers affidavits from Hwang Ho-eun, another employee of Semo, as well as Ryu Geun-ha, an employee of Key Solutions who worked with Semo. (*See* Docket No. 18 at 30-31; Semo Documents Binder, Tabs 3-4). Hwang Ho-eun's affidavit states that Yoo suggested improvements to Semo's production processes, which increased Semo's profitability by KRW 10 billion and increased its product yield by eleven percent. (Docket No. 30 at 12; Semo Documents Binder, Tab 3). According to Ryu Geun-ha's affidavit, Ryu worked long hours preparing consulting reports regarding Semo's business strategy as well as FDA and HACCP certification processes to enable Semo to export its products. (Semo Documents Binder, Tab 4). To further demonstrate that Key Solutions provided valuable services to Semo, Yoo has also submitted six consulting reports, a Consulting Schedule Management Table, and fifteen reports reflecting minutes of meetings conducted by Key

29. The affidavit is listed as Defense Exhibit 17. (Docket No. 38 at 2).

Solutions between 2012 and 2013.[30] (*See* Docket No. 18 at 30-31; Semo Documents Binder Tabs 5-26).

(c) Analysis

As with the alleged trademark schemes, Korea's submissions present sufficient evidence to indict Yoo based on a reasonable belief that he orchestrated the alleged Semo scheme. *See Austin*, 5 F.3d at 605. The additional affidavits and materials submitted by Yoo largely constitute contradictory evidence that the Court cannot take into account. *See Shapiro II*, 478 F.2d at 905. The rest of his objections raise factual disputes and relatively minor translation and reliability issues that do not overcome the consistent evidence supporting the Government's case at this early stage. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; *In re Marzook*, 924 F. Supp. at 592. Likewise, because Korea had no obligation to produce its witnesses' exculpatory statements, its failure to do so has no impact on probable cause. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9.

Turning first to the evidence Yoo offers, none of the documents are admissible because they constitute either impermissible contradictory evidence or evidence that is not legally sufficient to rebut probable cause. *See Shapiro II*, 478 F.2d at 905; *In re Extradition of Sindona*, 450 F.

30. The Hwang Ho-eun and Ryu Geun-ha affidavits are listed as Defense Exhibits 18 and 19, and the additional consulting documents and meeting minutes are listed as Defense Exhibits 20 through 41. (Docket No. 38 at 2-3).

Supp. at 685. The Court cannot admit the affidavits of Kim Gyu-seok, Hwang Ho-eun or Ryu Geun-ha, as they all contradict rather than explain the testimony of the other government witnesses that the consulting services provided to Semo were not worth the fees charged. *See Collins*, 259 U.S. at 315-16. For example, Kim Gyu-seok's affidavit asserts that for various reasons, the subject fees were "reasonable," and that he "never told the prosecutors that the consultation services Key Solutions provided were not valuable," (Semo Documents Binder, Tab 1), but this evidence simply offers an alternative set of facts that stand at odds with the heart of Park Seung-il's testimony, (Docket Nos. 2-4 at 26, EX-YOO-S1-00026; 27-1 at 44, 58). The same is true with regard to Hwang Ho-eun's attestations that Key Solutions improved Semo's business and Ryu Geun-ha's assertions regarding the hard work he put into serving Semo on behalf of Key Solutions, and the other documents submitted by Yoo meant to evidence the legitimacy of this work. (*See* Semo Documents Binder, Tabs 3-26). To the extent Yoo argues that these documents are admissible to explain the FDA and HAACP-related work referred to by Go Chang-hwan, (*see* Docket Nos. 27-1 at 46-47; 30 at 10), they cannot obliterate probable cause because they merely create factual inconsistencies regarding the quality and professional expertise behind this work that cannot be evaluated without a trial. *See Shapiro v. Ferrandina*, 355 F. Supp. 563, 572 (S.D.N.Y.), *modified and aff'd*, 478 F.2d 894 (2d Cir. 1973) (hereinafter "*Shapiro I*"), ("The improbability or the vagueness of testimony may destroy the probability of guilt, but the tendering of witnesses who testify to an opposite version of the facts does not."). Although this evidence may prove

Yoo's innocence at the end of the day, it is not appropriate for the Court to consider it at this stage.

Nor will the Court accept as evidence Jo Seon-ae's affidavit regarding her limited knowledge of the subject agreement with Semo. (*See* Semo Documents Binder, Tab 2). The affidavit constitutes "evidence that merely raises doubts about the reliability of the government's proof," and therefore, is not admissible because it does not obliterate probable cause. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9. In any event, Yoo's excerpted version of Jo Seon-ae's interview, which is already in evidence, clearly shows that Jo Seon-ae explicitly denied knowledge of what services were covered by the agreement as well as the circumstances under which it negotiated. (*See* Korean Interviews Binder, Tab C at 7). Viewed in this context, any evidentiary value the affidavit would provide is minimal.

Now considering Korea's evidence, the discrepancies noted by Yoo in Park Seung-il's statements are not sufficient to overcome probable cause. (Docket No. 18 at 28-29). Yoo is correct that the exact words "[a] business consulting fee was merely a means to collect money illegally from Semo, Moreal Design, and Chonhaiji. [Yoo] was behind all this," do not appear in his translation of Park Seung-il's interview. (*Compare* Docket No. 2-4 at 26, EX-YOO-S1-00026, *with* Korean Interviews Binder, Tab E). However, as explained, Korea was entitled to submit summaries of statements made by witnesses to the authorities for these proceedings, and Yoo's own rendition of the interview is ultimately consistent with

the summary to which he objects. *See Samuels*, 2009 U.S. Dist. LEXIS 9616, 2009 WL 367578, at *7; *In re Marzook*, 924 F. Supp. at 592; (Korean Interviews Binder, Tab E at 8-10, 15). In addition, although Park Seung-il technically told prosecutors that Key Solutions employed between three and five people — not three people — this misquotation is not sufficiently material to overcome the rest of the incriminating statements made by this and numerous other witnesses. (*Compare* Docket No. 2-4 at 26, EX-YOO-S1-00026, *with* Korean Interviews Binder, Tab E at 6 *and* Docket No. 27-1 at 58).

The discrepancies Yoo highlights in Go Chang-hwan's statements are *de minimis* as well. *See In re Marzook*, 924 F. Supp. at 592. Although Yoo claims that Korea misstated the contents of this witness's April 24, 2014 interview, the Court cannot meaningfully evaluate this assertion because Yoo has not submitted a translation of that proceeding for comparison purposes, as he has for other interviews. (*See generally* Korean Interviews Binder). In response to this claim, Korea submitted certified interview excerpts from that date containing the exact content Yoo disputes. (*See* Docket No. 27-1 at 44-46). The Court will consider these statements as true because the Court is permitted to accept such certified submissions from a requesting State as true, and Yoo has offered no reason beyond his conclusory assertions to do otherwise. *See Samuels*, 2009 U.S. Dist. LEXIS 9616, 2009 WL 367578, at *7. With regard to the May 6, 2014 interview, a close reading of Yoo and Korea's versions side-by-side reveals that Go Chang-hwan admitted, in sum and substance, that the Semo consulting arrangement was

not worth regular consulting fees, and could have been "outsource[d]" on a "one-time" basis. (*Compare* Korean Interviews Binder, Tab B at 16-17, *with* Docket No. 27-1 at 46-47). Therefore, Yoo's complaint boils down to mere semantic disparities between inculpatory statements that ultimately confirm Park Seung-il and Kim Gyu-seok's testimony. *See In re Marzook*, 924 F. Supp. at 592.

Taken together, the bank records submitted by Korea and the statements from these three witnesses establish a reasonable belief that, as with the alleged trademark schemes, Yoo used the Semo consulting agreement to enrich his family without providing Semo legitimate consulting services as promised under the contract. *See Austin*, 5 F.3d at 605. This evidence is also consistent with Kim Chun-gyun's statements, which, as explained above, are sufficiently reliable at this early stage of the proceedings. *See supra* Section III.D.2.iii.(c). Therefore, regardless of the weight afforded to Jo Seon-ae's statements, there is probable cause for the Semo charge. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; *Ahmad I*, 726 F. Supp. at 400. This is so even though some portions of Go Chang-hwan and Kim Gyu-seok's testimony may be seen as exculpatory and/or inconsistent with their other statements. (*See* Docket No. 18 at 24-26). Those discrepancies raise mere factual issues that must be resolved at trial. *See Samuels*, 2009 U.S. Dist. LEXIS 9616, 2009 WL 367578, at *7 (finding that internal inconsistencies and inconsistencies between multiple witness statements were insufficient to defeat probable cause).

As to Korea's initial failure to disclose Go Chang-hwan and Kim Gyu-seok's exculpatory statements, district courts in this Circuit have declined to deny extradition on these grounds alone. *See, e.g., Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *6; *Sacirbey v. Guccione*, No. 05 Cv. 2949(BSJ)(FM), 2006 U.S. Dist. LEXIS 64577, 2006 WL 2585561, at *14 (S.D.N.Y. Sept. 7, 2006), *rev'd on other grounds*, 589 F.3d 52 (2d Cir. 2009); *Hunte*, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *16. Ordinarily, under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (hereinafter "*Brady*"), the Government's "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. *Brady*'s purpose is to "protect a defendant's right to a fair trial by ensuring the reliability of any criminal verdict against him." *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001) (citing *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). However, as the Second Circuit has reiterated numerous times, an extradition proceeding "is not the occasion for adjudication of guilt or innocence," *Melia*, 667 F.2d at 302, and thus, is patently not a trial on the merits where a criminal defendant may cross-examine government witnesses or introduce rebuttal evidence. *See Messina*, 728 F.2d at 80. Therefore, "the evidentiary rules of criminal litigation are not applicable." *Id.* (rejecting contention that extradition proceedings were "defective" where court declined to grant motion for discovery of tapes of incriminating telephone calls); *see also Collins*, 259 U.S. at 316 (noting that "wrongful exclusion of specific pieces of evidence, however important, does not render

the detention illegal"). Taking this logic one step further, courts in other jurisdictions have explained that there are no *Brady* obligations in an extradition proceeding precisely because, absent a full trial on the merits by the extraditing court, the extraditee has no rights that trigger *Brady*'s underlying purpose. *See, e.g., Montemayor Seguy v. United States*, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004); *In re Extradition of Singh*, 123 F.R.D. 108, 112 (D.N.J. 1987); *see also Merino v. U.S. Marshal*, 326 F.2d 5, 13 (9th Cir. 1963).

The Court is persuaded that in light of Yoo's limited rights at this procedural posture, the Korean government was not required to apprise Yoo or this Court of the statements about which Yoo complains. *See Messina*, 728 F.2d at 80. Moreover, even if *Brady* were applicable, the record indicates that rather than suppressing potential exculpatory evidence, the Government and/or the Korean authorities ultimately cooperated with Yoo's requests for information. *See* 373 U.S. at 87. Yoo has submitted extensive translations of the original interviews conducted by Korean authorities, indicating that he was able to obtain material in Korea's possession that he deemed important to his case. (*See generally* Korean Interviews Binder). Therefore, the fact that this information was not included in Korea's initial submissions does not undermine the Court's finding of probable cause. *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *6.

ii. Moreal

(a) Evidence in Support of Extradition

In support of the alleged Moreal consulting scheme, Korea proffers the above statements from Park Seung-il and Kim Chun-gyun as well as additional statements from Park Hwa-sun and Ha Myeong-hwa. (*See generally* Docket Nos. 2-4 at 28-29, EX-YOO-S1-00028-29; 2-7 at 7-8, EX-YOO-S4-00007-08; 27 at 21; 27-1 at 60-63; *see supra* Sections III.D.2.i.(a), iii.(a), 3.i.(a)).

Korea asserts that despite working for Moreal, neither of these additional witnesses were aware of any consulting services provided under the company's contract with Key Solutions. According to Korea's submissions, Park Hwa-sun, a Moreal employee in charge of accounting, stated that she did not know whether Key Solutions provided consulting services to Moreal, even though she was aware that a contract for such services was signed. (Docket No. 2-4 at 29, EX-YOO-S1-00029; *see also* Docket Nos. 2-7 at 8, EX-YOO-S4-00008; 27-1 at 62-63). In addition, Ha Myeong-hwa, a CEO of Moreal, told prosecutors that Yoo and Yoo Chong Somena, Ha's co-CEO and Yoo's sister, signed a business consulting contract whereby Yoo was paid KRW 20,000,000 every month even though "there is no official record showing that the company received consulting services." (Docket No. 2-4 at 28-29, EX-YOO-S1-00028-29; *see also* Docket Nos. 2-7 at 7-8, EX-YOO-S4-00007-08; 27-1 at 61). Ha Myeong-hwa also "concluded the contract at the amount P[ark] Seung-il

demanded," and was told by Park Seung-il that Key Solutions would provide a "design training program," but did not know whether such training was ever provided because she was "not in charge of design." (Docket No. 27-1 at 61). Ha Myeong-hwa further asserted that rather than making an independent determination regarding whether Moreal needed consulting services, whether Key Solutions was capable of providing them, whether the price under the contract was appropriate, and whether the contract was being implemented properly, she "just followed" Yoo Chong Somena's lead. (Docket No. 27-1 at 61-62).

Korea also notes that Yoo Chong Somena, who "effectively managed Moreal," was convicted in Korea for her role in facilitating the provision of fraudulent consulting services to Moreal in exchange for exhorbitant fees through the same agreement. (Docket No. 27-1 at 64-65). The adjudicating court found that Key Solutions "unilaterally" set the price under the contract, and that Moreal did not compare it to quotations from other consulting firms or "substantively review the needs of consulting services on a regular basis." (*Id.* at 64). The arrangement was "done through P[ark] Seung-il upon the request of Key Solutions." (*Id.*). In addition, whereas Moreal paid Key Solutions KRW 280,000,000 in 2012, its net profits that year were only 44,000,000. (*Id.* at 65). The court reasoned that such an "expenditure [wa]s beyond comprehension," in light of the fact that the consulting reports provided to Moreal were prepared "ex post facto" by individuals with no background in consulting. (*See id.*). The court concluded that "the reports were merely a formality to receive consulting fees." (*Id.*).

Korea further asserts that its claims are corroborated by account records from April 2010 to December 2013 showing regular monthly payments from Moreal's account into Yoo's account. (*E.g.*, Docket No. 2-5 at 56-58, EX-YOO-S2-00056-58). It has also submitted copies of two "Consulting Service Contract[s]," dated April 1 and December 31, 2010 and listing Yoo as Key Solutions' CEO. (Docket No. 2-8 at 22-29, EX-YOO-S5-00022-28).

(b) Yoo's Response

In addition to disputing Korea's summaries of their testimony, Yoo faults Korea for inordinately relying on Ha Myeong-hwa and Park Hwa-sun when both witnesses had limited personal knowledge of the consulting services provided under the relevant agreement. (Docket Nos. 18 at 31-33; 30 at 13-16). To support this contention, in addition to excerpts of their interviews, Yoo refers the Court to affidavits submitted by each witness denying knowledge of any fraudulent consulting services.[31] (*See* Moreal Documents Binder, Tabs 1-2; Korean Interviews Binder, Tabs F-G; *see also* Docket Nos. 18 at 31-33; 30 at 13-16). Yoo argues that Ha Myeong-hwa's uncertainty during her interview regarding whether Moreal received any consulting services from Key Solutions is explained by the fact that Ha was a doctor in charge of Moreal's medical division, and naturally would not have knowledge of the consulting services provided to Moreal's design division. (*See* Docket Nos. 18 at 31-32; 30 at 15-16). Furthermore,

31. These affidavits are listed as Defense Exhibits 42 and 43. (Docket No. 38 at 3).

during her interview, "[she] was never asked about the work that Keith Yoo himself did for Moreal's medical products division," (Docket No. 30 at 15; *see also* Korean Interviews Binder, Tab F), and her affidavit lists numerous services that Key Solutions and Yoo personally provided to Moreal's medical division, which Yoo believes refute Korea's allegation that no consulting was provided under the contract, (Docket No. 30 at 15-16; 18 at 32; *see also* Moreal Documents Binder, Tab 1 ¶ 3). As to Park Hwa-sun, Yoo maintains that as explained in her affidavit, because she was an accounting employee, "she was not in a position to know what consulting services were provided." (Docket No. 18 at 33; *see also* Moreal Documents Binder, Tab 2).

With regard to Yoo Chong Somena's conviction, Yoo asserts that the Korean court's findings do not sufficiently establish probable cause, and because Yoo's family "cannot receive a fair trial in Korea," this conviction "should not count in the probable cause calculus." (Docket No. 30 at 14 & n.11). Specifically, according to Yoo, Moreal's unconventional approach to signing the subject contract, without bargaining for or vetting the fee, demonstrates nothing more than "bad business" or typical practices between affiliated companies. (*Id.* at 14). As to the disproportionate relationship between Moreal's net profits and the consulting fees it paid in 2012, Yoo argues that the proper comparison is between the company's revenue and the fees because the fees are "deducted" to arrive at the figure for net profits. (*Id.*). Furthermore, based on documentation of Moreal's finances between 2011 and 2013 and an asset purchase agreement between Moreal

and a non-party dated March 8, 2012,[32] Moreal's revenue greatly surpassed the fees from 2011 to 2013, and Moreal was not in debt during this period. (*Id.* at 14-15; *see also* Docket Nos. 30-2-30-3).

Yoo also directs the Court to (1) an affidavit from Han Yeun Ju, the leader of Moreal's graphic design team, explaining that Key Solutions helped that division develop an internship program overseas; (2) a Key Solutions consulting report for Moreal; and (3) annual reports from 2010 to 2013 provided by Key Solutions to Moreal regarding the internship program.[33] (*See* Docket No. 18 at 33-34).

(c) Analysis

Although Yoo's complaints raise questions about the strength of Korea's case against him, these issues are not appropriate to resolve here. *See Melia*, 667 F.2d at 302. The combination of Park Seung-il, Ha Myeong-hwa and Kim Chun-gyun's statements; the contracts directly implicating Yoo; and the bank records tracking Moreal's payments to Key solutions, provides sufficient evidence to reasonably believe Yoo committed the Moreal charge, as well. *See Austin*, 5 F.3d at 605. Thus, even considering Yoo's objections, the totality of the circumstances supports probable cause. *See Illinois*, 462 U.S. at 238.

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32. These documents are listed as Defense Exhibits 3 and 4. (Docket No. 38 at 1).

33. These additional documents are listed as Defense Exhibits 44-49. (Docket No. 38 at 3-4).

Appendix C

As a preliminary matter, the Court excludes the Moreal consulting report and annual reports, as well as Han Yeun Ju and Park Hwa-sun's affdavits. (*See* Moreal Documents Binder, Tabs 2-8). For the same reasons explained *supra* with respect to Jo Seon-ae's testimony, Park Hwa-sun's denial of relevant knowledge is inadmissible because it only "raises doubts about the reliability of the government's proof," and therefore cannot obliterate probable cause. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9; *supra* Section III.D.3.i.(c). The rest of these materials constitute impermissible contradictory evidence with regard to the quality of Key Solutions' services, which may successfully exculpate Yoo at trial, but cannot be considered at this stage. *See Collins*, 259 U.S. at 315-16.

The Court next excludes Ha Myeong-hwa's affidavit, which Yoo argues obliterates probable cause by demonstrating a plethora of valuable services Yoo and Key Solutions in fact provided to Moreal. (*See* Docket Nos. 18 at 32; 30 at 15-16). The Court disagrees. This affidavit is inconsistent with this witness's prior statements to Korean prosecutors, and thus constitutes recantation testimony subject to a unique set of considerations that bar its admissibility here. *See generally Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *5-6 (collecting cases). Specifically, the affidavit details numerous consulting services provided by Key Solutions under the contract that Ha Myeng-hwa failed to mention when asked to describe them during her interview. (*Compare* Moreal Documents Binder, Tab 1, ¶ 3, *with* Korean Interviews Binder, Tab F at 14). For example,

according to both Yoo and Korea's transcripts, when asked what advice Moreal "actually" received from Key Solutions under the contract, Ha Myeng-hwa denied having specific knowledge of any advice, stating that she thought Key Solutions helped finance design training programs abroad, but was "not sure about the details" and could not find any "official" documentation.[34] (*See* Korean Interviews Binder, Tab F at 14-15; *see also* Docket No. 27-1 at 61). In contrast, her affidavit describes assistance from Key Solutions in planning promotional forums abroad and hiring employees in Moreal's medical products division, as well as from Yoo personally in introducing Ha to potential customers, consulting on product packaging and design, and promoting Moreal's products. (*See* Moreal Documents Binder, Tab 1, ¶ 3). The affidavit does not make reference to her interview with the Korean authorities, let alone provide any explanation for this inconsistency. (*See id.*).

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34. Yoo's argument that Korean prosecutors never asked Ha Myegon-hwa what work "Yoo himself did for Moreal's medical products division" is not persuasive. (Docket No. 30 at 15). Although the prosecutors only asked about the advice Key Solutions provided to Moreal — rather than Yoo personally — Ha Myeong-Hwa's affidavit lists numerous services provided by Key Solutions that appear nowhere in the interview excerpt provided by Yoo, such as assisting in interviewing and hiring potential employees for Moreal's medical products division. (*Compare* Korean Interviews Binder, Tab F, *with* Moreal Documents Binder, Tab 1 ¶ 3). Furthermore, the affidavit describes services from both Yoo and Key Solutions as distinct components of the consulting provided under the contract, so it is unclear why Ha Myeong-hwa did not mention them both during her interview. (*See* Moreal Documents Binder, Tab 1 ¶ 3).

As a general matter, federal courts "view recantations with suspicion." *Channer v. Warden Leslie E. Brooks*, No. 3:99CV1707(AWT)(DFM), 2001 U.S. Dist. LEXIS 1104, 2001 WL 34056850, at *6 (D. Conn. Jan. 25, 2001), *aff'd sub nom. Channer v. Brooks*, 320 F.3d 188 (2d Cir. 2003); *see also Hysler v. Florida*, 315 U.S. 411, 422, 62 S. Ct. 688, 86 L. Ed. 932 (1942) (noting that courts must "exercis[e] . . . hardy judgment to determine whether such a belated disclosure springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation"). In the context of extradition proceedings, courts are divided over whether recantation testimony is even admissible. *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *5. Whereas the Seventh Circuit has held that recantation testimony constitutes inadmissible contradictory evidence, *see Eain*, 641 F.2d at 511-12, district courts elsewhere[35] have found that recantations may be admissible where they (1) bear "sufficient indicia of reliability;" and (2) "obliterate probable cause," *see Hunte*, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *7; *see, e.g., Bisram v. Quay*, 17-cv-6730 (KAM), 2018 U.S. Dist. LEXIS 185637, 2018 WL 5624147, at *5 (E.D.N.Y. Oct. 30, 2018), *aff'd sub nom. Bisram v. United States*, 777 Fed. App'x 563 (2d Cir. 2019) (hereinafter "*Bisram I*"); *Kapoor v. Dunne*, No. 12-CV-3196 (FB), 2014 U.S. Dist. LEXIS 63359, 2014 WL 1803271, at *3 (E.D.N.Y. May 7, 2014), *aff'd*, 606 Fed. App'x 11 (2d Cir. 2015) (hereinafter "*Kapoor II*"). However, recantations that raise credibility

35. The Second Circuit has yet to weigh in on the admissibility of recantation testimony. *Cf. Kapoor v. Dunne*, 606 Fed. App'x 11, 13-14 (2d Cir. 2015) (summary order) (hereinafter "*Kapoor III*").

issues are best left within the province of the factfinder at trial. *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *6.

Ha Myeong-hwa's affidavit is not admissible for two reasons. First, it is not sufficiently reliable because it was introduced by Yoo's counsel and makes material changes to damaging aspects of her prior testimony. *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *5; *see also In re Extradition of Kapoor*, No. 11-M-456 RML, 2012 U.S. Dist. LEXIS 54026, 2012 WL 1318925, at *3 & n.7 (E.D.N.Y. Apr. 17, 2012) (hereinafter "*Kapoor I*"). "Where a prior incriminating statement bears greater indicia of reliability than a subsequent recantation, the recantation, if admitted, would fail to negate the existence of probable cause." *Hunte*, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *7. Examples of recantations with sufficiently "strong" indicia of reliability include recantations "made during the course of a court proceeding or made against the interests of the individual recanting." *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *5. Here, Ha Myeong-hwa's original statements to prosecutors are far more reliable than her affidavit. Her statements to prosecutors were clearly against her interest; she admitted that she failed to assess whether binding her company under the subject contract was a sound business decision, and was uncertain of the specific consulting services "actually" provided. (*See* Docket No. 27-1 at 60-62; Korean Interviews Binder, Tab F at 14-15). Her affidavit effectively neutralizes these statements by highlighting numerous legitimate services provided under the contract and stating that "no

payments . . . made to Key Solutions . . . lacked a solid basis." (*See* Moreal Documents Binder, Tab 1, ¶¶ 3-4). It was also obtained by private counsel, and therefore, the Government had no opportunity to question her or "otherwise test the reliability of [her] recantation[]." *See Hunte*, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *8. Ha's failure to explain her reasons for changing her testimony creates additional doubt as to her recantation's reliability. *Cf. Bisram v. United States*, 777 Fed. App'x 563, 566-67 (2d Cir. 2019) (hereinafter "*Bisram II*") (summary order).

Second, Ha Myeong-hwa's affidavit does not obliterate probable cause due to the other evidence against Yoo from multiple sources. *See id.*; *see also Kapoor II*, 2014 U.S. Dist. LEXIS 63359, 2014 WL 1803271, at *3. Indeed, this is not a situation "[w]here the only evidence to support probable cause is the unrecanted confession." *See Hunte*, 2006 U.S. Dist. LEXIS 607, 2006 WL 20773, at *7 (quoting *In re Extradition of Strunk*, 293 F. Supp. 2d 1117, 1126 (E.D. Cal. 2003)). Rather, Ha Myeong-hwa's initial testimony is corroborated by that of Park Seung-il, Yoo's alleged accomplice, as well as Kim Chun-gyun, that the subject contract was meant to extract monies for the Yoo family and any work provided was not valuable. (Docket No. 27-1 at 61; *see supra* Sections III.D.2.i.(a), iii.(a), 3.i.(a)). Therefore, the affidavit only creates conflicting factual narratives, the credibility of which must be assessed at trial, when Ha Myeong-hwa and these other witnesses are present. *See Kapoor II*, 2014 U.S. Dist. LEXIS 63359, 2014 WL 1803271, at *3.

As to Yoo Chong Somena's conviction,[36] the Court declines to assign any independent significance to the specific findings of the Korean court that convicted her. (*See* Docket No. 27-1 at 64-65). The excerpts of the decision provided by Korea do not disclose the testimony or documentary evidence on which its conclusions are based. (*See id.*). For this reason, the Korean court's conclusions as to Moreal's financial condition, the fact that the consulting reports were prepared *ex post facto*, and the unusual circumstances under which the contract was signed, are insufficient to establish probable cause. *See supra* n.17; (*id.*). As a consequence of that determination, the documents Yoo submitted contextualizing the Korean court's conclusions are not admissible because they will not obliterate probable cause. *See Shapiro II*, 478 F.2d at 905; (Docket Nos. 30-2-30-3).

Even discounting the Korean court's findings, however, the totality of the circumstances create a

36. The Court cannot consider Yoo's argument that Korea lacks the requisite protections that would afford him or his older sister due process at trial. *See Marzook*, 924 F. Supp. at 578-79; (Docket Nos. 18 at 7-8; 30 at 14 n.11). In the context of an already-existing extradition treaty, "good faith to the demanding government requires [an extraditee's] surrender" upon a showing of probable cause. *See Glucksman v. Henkel*, 221 U.S. 508, 512, 31 S. Ct. 704, 55 L. Ed. 830 (1911). Moreover, "[t]he interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced." *Ahmad II*, 910 F.2d at 1067. It is the Secretary of State — not this Court — who is responsible for deciding whether to deny extradition "on humanitarian grounds." *See id.*

reasonable belief that Yoo utilized his relationship with his older sister, Moreal's co-CEO, to embezzle Moreal's funds through a fraudulent business consulting contract. *See Illinois*, 462 U.S. at 238; *Austin*, 5 F.3d at 605. Ha Myeong-hwa's description of the contract's unusual formation, and uncertainty regarding the specific services provided despite her executive position, are consistent with the other evidence before the Court that the contract was meant to extract funds from the company for the Yoo family's sole benefit. As with the majority of the summaries at issue in this proceeding, a review of the excerpts of Park Hwa-sun and Ha's testimonies provided by both sides reveals that the summaries provided by Korea are consistent the original interviews.[37] (*Compare* Docket Nos. 2-4 at 28-29, EX-YOO-S1-00028-29; 2-7 at 7-8, EX-YOO-S4-00007-08; 27-1 at 61-63, *with* Korean Interviews Binder, Tabs F at 14-15, G at 12-13). Therefore, the Court finds probable cause with respect to the Moreal charge.

iii. Chonhaiji

(a) Evidence in Support of Extradition

As with the alleged Chonhaiji trademark scheme, Korea's charge regarding the Chonhaiji business consulting scheme relies on testimony from Park Seung-il and Byeon Gi-chun. In addition to the statements from these witnesses noted *supra* regarding Key Solutions'

37. As previously explained, it was perfectly permissible for Korea to submit summaries of statements made by witnesses to the authorities. *See supra* n.16.

spurious advisory and consulting work, according to Korea, Byeon Gi-chun told prosecutors that Chonhaiji and Yoo "turned to consulting fees" in 2010 when the National Tax Service of Korea determined that the trademark licensing fees pursuant to the 2008 contract were no longer tax deductible. (Docket Nos. 2-7 at 11, EX-YOO-S4-00011; 27-1 at 75-77); *see supra* Section III.D.2.i.(a), III.D.3.i.(a). When asked whether it was "really necessary" for Chonhaiji to pay consulting fees to Yoo, Byeon Gi-chun stated that "as hired CEOs, we just followed instructions." (Docket No. 27-1 at 76). Byeon Gi-chun also admitted that the subject consulting fees were simply an "alternative" to "replace" the trademark fees following the National Tax Service decision. (*Id.* at 76-77). Although he stated that Yoo gave Chonhaiji "instructions" on Chonhaiji's future business in the yacht manufacturing industry, that he also explained that this business had been underway since "before 2007." (*Id.* at 76). Furthermore, in line with Korea's allegations, bank records reflect that Chonhaiji made payments directly to Yoo from February to November 2011. (*E.g.*, Docket No. 2-5 at 66, EX-YOO-S2-00066).

(b) Yoo's Response

Yoo protests that Korea's initial submissions regarding this charge are misleading because they omit Byeon Gi-chun's statements to prosecutors regarding Yoo's assistance in developing Chonhaiji's yacht business. (Docket No. 18 at 38-39). According to Yoo, these statements "rebut the claim that . . . Yoo played no role in Chonhaiji's management," and therefore, overcome any probable cause. (*See id.* at 39).

In further support of this argument, Yoo offers into evidence an affidavit from Sung Min Park, a Chonhaiji employee who assumed a managerial role in Chonhaiji's shipyard business. (*See id.*; *see also* Other Companies' Documents Binder, Tab 10, at 2). Sung Min Park asserts that Yoo advised him on growing his career in this field beginning in August 2007, when they met at a meeting with Chonhaiji's executives. (Other Companies' Documents Binder, Tab 10, at 2). Thereafter, Yoo helped Sung Min Park secure a number of valuable internships, collaborated with him to compile research materials on shipyards and yacht building, and advised him to enroll at The Landing School in Kennebunk, Maine, to study boat building and yacht design. (*Id.* at 2-3). While at the Landing School, Sung Min Park and Yoo met "continuously" to discuss Sung Min Park's progress. (*Id.* at 3). That experience led to a formal partnership between the school and Chonhaiji in November 2012, whose purpose was to help advance Chonhaiji's ship building and marine operations and relationships in the United States and Europe. (*Id.*). Yoo has submitted a copy of the relevant partnership agreement with the school for additional consideration, as well as a Chonhaiji report on 2010 boat markets and what appears to be Sung Min Park's final project on Yacht Design from the Landing School. (*See* Other Companies' Documents Binder, Tabs 14-17). He claims that contrary to Korea's assertions, these materials[38] "demonstrate[] that [he] did valuable consulting work for Chonhaiji," (Docket No. 18 at 40), which was part of a "well-conceived yacht building plan," (Docket No. 30 at 17).

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38. These additional materials are listed as Defense Exhibits 59 and 63-66. (Docket No. 38 at 4-5).

(c) Analysis

Although Yoo may succeed at trial with regard to this charge, his arguments are insufficient to defeat the minimal showing required for probable cause. *See DiNapoli*, 8 F.3d at 915.

First, the Court finds Sung Min Park's affidavit and the other materials Yoo has submitted to demonstrate the value of his work for Chonhaiji in 2011 inadmissible. (*See* Other Companies' Documents Binder, Tabs 10, 14-17). Even assuming that these submissions explain Yoo's role in the ship and yacht industry work referenced in Byeon Gi-chun's interview, they do not "obliterate" Byeon's key admission — contained in both Yoo and Korea's versions of the interview, and central to Korea's claims — that the consulting fees in question were merely a "replacement" for the illicit trademark fees described above. *See Shapiro II*, 478 F.2d at 905; (*compare* Korean Interviews Binder, Tab H at 36, *with* Docket No. 27-1 at 76-77). Furthermore, irrespective of Yoo's advisory work for Chonhaiji between 2007 and 2012, the submissions do not demonstrate that he performed any specific projects[39] during the ten-month period in 2011 when Korea alleges the embezzlement took place. (*See* Docket No. 2 ¶ 7g). According to Sung Min Park's affidavit, Yoo's only "work" during this time comprised of meeting with Park Seung-il while he was at the Landing School, and such meetings occurred

39. Although Sung Min Park notes that Yoo "asked" him "to research the 2010 boating industry" for a report in 2011, that is work performed by Sung Min Park — not Yoo. (*See* Other Companies' Documents Binder, Tab 10 at 3).

throughout his enrollment between September 2009 and April 2014. (*See* Other Companies' Documents Binder, Tab 10 at 3). Simply because Yoo performed valuable work for Chonhaiji before and after the time period when the fees were paid does not mean that these fees were legitimate. A jury is required to weigh the evidence cited by Yoo against that submitted by Korea, to determine the true purpose of the consulting fees. *See Pena-Bencosme*, 2006 U.S. Dist. LEXIS 82579, 2006 WL 3290361, at *9.

Left with Byeon Gi-chun and Park Seung-il's testimony plus the corroborative bank records, there is sufficient evidence to support a reasonable belief that Yoo converted the Chonhaiji trademark scheme into a consulting scheme in 2011, when it no longer made financial sense to use fraudulent trademark fees to meet his goals. *See Austin*, 5 F.3d at 605. The testimony of two convicted co-conspirators, combined with this objective evidence, is sufficient to meet the modest probable cause standard. *See, e.g., In re Extradition of Neto*, 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *3-4. Any fault Yoo ascribes to Korea for failing to initially disclose Byeon's statements regarding Yoo's yacht building assistance is baseless, given that Korea had no duty to make this information available in the first place, and it was ultimately provided to him. *See Pena-Bencosme*, 2007 U.S. Dist. LEXIS 80316, 2007 WL 3231978, at *6; *supra* Section III.D.3.i.(c).

4. Inflated Advanced Payments for Photography Exhibition

(a) Evidence in Support of Extradition

In support of its last charge, Korea proffers the statements of Park Seung-il, Byeon Gichun, and Kim Chun-gyun, all of which attest that Yoo ordered the affiliates of Semo Group to fund an exhibition of his father's photographs in Versailles, France by purchasing his photographs for well-above market value. According to Korea, Park Seung-il told Korean authorities that Yoo "ordered the CEOs of affiliate companies of Semo Group to raise money in the form of paid-in capital increase[s] . . . telling them to sell Y[oo's father's] photographs. The CEOs had no other choice but to obey because [of who Yoo's father was]." (Docket No. 2-4 at 32, EX-YOO-S1-00032; *see also* Docket No. 2-7 at 12, EX-YOO-S4-00012). In turn, after collecting KRW 13,869,000,000 worth of funds from these affiliates through "rights offering[s]" and "cash deposit[s] for subscribing to new shares," Byeon Gi-chun, through Chonhaiji, transferred these funds and additional money in Chonhaiji's possession to Ahae Press and Ahae Press France.[40] (Docket No. 27-1 at 80-81). The amount transferred totaled KRW 19,862,000,000. (*Id.*). Park Seung-il stated that whereas he "prepared logistical stuff like invoices" for these transactions, Byeon Gi-chun "led everything." (Docket No. 27-1 at 81). He also admitted

40. According to Byeon Gi-chun's interview, both Ahae Press and Ahae Press France are controlled by Yoo and his father. (Korean Interviews Binder, Tab H at 23).

that Chonhaiji was essentially "collecting money from the affiliates under the pretext of rights offerings or cash deposits for new shares and giving that money to A[hae Press France] or A[hae Press] I&C as advance payment [sic] for purchasing Ahae's works." (*Id.* at 82).

Likewise, Byeon Gi-chun confirmed that Yoo "ordered the affiliate companies of Semo Group to raise funds for [Yoo's father's] photo exhibition to be held at Chateau de Versailles." (Docket No. 2-4 at 32, EX-YOO-S1-00032; *see also* Korean Interviews Binder, Tab H at 14). To this end, Chonhaiji "collected KRW 11,024,000,000 from Dapanda, Moonjin Media, Onzigo and Semo . . . under the pretext of paid-in capital increase[s]." (Docket No. 2-4 at 32-33, EX-YOO-S1-00032-33). It also "received KRW 2,800,000,000 from Ahae" which was "disguis[ed] . . . [as] payment for subscription of new stocks." (Docket No. 2-7 at 12, EX-YOO-S4-00012). Chonhaiji combined these funds with its own monies to pay KRW 19,862,077,987 to Ahae Press and Ahae Press France "as an advanced payment for [Yoo's father's] photograph[s]."[41] (Docket

41. According to Yoo's transcript of Byeon Gi-chun's interview, Byeon explained that Chonhaiji and the other affiliate companies raised the funds based on instructions given at a meeting held by I-One-I President Kim Pil-Bae in December 2012. (Korean Interviews Binder, Tab H at 14-15). At the meeting, Chonhaiji merged with the Hemato Centric Life Research Institute's ("Hemato") Culture and Arts Division to pursue a photography business. (*Id.* at 15). Thereafter, Chonhaiji collected monies from affiliates three times in 2013, and on December 20, 2013, Chonhaiji borrowed KRW 2,845,000,000 from Ahae which was "replaced with [a] new stock subscription deposit." (*Id.*). All of these funds were used as advance payments for the subject photographs or for repaying money

No. 2-4 at 32-33, EX-YOO-S1-00032-33; *see also* Docket No. 27-1 at 79-80; Korean Interviews Binder, Tab H at 22-23). The CEOs of the affiliate companies "had no . . . choice but to follow Y[oo's] order," even though they did not know "what photographs there were" or "decide what photographs they would buy." (Docket No. 2-4 at 33, EX-YOO-S1-00033; *see also* Docket No. 2-7 at 12-13, EX-YOO-S4-00012-13). When asked how individual photographs were assigned their prices, Byeon Gi-chun stated that the prices were not based on artistic merit or a professional appraisal, but on what "Y[oo] . . . said." (Docket No. 27-1 at 78). Furthermore, "most[]" of the money collected was used to cover the fees for holding the Versailles photography exhibition, rather than the artistic value of the photographs themselves. (*Id.* at 79; *see also* Korean Interviews Binder, Tab H at 18, 22-23). Byeon Gi-chun did not request any expert evaluations of the value of the works, and the affiliates were never told that most of their advance payments were used to cover the costs of the exhibition. (*See* Korean Interviews Binder, Tab H at 18-19). Byeon further admitted that he had "inflict[ed] damage to the company," explaining that he had followed Yoo's wishes to avoid being forced to resign.[42] (*See* Docket No. 27-1 at 79; *see also* Korean Interviews

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borrowed in 2013, even though none of the photographs purchased had yet been created when the payments were made. (*See id.* at 15-17).

42. When asked whether a "normal" company would have purchased the photographs "at such a high price," Byeon Gi-chun stated that "if a company ha[d] nothing to do with Mr. Yoo's family, there [would be] no way to use the company's funds to purchase photos." (Korean Interviews Binder Tab H, at 19-20).

Binder, Tab H at 22-23). In addition to being convicted for assisting Yoo in extracting the consulting and trademark fees noted above, Byeon Gi-chun was found guilty for his involvement in funding the exhibition. (Docket No. 2-7 at 13, EX-YOOS4-00013; *see also* Docket No. 27-1 at 82-88).

In line with this testimony, Korea alleges that Kim Chun-gyun told prosecutors that Park Seung-il "contacted the CEO of each affiliate company and collected money whenever money [wa]s needed for Y[oo's father's] photograph exhibition." (Docket No. 2-3 at 11-12, EX-YOO-00089-90). Korea has submitted account information demonstrating forty-four payments to Ahae Press between March and December 2013, amounting to 19,862,077,987. (Docket No. 2-3 at 38-39, EX-YOO-00116-17). However, Korea's submissions do not disclose the identity of the company that made each payment. (*See id.*).

(b) Yoo's Response

Yoo mounts further semantic and *Brady* objections to Korea's submissions, and attempts to introduce new evidence demonstrating that the advance payments were good investments based on the intrinsic artistic value of Yoo's father's works. (*See* Docket Nos. 18 at 40-44; 30 at 19-20).

First, Yoo argues that Korea's summary of Byeon Gi-chun's testimony does not reflect his actual statements to Korean prosecutors. (Docket No. 18 at 42-43). Specifically, he contends that Byeon Gi-chun's interview transcript is devoid of any admission that Chonhaiji "had no idea

about [Yoo's father's] works and didn't decide what works [it] should buy [because it] had no choice but to follow what [Keith Yoo] told them to do." (Docket No. 2-7 at 12-13, EX-YOO-S4-00012-13; *see also* Docket No. 18 at 42). In addition, Korea's submissions did not disclose Byeon Gi-chun's assertion that some amount of "sales w[ere] expected" given that many of Yoo's father's followers had previously purchased his works after they were shown at the Louvre in Paris, France in 2012. (Docket No. 18 at 41-43; Korean Interviews Binder, Tab H at 18).

To demonstrate the inherent value of the subject photographs, Yoo traces the trajectory of his father's artistic career through evidence of several successful exhibitions that predated the Versailles exhibition. (*See* Docket No. 18 at 41-42; *see also* Docket No. 30 at 20 n.16). Yoo asserts that although his father only began pursuing artistic photography in 2009, his works were shown at nine exhibitions all over the world between 2011 and 2012. (*See* Docket No. 18 at 41-42). The works received numerous accolades from academics and art curators, and according to a May 23, 2014 appraisal by Lorraine Anne Davis ("Davis"), an art photography appraiser, their prices "are in line with other photographers working in a similarly closed market-place." (Other Documents Binder, Tab 20 at 1; *see also* Docket No. 18 at 41-42). According to Yoo, Chonhaiji's purchase of the photographs was part of a strategic business decision to merge with Hemato and obtain the right to sell Yoo's father's works, which Chonhaiji hoped would increase its profits despite its dwindling shipbuilding business. (Docket No. 18 at 42; *see supra* n.41). In support of these arguments, Yoo offers

two Chonhaiji reports regarding this business plan and various exhibitions, Davis's full appraisal, excerpts of selected accolades, and a copy of Ahae, *Ten Exhibitions Around the World* (Prosper Assouline et al. eds., 2016), a hard-copy book which showcases Yoo's father's works.[43] *See* Ahae, *Ten Exhibitions Around the World* (Prosper Assouline et al. eds., 2016); (Other Companies' Documents Binder, Tabs 18-21).

(c) Analysis

Here, too, Korea's evidence is sufficient to support a reasonable belief that Yoo used his relationships with Park Seung-il and Byeon Gi-chun to extract monies from various affiliates to fund the Versailles exhibition in order to inflate the value of his father's photographs. *See Austin*, 5 F.3d at 605. Consistent with Park Seung-il's statements, Byeon Gi-chun's detailed testimony explains the specific transactions undertaken by Chonhaiji and the other affiliates to raise a total of KRW 19,862,077,987, which was transferred to Ahae Press and Ahae Press France, which Yoo and his father controlled. (Docket No. 2-4 at 32-33, EX-YOO-S1-00032-33; 2-7 at 12, EX-YOO-S4-00012; *see also* Korean Interviews Binder, Tab H at 14, 23). Byeon also admitted that the advance payment figures (1) were unilaterally set by Ahae Press, before the photographs had even been taken; (2) were used to cover substantial expenses associated with the exhibition; (3) and were not tied to any appraisal of the works in question. (Docket

43. These documents are listed as Defense Exhibits 67-71. (Docket No. 38 at 5).

No. 27-1 at 78-79; *see also* Korean Interviews Binder, Tab H at 18-19, 22-23). In addition, both of these witnesses confirmed that the instructions for these arrangements all came from Yoo. (Docket Nos. 2-4 at 32, EX-YOO-S1-00032; 2-7 at 12, EX-YOO-S4-00012; *see also* Korean Interviews Binder, Tab H at 14).

Yoo's objections fall flat for two reasons. First, the semantic discrepancies between Korea's summaries and Byeon Gi-chun's interview are immaterial. (*See* Docket No. 18 at 42-43). Yoo is correct that the specific words in the summary to which he objects do not appear in his version of Byeon's transcript. (*Compare* Docket No. 2-7 at 12-13, EX-YOO-S4-00012-13, *with* Korean Interviews Binder, Tab H). However, the import of the summary — that the affiliates who made advance payments did not know what photographs they were purchasing — is consistent with Byeon's acknowledgement that the subject photographs were "pre-price[d] . . . by size" and "ha[d] not . . . been completed" when the prices were set. (*See* Korean Interviews Binder, Tab H at 17). Moreover, Byeon's assertion that he expected some photograph sales from the Versailles exhibition does not neutralize his damning admissions that only a "small portion" of the advance payments raised were "used for [the] photography itself," and that the affiliates were never told that most of their monies were used to cover the expenses of holding the exhibition. (Korean Interviews Binder, Tab H at 18, 19).

Second, although Yoos' evidence raises substantial fact issues that may exonerate him at trial, it is not sufficient to "obliterate" Korea's showing of probable cause. *See*

Shapiro II, 478 F.2d at 905. To the extent the Chonhaiji reports "explain" Byeon's testimony by shedding light on the purpose of Chonhaiji's merger with Hemato, the reports do not defeat the heart of Korea's allegations that the advance payments at issue were inflated to cover the costs of the Versailles exhibition, and to pump up the resale value of the photographs. *See id.*; *supra* n.41 (Korean Interviews Binder, Tab H at 14-15; Other Companies' Documents Binder, Tabs 18-19). Moreover, any legitimate reasons behind Chonhaiji's actions do not negate Korea's evidence that other affiliates were unknowingly coerced into making inflated payments to fund an exhibition whose purpose was to increase the value of the photographs the affiliates thought they were buying. (*See* Docket Nos. 2-3 at 6, EX-YOO-00084; 2-4 at 23, 32-33, EX-YOO-S1-00023, EX-YOO-S1-00032-33; 27-1 at 79; *see also* Korean Interviews Binder, Tab H at 18, 22-23; Docket No. 2 ¶ 6g). Chonhaiji's motivations also do not change the undisputed fact that the affiliates transferred their payments to Chonhaiji — rather than Ahae Press or Ahae Press France, the ultimate recipients of their payments — and their payments were recorded as various types of stock transactions, rather than transfers of cash. (*See* Korean Interviews Binder, Tab H at 14-15; Docket No. 27-1 at 80-82). These transactions constitute circumstantial evidence that, regardless of Chonhaiji's own business plans, the advance payments had a nefarious purpose that needed to be disguised on the affiliates' books as legitimate stock purchases. *See In re Extradition of Sindona*, 450 F. Supp. at 689-90.

The Court denies admission of the rest of the documents Yoo offers because they constitute impermissible contradictory evidence intended to show that the photographs purchased were worth the money the affiliates paid. *See Shapiro II*, 478 F.2d at 905; (Other Documents Binder, Tabs 20-21; Ahae, *Ten Exhibitions Around the World*). Admittedly, Davis's appraisal, and the fact that Yoo's father gained international recognition through several exhibitions before the one at Versailles, raise significant questions whether these photographs were completely worthless. (Other Documents Binder, Tab 20; Ahae, Introduction, *Ten Exhibitions Around the World*). However, it is the role of a factfinder to weigh this evidence and determine what value, if any, the affiliates gained from the advance purchases at issue. *Cf. In re Extradition of Sindona*, 450 F. Supp. at 689-90.

Although the Court declines to consider the specific factual findings of the Korean court that found Byeon Gi-chun guilty for charges related to this scheme,[44] the consistency between his and Park Seung-il's testimonies provides ample support for probable cause. These witnesses explicitly implicated Yoo as the decisionmaker driving the transactions underlying this alleged scheme. Moreover, the transaction dates and total advance payment amounts in their testimonies correspond with the account records provided by Korea. (*Compare* Docket No. 2-3 at 38, EX-YOO-00116-17, *with* Docket Nos. 2-4 at 32-33, EX-YOO-S1-00032-33, *and* 27-1 at 80-81; *see also* Korean Interviews Binder, Tab H at 15-16). This combination of

44. *See supra* n.17.

accomplice testimony and objective evidence supports a finding that the Government has established the existence of probable cause. *See In re Extradition of Neto*, 1999 U.S. Dist. LEXIS 12626, 1999 WL 627426, at *3-4.

E. Statute of Limitations

Yoo argues that even if Korea has established probable cause, he is not extraditable under the Treaty because the relevant charges are barred by the applicable statute of limitations. (*See* Docket Nos. 18 at 10-22; 30 at 4-9). The Government contends that this action is not time-barred, and even if it was, this Court lacks the requisite authority to decide whether the statute of limitations has run because the plain language of the Treaty reserves that decision for the Secretary of State. (*See* Docket No. 27 at 35-40). The Court agrees that this question falls outside the ambit of its limited role in this proceeding. Therefore, the Court will not address whether Korea's prosecution is, in fact, time-barred, and certifies extradition.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott v. Abbott*, 560 U.S. 1, 10, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010) (quoting *Medellin v. Texas*, 552 U.S. 491, 506, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008)) (internal quotation marks omitted). "Where the language of . . . [a] . . . treaty is plain, a court must refrain from amending it because to do so would be to make, not construe, a treaty." *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 457 (2d Cir. 2003); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989) ("We must . . . be

governed by the text[,] . . . whatever conclusions might be drawn from the . . . drafting history . . . ."). In addition, because "a treaty is a contract . . . between nations," it must also be interpreted according to principles of contract interpretation. *See Georges v. United Nations*, 834 F.3d 88, 93 (2d Cir. 2016) (quoting *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 37, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014)) (internal quotation marks omitted). Therefore, "it is [the Court's] responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985). To ascertain those expectations, the court may look to the treaty's negotiating and drafting history. *See id.* at 400. Although "the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the Executive Branch's interpretation of a treaty is entitled to great weight." *Lozano v. Alvarez*, 697 F.3d 41, 50 (2d Cir. 2012), *aff'd sub nom. Lozano v. Montoya Alvarez*, 572 U.S. 1, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014) (quoting *Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010)) (internal quotation marks omitted).

Article 6 of the Treaty, which addresses "[l]apse of [t]ime," provides as follows:

> Extradition *may* be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested

> State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought does not count towards the running of the statute of limitations. Acts or circumstances that would suspend the expiration of the statute of limitations of either State *shall* be given effect by the Requested State, and in this regard the Requesting State *shall* provide a written statement of the relevant provisions of its statute of limitations, which *shall* be conclusive.

Extradition Treaty art. 6 (emphasis added). The ordinary meaning of the word "may" is permissive, connoting discretion and possibility, whereas "shall" connotes a mandate or command. *Compare* Merriam Webster Online Dictionary, may, https://www.merriam-webster.com/dictionary/may (last accessed July 1, 2021) ("(1)(a) used to indicate possibility or probability . . . (b) have permission to . . . (c) have the ability to"), *with* Merriam Webster Online Dictionary, shall, https://www.merriam-webster.com/dictionary/shall (last accessed July 1, 2021) ("(1)(a) used to express what is inevitable or seems likely to happen in the future . . . (b) used to express simple futurity . . . (2) used to express determination . . . (3)(a) used to express a command or exhortation . . . (b) used in laws, regulations, or directives to express what is mandatory"). The permissive connotation of "may" "is particularly apt where," as here, these two words are "contrapose[ed]" in the same text. *See Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005); *see also Atsilov v. Gonzales*, 468

F.3d 112, 116 (2d Cir. 2006) (finding that where statute used permissive "may" instead of mandatory "shall" in authorizing agency to grant relief, the "ultimate decision whether to grant relief [wa]s entrusted to the discretion of the [agency]"). Under this reading, Article 6's first sentence provides that denial of extradition on statute of limitations grounds is discretionary rather than mandatory. *See Simone v. United States*, 09-CV-3904 (TCP)(AKT), 2010 U.S. Dist. LEXIS 153682, 2010 WL 11632765, at *10 n.11 (E.D.N.Y. June 17, 2010) (citing *Vo v. Benov*, 447 F.3d 1235, 1246 (9th Cir. 2006)).

This dichotomy signals a split in function and authority between the extraditing court and the Secretary of State. Generally, whereas it is the court's role to determine whether the legal requirements for extraditablity are established, "the executive branch . . . is empowered to make the final decision on extradition" and "assume[s] discretion" regarding whether to deny extradition on humanitarian or political grounds. *See Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980); *see also* 18 U.S.C. §§ 3184, 3186; *Cheung*, 213 F.3d at 88; *Petrushansky*, 325 F.2d at 565 (holding that role of extradition court is "limited to ensuring that the applicable provisions of the treaty and the governing American statutes are complied with").

Because of this divide, "discretionary" determinations are reserved for the Secretary of State, and "mandatory" determinations must be addressed by the extraditing court. *See Patterson v. Wagner*, 785 F.3d 1277, 1281 (9th Cir. 2015); *see also Cheung*, 213 F.3d at 88 (noting that judicial officer's role is "confined" to certain legal

questions that, when answered affirmatively, require certification of extraditability, but "the Secretary of State has sole discretion to weigh the political and other consequences of extradition and to determine finally whether to extradite the fugitive"). In *Vo v. Benov*, the Ninth Circuit explained that the coupling of "shall" and "may" in an extradition treaty creates "two general types" of exceptions to extradition that correspond with these roles: "mandatory exceptions" and "discretionary exceptions." *See* 447 F.3d at 1245-46. Where an individual is subject to a "mandatory exception," he or she cannot be extradited to the requesting country, and therefore, the extraditing magistrate judge "may not certify him [or her] as extraditable." *Id.* at 1246. On the other hand, where the individual is subject to a "discretionary exception, . . . the United States can choose not to extradite him [or her] to the requesting country, but is under no obligation to . . . do so." *Id.* When this latter exception applies — *i.e.*, when the individual satisfies discretionary criteria — upon a request for extradition, the magistrate judge lacks the authority to "deny extradition on that basis" and "*must* certify [the] individual," leaving the Secretary of State with the sole power to deny extradition on that ground. *See id.* (emphasis added). In other words, treaty provisions containing the word "shall" signal legal requirements to be reviewed by the extraditing court, whereas provisions containing the word "may" signal discretionary factors reserved for the Secretary of State alone. *See id.*

Faced with the same treaty and statute of limitations defense at issue here, the Ninth Circuit in *Patterson v. Wagner* extended this reasoning and held that based on

the plain language of Article 6 and the relevant drafting history, "there is no mandatory duty [with regard to any alleged lapse of time] that a court may enforce." *See* 785 F.3d at 1281-83. The extraditing court, therefore, was not permitted to consider whether the relevant charges were time-barred. *See id.* Rather, the court found that "the Secretary of State may choose, in his or her discretion, whether to grant or deny extradition in a case where the statute of limitations in the United States has expired," and federal courts are not authorized to "dictate to the Secretary of State what he or she must do in such a case." *Id.* at 1283. Although not yet addressed by the Second Circuit, district courts analyzing extradition treaties with identical language in lapse of time provisions have reached the same conclusion.[45] *See, e.g., Mirela v. United States*, 416 F. Supp. 3d 98, 110-11 (D. Conn. 2019), *appeal dismissed*, No. 19-3366, 2020 U.S. App. LEXIS 12371, 2020 WL 1873386 (2d Cir. Feb. 25, 2020); *United States v. Porumb*, 420 F. Supp. 3d 517, 527-28 (W.D. La. 2019).

Yoo contends that use of the word "may" is not controlling, and in light of the Treaty's other provisions and legislative history, Article 6 requires the Court to

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45. Also in line with this reasoning, courts within this Circuit have interpreted the word "shall" in such lapse of time provisions as connoting a mandatory requirement that must be considered by the extraditing magistrate judge in order to certify extradition. *See Skaftouros v. United States*, 667 F.3d 144, 161 (2d Cir. 2011); *In re Extradition of Mujagic*, 990 F. Supp. 2d 207, 222 (N.D.N.Y. 2013); *In re Extradition of Ernst*, No. 97CRIM.MISC.1PG.22 (HBP), 1998 U.S. Dist. LEXIS 710, 1998 WL 30283, at *3 (S.D.N.Y. Jan. 27, 1998) (hereinafter "*In re Extradition of Ernst I*").

consider the issue of statute of limitations. (*See* Docket No. 18 at 11-18). Relying on *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983), Yoo asserts that although "[t]he word 'may' usually implies some degree of discretion, . . . [t]his . . . principle . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." (Docket No. 18 at 12). However, Yoo fails to appreciate that even following this reasoning, the overall structure and language of the Treaty, combined with its legislative history, evidence an intent that *confirms* Article 6's plain meaning. *Cf. Patterson*, 785 F.3d at 1283.

Although "the interpretation of a treaty . . . begins with its text," *Medellín*, 552 U.S. at 506, courts "also look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the [signatory] parties in determining the meaning of a treaty provision," *Swarna*, 622 F.3d at 132 (quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991)) (internal quotation marks omitted) (alteration in original). Yoo contends that three aspects of these materials evidence an intent that the time bar provision be mandatory, including (1) the Treaty's inconsistent use of the word "may" in various other provisions; (2) the "Summary" and "Technical Analysis" sections of the Senate Report; and (3) a colloquy during the Senate hearing between Senator Rod Grams ("Senator Grams") and John Harris, the Acting Director of the Office of International Affairs at the Department of Justice ("Harris"). (*See* Docket No. 18 at 13-17). The Court addresses each argument in turn.

First, Yoo's characterization of "may's" usage throughout the Treaty is not supported by the analysis in the legislative history to which he cites. (*See* Docket No. 18 at 13-14). For example, pointing to Articles 2(4) and 3(1), Yoo argues that this word cannot signal discretion because other words in those provisions, such as "executive authority" and "in its discretion," would otherwise constitute surplusage. *See* Extradition Treaty art. 2(4), 3(1), 4(4); (*id.*). However, a court's "hesitancy to construe statutes to render language superfluous does not require [it] to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007). A review of the Technical Analysis section[46] of the Senate Report reveals that Articles 2(4) and 3(1) are not the only provisions that the American and Korean delegations considered discretionary. *See generally* S. Rep. at 8-23. That section explains that other provisions containing the word "may," but not the additional words noted by Yoo — such as Articles 7(1), 12(1) and 17(1) — are "discretion[ary]" or "permi[ssive]" with the regard to the powers conferred therein. *See* S. Rep. at 15, 18, 20; Extradition Treaty art. 7(1), 12(1), 17(1). Therefore, Yoo's argument that the word "may" in Article 6 cannot connote discretion on its own is unavailing. If applied, his rationale

46. The Technical Analysis section was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, and is based on notes from the negotiations. S. Rep. No. 106-13, at 8 (1999).

would impermissibly render this word meaningless in a number of places in the Treaty.[47] *See Atl. Rsch. Corp.*, 551 U.S. at 137; (Docket No. 18 at 13-14).

Yoo correctly notes that the Summary of the Treaty at the beginning of the Senate Report uses mandatory language, but any intent evidenced by that statement "is overwhelmingly outweighed by the contrary purport of the legislative history as a whole." *See Dir., Off. of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 43 n.15, 99 S. Ct. 903, 59 L. Ed. 2d 122 (1979) (quoting *Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab. v. Rasmussen*, 567 F.2d 1385, 1388 n.5 (9th Cir. 1978), *aff'd sub nom. Dir., Off. of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 99 S. Ct. 903, 59 L. Ed. 2d 122 (1978)). As with the other provisions noted above, the Technical Analysis section connects the word "may" in the original text of Article 6 with discretionary authority through a detailed explanation of the provision's negotiating history. (*See* S. Rep. at 14-15). Crucially, although Korea "insisted" that the first sentence comport with Korean law, the section explains that because "the delegations were sensitive" to the differences between Korean and United States statutes of limitations, "the Treaty provides that a request *may* be denied if it would be timebarred in the Requested State, *but* that acts or circumstances that would toll the statute of limitation in

47. The Court also disagrees with Yoo's reading of Article 10(4), which he claims "seems directed to the court," (Docket No. 18 at 14), as this provision for discharge from custody is contingent on "the *executive authority['s]*" non-receipt of a formal extradition request and supporting documentation. *See* Extradition Treaty art. 10(4).

either state *would be applied* by the Requested State." (*Id.* at 14) (emphasis added). Contrary to Yoo's assertions, this passage does not communicate that the provision adopts Korean law's "demand[] that extradition be denied if the statute of limitations would have expired in either Korea or in the Requesting State." (*See* Docket No. 18 at 15; *id.*). Rather, through a combination of permissive and mandatory language mirroring Article 6 itself, the passage reflects a compromise between the delegations, allowing Korea to apply its own statute of limitations law when it is the requested State — as it wanted — and requiring consideration of the tolling rules of either State whenever statute of limitiations is in play. (*See* S. Rep. at 14). This reading is confirmed by the rest of the section, which explains that "[t]he second sentence of the paragraph *adopts* the U.S. standard" for tolling based on fugitivity, and that "the final sentence" provides that other "acts or circumstances" triggering tolling "in either State *shall* be given effect by the Requested State . . . ." (*See id.*) (emphasis added). In other words, the first sentence of Article 6 provides discretionary authority to deny extradition on statute of limitations grounds; however, if the relevant authority of the requested State chooses to apply these considerations, it must also take into account any tolling by fugitivity and any other tolling rules from either State. (*See id.*; *see also* Extradition Treaty art. 6). As the court in *Patterson* found in analyzing the same section, "[w]hen parties to a treaty intend to make an exception to extradition mandatory, . . . they know how to state that it 'shall' apply." *See* 785 F.3d at 1282. The careful construction of the Technical Analysis section therefore supports a finding that consideration of the statute of limitations is not mandatory under the treaty. *See id.*

Appendix C

The brief colloquy between Senator Grams and Harris at the conclusion of the Senate hearing evidences the same compromise and intent. *See* S. Rep. at 37; *see also Patterson*, 785 F.3d at 1282-83. Yoo's analysis of this conversation focuses almost exclusively on Senator Grams' question and what is missing from Harris's answer. (*See* Docket Nos. 18 at 15-17; 30 at 5-6). However, Yoo ignores Harris's words. The Senate Report reflects the following conversation:

> Senator Grams: Article 6 of the proposed treaty *bars* extradition in cases where the law of the requested State would have barred the crime due to a statute of limitations having run out.
>
> Now South Korea, unlike other treaty partners with similar commitments, also allows the time to continue running on the statute of limitations, even when charges are filed. Actions that would toll the statute of limitations, therefore, will apply under this treaty.
>
> So the question is are you confident that this article of the treaty adequately insures that fuguitives cannot simply run out the clock by fleeing to Korea?
>
> Mr. Harris: Senator, this article of the treaty was the subject of considerable negotiation. As you may recall, of the treaties that were before the Senate last fall, most of them had slightly different language. Many of our most modern

> extradition treaties flatly state that the statute of limitations of the requesting State will apply.
>
> We have a few in which it was not possible to reach that resolution. *In this case*, because of the specific provisions of Korean law, we did agree that the statute of limitations of the requested State would apply. ***But***, as you have indicated, *the specific language in the article is crafted so that those factors which toll the statute of limitations under the law of the requesting State would be given weight.*
>
> So when the United States is making a request to Korea, there should be *the ability* to prevent a miscarriage of justice by the statute of limitations of Korea having expired before extradition can be accomplished.

S. Rep. at 37 (emphasis added). Although Senator Grams certainly frames the applicability of the statute of limitations as mandatory, Harris' answer communicates a far more nuanced reading. *See id.* In line with the Technical Analysis, he explains that the delegations reached a unique agreement applying the statute of limitations of the *requested* State, which is different from typical modern extradition treaties that (1) use the *requesting* State's statute of limitations; and (2) "flatly state" that this law "*will* apply." *See id.* Therefore, Harris acknowledges that, as noted by Senator Grams, the provision gives credence to the particularities of Korean law when Korea is the requested State. *See id.*; *see also*

S. Rep. at 14. However, Harris does not stop there. He explains that instead of simply "bar[ring]" extradition under that law — like typical treaties — the provision "is crafted so that" tolling rules from the requesting State "would be given *weight*," thereby providing "*the ability*" to prevent expiration of the Korean statute of limitations using American tolling rules. *See* S. Rep. at 37 (emphasis added). Consequently, the Treaty does not mandate application of the requested State's statute of limitations, as Senator Grams stated, but rather, permits that law to be "weigh[ed]" alongside of tolling rules from both States. *See id.* This balancing act addresses Senator Grams' precise concern because it preserves the possibility for the United States to "prevent fugitivies [from] . . . simply run[ning] out the clock by fleeing to Korea." *See id.* Moreover, like the Technical Analysis and Article 6 itself, it reflects a permissive reading of the decision regarding whether to consider statute of limitations arguments, thus allocating that responsibility to the Secretary of State. *See id.* at 14, 37; *see also* Extradition Treaty art. 6.

This intent is clear from a final source, ignored by Yoo, but key to the Ninth Circuit's decision in *Patterson*. *See* 785 F.3d at 1283. The Treaty's official submittal letter, which President William J. Clinton transmitted with the Treaty for the Senate's review, states that "Article 6 *permits* extradition to be denied when the prosecution or execution of punishment" for the relevant offense would be barred by the "statute of limitations of the Requested State." (S. Treaty Doc. No. 1062, at v, vii (1999) (emphasis added). This letter is entitled to great weight, as it was drafted by Strobe Talbot of the Department of State, an

office that played a key role in the Treaty's negotiations, and therefore was well-aware of the Treaty's implications. *See Lozano*, 697 F.3d at 50; *id.* at v. The same is true for Harris's explanation, as he represented the views of the Department of Justice, another executive agency that participated in negotiations. *See id.*; *see also* S. Rep. at 29-30.

Because these legislative history materials confirm rather than undermine a permissive reading of Article 6's plain language, the determination regarding whether Yoo's prosecution is time-barred is reserved for the Secretary of State. *See Patterson*, 785 F.3d at 1283. This reading aligns with the well-settled principle that the extraditing court is not to engage in matters of foreign policy and other political questions. *See In re Extradition of Mujagic*, 990 F. Supp. 2d at 217; *see also Regan v. Wald*, 468 U.S. 222, 242, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S. Ct. 512, 96 L. Ed. 586 (1952)); *Shapiro II*, 478 F.2d at 906 & n.10. This conclusion also comports with the Court's obligation to construe extradition treaties "in the interest of justice and friendly international relationships." *See Factor v. Laubenheimer* , 290 U.S. 276, 298, 54 S. Ct. 191, 78 L. Ed. 315 (1933). The particular situation here especially implicates the United States' diplomatic relationship with Korea because *Korea* is seeking extradition of a *Korean* national for alleged crimes that caused harm

within *Korea's* borders, yet under Article 6, *American* law supplies the applicable statute of limitations. *See* Extradition Treaty art. 6. The Secretary of State is best equipped to weigh the political ramifications of denying Korea the opportunity to hold its own citizen to justice based on American laws. *Cf. Shapiro II*, 478 F.2d at 906 n.10 (noting that "the Executive's responsibilities and need for flexibility are greater when the extradition is to another country, in which the sole effective remedies are diplomatic ones").

For these reasons, the Court declines to consider whether this action is time-barred and defers that question to the Secretary of State. A judicial opinion analyzing this question, although not binding on the Secretary of State, would strip the Executive Branch of its exclusive authority to manage the United States' diplomatic relations with Korea, and contravene the plain meaning of the words adopted by both delegations in the Treaty.[48] *See Mirela*, 416 F. Supp. 3d at 111-12.

IV. CONCLUSION

For the foregoing reasons, the Court certifies that the evidence submitted is sufficient to sustain the charges against Yoo under the Treaty. The Court orders that Yoo remain in the custody of the United States Marshal for the Southern District of New York, or his authorized

48. Because the Court does not reach the issue of whether the applicable statute of limitations has run, the evidence Yoo offers in support of his arguments on this topic is excluded. (Docket Nos. 18-1, 34-1).

representative, pending final disposition of this matter by the Secretary of State and possible surrender to the proper authorities of Korea.

The United States Attorney's Office for the Southern District of New York is directed to forward a copy of this Certification and Order, together with a copy of the transcript of the hearing conducted on March 3, 2021, and all the documents admitted into evidence in this matter, to the Secretary of State.

Dated: July 2, 2021
White Plains, New York

SO ORDERED:

/s/ Judith C. Mccarthy
JUDITH C. McCARTHY
United States Magistrate Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand twenty-two.

HYUK KEE YOO, AKA KEITH YOO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Docket No: 21-2755

Appellant, Hyuk Kee Yoo, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix D

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

/s/_____