No. _____

IN THE

Supreme Court of the United States

BRUTUS TRADING, LLC,

Petitioner,

—v.—

STANDARD CHARTERED BANK, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States ex rel. Polansky v. Executive Health Resources, Inc.,* 143 S. Ct. 1720 (2023), this Court held that a motion by the Government to dismiss a *qui tam* action under the False Claims Act ("FCA") must be resolved by the district court pursuant to FED.R.CIV.P. 41(a). However, as *Polansky* notes, under Rule 41(a), a court has "no adjudicatory role," 143 S.Ct. at 1734 n.4, but a §3730 (a)(2)(A) dismissal requires notice and an opportunity for a hearing, *id.,* at 1734, implicating due process principles. A grant in this case is needed to give lower courts much-needed practical direction concerning the procedure to follow in applying *Polansky's* command to balance Rule 41's deferential ethic with the FCA's and the Constitution's due process values when confronted by a record sharply contesting the facts alleged to support the Government's justification for dismissal. The continued viability of *qui tam* lawsuits depends on the practical working out of this balance sought by *Polansky*.

The FCA also provides that a challenge to a settlement pursuant to 31 U.S.C. § 3730(c)(2)(B) requires a hearing to determine whether the settlement is "fair, adequate, and reasonable under all the circumstances." Unlike the instant case, *Polansky* did not involve a challenge pursuant to § 3730(c)(2)(B).

The questions presented are:

Whether the Due Process Clause and 31 U.S.C. § 3730(c)(2)(A) and (B) require an evidentiary hearing when the evidence for and against dismissal is sharply conflicting at which the Relator is provided an opportunity to subpoena witnesses and to examine

Government witnesses who have supported the motion to dismiss.

Whether Relator is entitled to recover a share of funds paid by a defendant in an FCA action pursuant to a deferred prosecution agreement.

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PETITION FOR WRIT OF CERTIORARI

Brutus Trading, LLC, the *qui tam* relator below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the court of appeals is reported at 2023 WL 5344973, and is reproduced at App.17a-27a. The opinion of the district court is reported at 2020 WL 3619050 and is reproduced at App.1a-12a.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2023. Petitioner filed a petition for rehearing en banc on October 5, 2023, which was denied on October 27, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant constitutional and statutory provisions are reprinted in the Appendix, beginning at App. 109a.

INTRODUCTION

This case demonstrates the inadequacy of *United States ex rel. Polansky v. Executive Health Services, Inc.*, 143 S. Ct. 1720 (2023) to provide guidance in determining whether to grant a motion of the Department of Justice to dismiss a *qui tam* action when considerations of the relator's right to due

process and the provisions of 31 U.S.C. §3730(c)(2)(B) require an evidentiary hearing. The "proper terms" analysis of Fed.R.Civ.P. 41(a)(2) prescribed in *Polansky* is unsuited for cases involving conflicting factual evidence, as in this case. Despite the Court's conclusion that the Department does not exercise "unfettered discretion" to command the dismissal of *qui tam* cases, the "proper terms" analysis in practice devolves to a degree of deference to the Department that violates the express intent of Congress to assure through private *qui tam* actions accountability of the Department in its handling of False Claims Act matters, as well as the protection of the Due Process Clause for the relator's property interest in a *qui tam* case.

STATEMENT

A. Statutory Background

1. The Iran Sanctions Regime. International trade rests on a system of efficient and secure foreign currency exchange. Global network messaging systems, such as the SWIFT system,[1] provide the avenue to electronically process foreign exchanges. C.A.J.A.-502-503. "Dollar clearing" is the process of transmitting, reconciling, and in some cases, confirming transactions that are processed using the U.S. dollar ("USD"). C.A.J.A.-506. Settling an obligation denominated in dollars requires clearing by the Federal Reserve Bank in New York through the Fedwire clearing system. C.A.J.A.-485; C.A.J.A.-506. Fedwire allows the Federal Reserve to monitor USD settlements worldwide. C.A.J.A.-486. In the

[1] SWIFT is the acronym for Society for Worldwide Interbank Financial Telecommunication.

mid-2000s, electronic currency exchange volumes began to explode with the advent of the high-speed internet. C.A.J.A.-455-56.

Beginning in 1979, the United States imposed a variety of economic sanctions on the Government of Iran and parties associated with it to pressure the Iranian leadership to cease its support for terrorist organizations and the development of nuclear weapons. *See* K. Katzman, *Iran Sanctions* (Cong. Research Serv., Nov. 15, 2019); U.S. Dep't of the Treasury, Terrorism and Illegal Finance, https://www.home.treasury.gov/policy-issues/terrorism-and-illegal-finance. A principal component of this sanctions regime is blocking the access of Iran and its confederates to the U.S. financial exchange system. Because the dollar is such a dominant currency, the inability to engage in dollar clearing can be a significant blow to a country's trade.

Violations of the Iran sanctions are violations of the International Emergency Economic Powers Act, 50 U.S.C. §1705(a). Any proceeds obtained directly or indirectly from violations of the Iran sanctions are subject to forfeiture to the United States. 18 U.S.C. §981(a)(1)(C) and (a)(2)(A); §1965(c)(7)(D). Most importantly, under 18 U.S.C. § 981(f), "[a]ll right, title, and interest in [such proceeds] shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

2. The False Claims Act. The False Claims Act ("FCA") imposes civil liability on those who defraud the Federal Government by making false claims that the Government owes them money or engage in other deceptive practices concerning Government funds. 31 U.S.C. §3729(a)(1)(A)-(F). The FCA also imposes liability on those who defraud the Government by

concealing their obligation to pay money or convey property to the Government, known as a "reverse false claim." 31 U.S.C. §3729(a)(1)(G).

Congress authorized the Attorney General to bring FCA actions against fraudsters to recover civil penalties and treble damages. 31 U.S.C. §3730(a). In addition, Congress authorized private parties, called "relators," to bring *qui tam* actions against fraudsters "for the person and for the United States Government." 31 U.S.C. §3730(b)(1). Relators receive a percentage of any recovery they secure. 31 U.S.C. §3730(d).

The FCA establishes a detailed scheme to govern the relationship between the Government and a relator and the prerogatives of each. 31 U.S.C. §3730(b)–(d). The first FCA provision at issue here allows the Government to move to dismiss the relator's *qui tam* case over the relator's opposition if "the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). The standard of review of a Government motion under this section had been highly disputed in the lower courts until resolved by this Court in *Polansky*, which adopted a standard of review derived from Fed.R.Civ.P. 41(a), 143 S. Ct. at 1733-34 (2022), but recognizing that the "FCA requires notice and an opportunity for a hearing before a Subparagraph (2)(A) dismissal can take place." *Id.*, at 1734. As a result, *Polansky* directs "the district court [to] use that procedural framework to apply Rule 41's standards." *Id.*

The question remains what kind of "hearing" is necessary in a particular case to determine whether the Government offers "good grounds" for dismissal. *Id.*, at 1735. While the answer to that question is

"contextual," and involves "substantial deference" to the Government's "views," *id.*, at 1734, the statutory mandate of an opportunity for a hearing implicates due process principles. Moreover, *Polansky* rejected the Government's claim to "essentially unfettered discretion to dismiss." *Id.*, at 1733. Thus the hearing in the context of a particular case must subject the Government's motion to meaningful scrutiny, assuring reasonable accountability and protection for the relator's property rights.

The second FCA provision involved in this case allows the Government to settle a qui tam case over the relator's objection "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. §3730(c)(2)(B).

B. Facts and Procedural History

1. This case arose from the efforts of Petitioner's principals to alert the Government that Respondent Standard Chartered Bank and its affiliated entities (collectively "SCB") were engaging in systematic and massive violations of the United States' Iran sanctions regime far in excess of what the Government understood when it entered into a Deferred Prosecution Agreement ("DPA") with SCB in 2012 to resolve SCB's sanctions violations. C.A.J.A.-58-62; C.A.J.A.-64-78.

SCB, headquartered in London, processes trillions of dollars of financial transactions around the globe annually. C.A.J.A.-64. SCB's New York branch clears approximately $195 billion per day. C.A.J.A.-733. By far the largest share of its revenue is derived from transactions originating in Asia, Africa and the

Middle East. Most of its transactions are in USDs. C.A.J.A.-58-59; C.A.J.A.-604-05.

Since the sanctions bar certain persons or entities from access to USDs through the foreign exchange system, the true counterparties or ultimate beneficiaries of any foreign exchange must be concealed to evade the software mechanisms designed to filter out and block sanctions-violating transactions. Petitioner, through its principals, was uniquely positioned to expose SCB's lucrative scheme to circumvent U.S. sanctions. Robert Marcellus is a sophisticated global currency trader whose clients typically engage in $30 to $70 billions of trades in gross volume each year. C.A.J.A.-63-64; C.A.J.A.-446-47. Julian Knight had a top-level insider's perspective as the former Global Head of Transaction Banking Exchange Sales at SCB. C.A.J.A.-63; C.A.J.A.-478. In addition, they secured the assistance of Anshuman Chandra, who served as SCB's head of eCommerce Client Services, Financial Markets, for the bank's Middle East, South Asia, and Africa regions. C.A.J.A.-495.

Marcellus and Knight were spurred to action by the September 21, 2012 Consent Order between New York's Department of Financial Services ("DFS") and SCB concerning approximately 59,000 sanctions violations with a nominal value of $250 billion, for which SCB agreed to pay a $340 million penalty, among other remedies. C.A.J.A.-65. On December 10, 2012, SCB entered into a settlement with federal authorities to pay a $132 million penalty for the same wrongdoing. Both of these settlements were premised on the representation that SCB's sanctions violations ended by 2007.

Based on their expertise, knowledge of SCB's practices, and possession of SCB documents,

Marcellus and Knight were aware that these settlements captured only a fraction of SCB's sanctions violations. Government authorities had addressed only SCB's "wire-stripping," by which the bank simply removed the identity of the true counterparty or beneficiary from the transaction information the Federal Reserve's computers would see. C.A.J.A.-68; C.A.J.A.-455. Marcellus and Knight approached DFS and ultimately the Treasury Department's Office of Foreign Asset Control ("OFAC") to alert them to the full scope of SCB's deliberate scheme to protect their valuable business with sanctioned parties. On the advice of then-DFS General Counsel Daniel S. Alter, Messrs. Knight and Marcellus retained legal counsel and established Brutus Trading, LLC to pursue claims under the FCA. C.A.J.A.-459-60; C.A.J.A.-481.

Petitioner has conveyed to the Government extensive evidence to show that wire-stripping was the crudest of the sanctions-avoiding maneuvers employed by SCB. First, SCB's long-running scheme was well-organized through "Project Green," in which "[t]hree high-level SCB managing directors specializing in sovereign trade finance devised methods by which SCB could provide trade finance and cash management services to clients that were subject to U.S. sanctions so that those clients could evade the sanctions." C.A.J.A.-480.

Among those methods was the creation of the OLT3 system which was designed to have no ability to block illegal transactions and allowed Iranian clients to enter SCB's computer system on their own, conduct illegal foreign exchange transactions, and create no record of the transaction. C.A.J.A.-71; C.A.J.A.-487-88. SCB personnel would change some small part of the client's name, such as dropping a word or

changing a letter, so the transaction would be executed, and then go into a "sundry account," which was used to book a transaction in which the counterparty had not been properly identified. The transaction would then be reconciled with the true counterparty's account. SCB employed hidden cells in its electronic records to conceal the true parties to illegal transactions. SCB introduced deliberate "flaws" to defeat its system purportedly intended to detect illegal transactions.

To educate the Government to the scope of SCB's sanctions violations, which extended beyond 2007, Petitioner provided the Government with tens of thousands of documents – Mr. Chandra provided 20,000 records in September 2013 alone – recording illegal transactions, identifying sanctioned counter-parties, and providing the names of witnesses to interview. C.A.J.A.-460-62; C.A.J.A.-483-85. Petitioner gave step-by-step instructions on how to open the hidden cells in SCB's spreadsheets. C.A.J.A.-594.

Unbeknownst to Petitioner, the joint investigation "wrapped up" the investigation in August 2013. C.A.J.A.-95. Mr. Chandra continued to provide information about SCB's dealings with Iranian customers to the FBI through December 2016. C.A.J.A.-500.

On April 9, 2019, the Government and SCB entered into an Amended DPA concerning approximately 9,500 illegal clearing transactions for companies owned by Mahmoud Reza Elyassi, about which Petitioner had informed the Government in 2012. C.A.J.A.-76. Among other remedies, SCB forfeited $20 million to the government. *Id.* The Government refused to award a share of the recovery to Petitioner. C.A.J.A.-76-78.

Based on the evidence provided by Petitioner to the Government, a conservative calculation of the clearing transactions in violation of the Iran sanctions that SCB handled between 2009 and 2014 is $56.75 billion.

2. Petitioner filed this case on December 17, 2012, contending that SCB's concealed violations of the Iran sanctions are reverse false claims under §3729(a)(1)(G). With some procedural detours not relevant here, see C.A.J.A.-773-75, the Government declined to intervene in March 2019 and the case was unsealed. On November 21, 2019, the Government moved to dismiss what was by then the Second Amended complaint, claiming that Petitioner's evidence was meritless and further litigation would be a waste of Government resources. App. 7a-9a.

The district court held no hearing of any kind on the Government's motion to dismiss. In granting the motion, the court relied exclusively on untested witness declarations from the Government. App. 7a. The court ignored the declarations of Petitioner's witnesses which contested in detail the claims made by the Government's witnesses. Indeed, the district court limited the evidence Petitioner could adduce by denying Petitioner's motion to depose Daniel Alter, the former DFS General Counsel who initiated and led DFS's participation in the joint investigation with federal authorities of SCB. Mr. Alter is thoroughly familiar with the amount and value of the evidence produced by Petitioner. C.A.J.A.-388-90; C.A.J.A.-441-43. Now in private practice, Mr. Alter was in a position to testify only pursuant to a subpoena. C.A.J.A.-388. The exclusion of Mr. Alter was particularly striking because the court expressly relied on what it called "declarations from leading members of the investigation teams." App. 7a.

Even without Mr. Alter's testimony, what was before the district court was a substantial body of conflicting evidence concerning what the facts were, not just a "subjective disagreement," as the court put it. App. 10a. How the court could claim that it found dismissal justified "[o]n the detailed record presented," App. 7a, is not clear from an opinion that considered only one, untested side of the record.

Amplifying the deficiencies of the proceedings was the fact that the conflict in the record concerning the facts was sharpened by the Government's misrepresentations to the court about the extent and detail of the evidence Petitioner had produced. The record was chock full of evidence sharply contesting the Government's generalized, conclusory, and mendacious factual claims, illustrated by the following examples:

- The Government represented to the court that its 2012 DPA with SCB captured all of SCB's sanctions violations before 2008, at which point SCB's sanctions violations stopped. C.A.J.A.-659.
  - ✓ Petitioner produced SCB's own records documenting $56.75 billion in illegal transactions on behalf of a host of Iran-related parties between 2009 and 2014. C.A.J.A.-484-85, 490-91.[2]

[2] The 2012 DPA has been the subject of criticism from observers not party to this case. *See, e.g.,* Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions,* 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 632, 634 (2014) (criticizing the SCB being "fined just 2.5%" of its Iranian transactions in the 2012 DPA).

- ✓ At a meeting on January 16, 2013, Petitioner's principals and counsel met with the Government's SCB investigation team, extensively detailing for them the variety of methods not captured in the 2012 DPA by which SCB had been evading and was continuing to evade the Iran sanctions. C.A.J.A.-465-67, 482.

- The Government represented to the court that Petitioner identified only "transactions with a handful of specific known Iranian entities," and never mentioned front companies in Dubai transacting in dollars for the benefit of Iranian entities. C.A.J.A.-660. The Government further represented to the court that its subsequent investigation, unaided by Petitioner, led to the 2019 settlements. C.A.J.A.-659.

  - ✓ Petitioner's initial complaint expressly alleged that Dubai-based entities backed by Iran played a major role in avoiding U.S. sanctions. C.A.J.A.-17-18, 22-23.

  - ✓ In 2012, Petitioner submitted SCB records of transactions by Dubai-based Iranian-backed entities to DFS, OFAC and DOJ. C.A.J.A.-490-91.

  - ✓ At a January 16, 2013 meeting of the Government's investigation team, Petitioner's principals discussed the activities of those entities. C.A.J.A.-464-67, 482.

  - ✓ In September, 2013, at the request of FBI Agent Komar, Mr. Chandra (the

SCB insider working with Petitioner) produced multiple computer discs of SCB files documenting the illicit activities of these entities. C.A.J.A.-496, 757-67.

- ✓ In a January 9, 2019 letter, Petitioner's counsel described in detail the role of Dubai front companies in SCB's sanctions-avoiding scheme, attaching an appendix that provided "highlights of the detailed transactional information and its relevance." C.A.J.A.-753.
- ✓ One such front company was Tanootas Taban Engineering, identified in several of SCB's revenue and trade spreadsheets provided by Petitioner. C.A.J.A.-461-62. The Government denied that "that name" was ever produced by Petitioner. C.A.J.A.-682. But, as Petitioner explained to the Government, SCB consistently and deliberately misspelled "that name" as "Tandootas," one of SCB's simpler maneuvers to prevent discovery of its illegal transactions. C.A.J.A.-462.
- ✓ The 2019 settlement in large measure was driven by violations that involved a Dubai-based petrochemical company linked to Iran and two Dubai-based companies owned by an Iranian national, Mahmoud Reza Elyassi. Petitioner had flagged both the petrochemical company and Elyassi for the federal investigators and the New

York DFS in 2012. C.A.J.A.-460-64, 473-74, 483, 491.

- The Government represented to the court that Petitioner's evidence concerned only the illegal continuation of SCB's previous relationships with known Iranian banks, government agencies, and companies. Govt. Reply, Doc. 54, 12 (Feb. 28, 2020).
  - ✓ Petitioner's evidence showed over $56 billion in illegal transactions far beyond the winding-down of preexisting relationships. C.A.J.A.-85-87, 490.
- The Government represented to the court that Petitioner never suggested that the SCB spreadsheets it produced contained hidden cells concealing SCB's illegal transactions. Govt. Reply, Doc. 54, 10 n.5 (Feb. 28, 2020).
  - ✓ A September 24, 2013 memorandum from Petitioner's counsel provided detailed instructions on how to open those hidden cells to examine the concealed, incriminating evidence. C.A.J.A. 594-95.
- The Government represented to the court that Mr. Chandra provided "some information" that was "generally similar" to information already provided by Petitioner and added nothing new. Govt. Reply, Doc. 54, 11 (Feb. 28, 2020).
  - ✓ Mr. Chandra provided 20,000 SCB records significantly different from what had been available previously, including records of SCB's "sundry accounts" used

to hide voluminous sanctions-violating transactions, analyses of the Iranian connections of numerous SCB customers, records of SCB's Iran Group customer base, and evidence of deliberate "flaws" SCB embedded in its supposed anti-money laundering system. C.A.J.A. 719-20.

- ✓ The Government has now admitted that it "wrapped up" the SCB investigation before it even received this massive production from Mr. Chandra. C.A.J.A. 95.

- The Government represented to the court that it was unable to corroborate Petitioner's allegations. Memorandum of Law in Further Support of the Government's Motion to Dismiss Relator's Second Amended Complaint at 8, No. 1:18-cv-11117 (Doc. 54).

  - ✓ The Government made no effort to examine SCB's profit in U.S. dollars from transactions for Iran-linked customers, failing to explain why the records Petitioner provided did not confirm its allegations. C.A.J.A.-490-91.

  - ✓ The Government did not bother to request SWIFT tickets or Omnibus Account Ledgers from SCB to confirm the credibility of SCB's representations about the timing and circumstances of changing currencies were credible. C.A.J.A.-488.

- ✓ The Government did not attempt to crosscheck the names of SCB customers suspected of sanctions violations provided by Petitioner, as Daniel Alter, then-General Counsel of DFS, and his team had done (who found probable violations to target for further investigation). C.A.J.A.-464, 491.

Notwithstanding such a record of disputed facts so dependent on the credibility of the witnesses, the district court rebuffed all of Petitioner's entreaties to hold an evidentiary proceeding with cross-examination of the witnesses.[3]

Finally, the Government had argued that Petitioner's claim was not cognizable under the "reverse false claim" provision of the FCA. The district court did not rule on that argument, but in a footnote gratuitously stated that it viewed the viability of Petitioner's claims "with skepticism." App. 9a n.2.

3. Petitioner timely appealed to the Second Circuit. While that appeal was pending, BuzzFeed News, the British Broadcasting Company, and the International Consortium of Investigative Journalists began publishing reports (called the *FinCEN Files*) based on the content of suspicious activity reports ("SARs")

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[3] The Second Circuit panel incorrectly claimed that Petitioner did not raise a procedural due process argument before the district court, App. 24a. Petitioner raised procedural due process in three filings. *See* Memorandum in Support of Motion for Indicative Ruling, ECF No. 68, at 11 (Oct. 27, 2020); Relator's Reply in Support of Motion for an Indicative Ruling, ECF No. 76, at 1, 7, 9 (Jan. 11, 2021); Letter Opposition to Government Letter Motion for Leave to File Sur-Reply, ECF No. 82, at 2 (Feb. 1, 2021).

maintained by the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") that FinCEN had received after Petitioner had presented its allegations and supporting evidence to the Government. Those SARs were available to the Government before it settled with SCB and before it moved to dismiss the complaint. Drawing from those SARs, these journalists described numerous transactions by Defendants with Iran and Iran-related parties that violated U.S. sanctions, including many transactions that had been reported earlier to the Government by Petitioner but apparently ignored by the Government.

These disclosures of the information contained in the SARs revealed that Petitioner's allegations and information were far from "meritless." BuzzFeed found that at least 35 transactions by SCB with entities subject to United States sanctions identified on the documents provided to the United States from 2012 through 2013 by Petitioner were also identified on SARs subsequently filed by SCB to report transactions that appear to violate U.S. sanctions. *Standard Chartered's Iran Problems Didn't Go Away* (September 25, 2020) https://www.buzzfeednews.com/article/richholmes/standard-chartered-bank-money-iran-fbi.

Accordingly, on October 27, 2020, Petitioner made a motion under Fed.R.Civ.P 62.1 for an indicative ruling from the district court that it would withdraw its dismissal of the case in light of this new evidence if the Court of Appeals remanded it for that purpose. The district court denied this motion on October 31, 2021.

4. On August 21, 2023, the Second Circuit issued a Summary Order affirming the district court. App.17a-

27a. The Second Circuit concluded that Petitioner had been given "the opportunity to be heard via its written submissions." App. 23a. The Court simply adopted the district court's characterization that what was at work in this case was simply a "subjective disagreement," App. 23a, offering no explanation for that conclusion in light of the detailed evidence Petitioner offered challenging the Government's portrayal of the facts, not the Government's assessment of the facts.

Petitioner's petition for panel rehearing, or, in the alternative, for rehearing en banc was denied on October 27, 2023.

REASONS FOR GRANTING THE PETITION

I. The Petition Raises an Issue of Exceptional Importance.

This Petition presents the Court with an issue of extraordinary significance. At a moment when concern about the ability and determination of the Islamic Republic of Iran to fund terrorist organizations and the development of nuclear weapons has never been greater, the courts below permitted the dismissal of Petitioner's *qui tam* complaint filed pursuant to the FCA on the motion to dismiss of the United States Department of Justice ("the Department"). The complaint charged SCB with vast, multi-year violations of sanctions imposed by the United States against entities engaged in currency transactions involving the United States dollar to benefit Iran and its terrorist proxies amounting to at least $56 billion. And Petitioner produced massive evidence supporting those charges to Government investigators. For example, in its

initial disclosures, Petitioner identified Matz Holding as a client of SCB. Matz is owned by Sudanese businessman Abdelbasit Hamza, who "was sanctioned by the United States in the aftermath of the Oct. 7 Hamas terror attack on Israel for managing Hamas' investments and for his involvement in the transfer of almost $20 million to the organization, including funds sent directly to a senior Hamas financial officer." Uri Blau and David Kenner, *Alleged Hamas financier holds stake in Cyprus company that mines Egyptian gold, leaked files reveal* (Dec. 20, 2023), http://www.icij.org/investigations/cyprus-confidential/alleged-hamas-financier-holds-stake-in-cyprus-company-that-mines-egyptian-gold-leaked-files-reveal. *See also* Press Release, U.S. Department of the Treasury, *Following Terrorist Attack on Israel, Treasury Sanctions Hams Operatives and Financial Facilitators* (Oct. 18, 2023) (imposing sanctions on Hamza for participating in the management of "Hamas's secret investment portfolio"), https://home.treasury.gov/news/press-releases/jy1816.

The courts below concluded that Petitioner's allegations were nothing more than "a subjective disagreement" with the Department and its witnesses. In dismissing Petitioner's complaint, the courts below rejected Petitioner's insistence that it was entitled to an evidentiary hearing at which it could challenge the written testimony of the Department's witnesses and offer the testimony of one of the most critical members of the joint investigation of Petitioner's allegations, Daniel Alter, the former General Counsel of the New York DFS, who was responsible for reopening the investigation of SCB in 2013.

Petitioner represented to the district court that Mr. Alter would testify about:

> whether Defendants [SCB and associated entities] "fully cooperated" with the investigation, as the Government contends, when they failed to disclose the roles of their high-level personnel in violating U.S. sanctions and their consultant altered records and computers. The Government accepted Defendants' representations that Defendants had terminated Iranian U.S. dollar transactions "altogether" as of November 2006, which is contradicted conclusion even in its inexplicably narrow 2019 Deferred Prosecution Agreement that Defendants had participated in a "criminal conspiracy, lasting from 2007 through 2011, [which] resulted in [SCB] processing approximately 9,500 financial transactions worth approximately $240 million through U.S. financial institutions for the benefit of Iranian entities." Finally, Mr. Alter can testify about whether Relator provided evidence that corroborates its allegations of Defendants' violations of sanctions in addition to those on which the Government based its decisions.

C.A.J.A.-389.

It is apparent on the face of the documents submitted by Petitioner that its allegations were not merely abstract assertions of wrongdoing. The allegations were supported by detailed facts and the sworn declarations of Petitioner's principals who have deep experience in currency trading and the internal operations of SCB. Furthermore, Petitioner

demonstrated that the Department's witnesses had provided false information to the district court, contradicted each other, lacked personal knowledge in some instances to the facts asserted in their declarations, and utterly failed to consider evidence submitted by Petitioner before submitting their declarations.

In a shareholders' action pending against SCB in which Petitioner's allegations and evidence ("the Brutus Allegations") formed the basis for the action, the High Court of Justice of the United Kingdom rejected the conclusion of the courts below that those allegations amounted to nothing more than a "subjective disagreement" with the Department's position:

> The Brutus Allegations do not have the look or feel of fabrication or speculation. To the contrary, the allegations are specific and display detailed knowledge of the Bank's internal procedures…. While the Brutus Allegations are very serious in terms of their scale and alleged deliberate policy, the Bank has already admitted engaging in similarly serious misconduct in both the 2012 and 2019 Settlements.

App. 78a.

The High Court went on to express its doubts about the Department's portrayal of Petitioner's evidence.

> While the US Government stated in support of its dismissal motion that it had formed the view that Brutus' allegations were inaccurate, there is evidence to suggest that it took that position premised on incomplete information and/or motivated by other

> factors, including embarrassment at having missed or overlooked information suggesting a much broader fraudulent scheme by the Bank and the potential conflict of having to hand over to Brutus some of the financial penalties imposed on the Bank in the 2019 Settlements.

App. 79a.

Under the circumstances, the refusal of the Department and the courts below to give the appropriate attention to Petitioner's allegations and the rejection of its argument that it was entitled to an evidentiary hearing, as required by the Due Process Clause and the FCA, is a demonstration of an inexplicable and unjustified failure to perform their obligations under the Constitution and the FCA, which constitutes a critical lapse in protecting the national security interests of the United States.

II. The Petition Raises Critical Due Process and Statutory Issues Setting the Procedural Bounds on Adjudication of a Government Motion to Dismiss a *Qui Tam* Case.

A. Petitioner was denied procedural due process.

In refusing Petitioner's requests that the district court conduct an evidentiary hearing, and that Petitioner be allowed to subpoena Mr. Alter, who was not able to testify because of his former state agency's opposition, the district court violated Petitioner's right to procedural due process. A relator's right to challenge the denial of such a fundamental right as procedural due process was not an issue raised in *Polansky*.

In *Vermont Agency for Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), the Court explained that the FCA "gives the relator an interest in the lawsuit, and not merely the right to retain a fee our of the recovery." *Id.,* at 772-73. *See also Polansky,* 143 S.Ct. at 1727 ("[A] *qui tam* suit is, as the statute puts it, 'for' both the relator and the Government."). Both the Government and the relator are real parties in interest in the action. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009). The FCA's assignment of a cause of action to the relator is a constitutionally recognized property interest protected by the Due Process Clause. *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, 495 (1988); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982). A statutory entitlement is a long-recognized property interest guaranteed by due process. *Fuentes v. Shevin,* 407 U.S. 67, 86 (1983); *Goldberg v. Kelly,* 397 U.S. 256, 262 (1970). Having given a relator the statutory "right to conduct the action," 31 U.S.C. §§3730(b)(4)(B) and 3730(c)(3), Congress could not include in the FCA a mechanism to extinguish that right without the meaningful hearing required by procedural due process.

The right to offer evidence and to call witnesses in support of a party's position and to challenge the opposing party's position when the circumstances warrant is guaranteed by the Due Process Clause. *See Subin v. Goldsmith,* 224 F.2d 753, 758 (2d Cir. 1955) (Frank, J.) ("The statements in [the] affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and…credibility ought not, when witnesses are available, be determined by mere paper affirmations and denials that inherently lack the important element of witnesses' demeanor."). The right to examine opposing witnesses to show a

lack of credibility, to test the witnesses' memory, or demonstrate other weaknesses in their testimony is an aspect of adversarial testing that is essential to due process. *Sessions v. Dimaya,* 138 S. Ct. 1204, 1232-33 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). The Department was permitted to submit multiple declarations in support of its motion to dismiss. The assertions contained in those declarations were never tested by Petitioner in a hearing at which the declarants would have been subject to cross-examination. *See Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 629, 628 (1944) (Due process does not allow procedures that "withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony.").

B. Petitioner was denied the evidentiary hearing required by the FCA when sharply conflicting and substantial evidence has been submitted by the parties.

The right of a private plaintiff to bring a *qui tam* action is a principal element of the FCA. As the Court has explained

> The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting … under the strong

> stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 542 n.5 (1943) (internal citation omitted). The rationale for the FCA Amendments of 1986, enhancing the incentives for relators, reflected this logic:

> The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.

S. Rep. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

Under the statutory scheme, the FCA provides a system by which the Executive Branch can be held accountable for its actions in protecting, or failing to protect, the public fisc. Congress has commanded the Attorney General to "diligently…investigate" FCA violations. 31 U.S.C. §3730(a). Congress intends the relator to "act[] as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without a legitimate reason." S. Rep. 99-345, at 26, 1986 U.S.C.C.A.N. at 5291. This statutory scheme cannot function effectively

unless an evidentiary hearing is conducted in circumstances in which the relator and the Government submit conflicting evidence concerning the facts, as in this case. The legislative history provides insight into congressional expectations:

> The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a 'substantial and particularized need' for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations.

S. Rep. 99-345, at 26, 1986 U.S.C.C.A.N. at 5291. This legislative history provides a standard to be applied by courts in deciding when an evidentiary hearing is appropriate and required. If the relator can show that it has a "substantial and particularized need" for the examination and cross-examination of witnesses in order to demonstrate a colorable challenge to the Department's justifications for its motion to dismiss or its settlement, the relator is entitled to a full evidentiary hearing. Petitioner has made just such a demonstration in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 1117 (PAE)

UNITED STATES OF AMERICA,
ex rel. BRUTUS TRADING, LLC,

Plaintiffs,

—v.—

STANDARD CHARTERED BANK, STANDARD CHARTERED PLC, and STANDARD CHARTERED TRADE SERVICES CORPORATION,

Defendants.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This is a *qui tam* action brought on behalf of the United States by relator Brutus Trading, LLC ("relator"), alleging that defendants Standard Chartered Bank, Standard Chartered PLC, and Standard Chartered Trade Services Corporation (together, "defendants" or "Standard Chartered") engaged in banking practices that violated U.S. sanctions against Iran. Before the Court is the Government's motion to dismiss relator's *qui tam* complaint. For the reasons that follow, the Court grants the motion.

I. Background

The Court assumes familiarity with the facts and procedural history of this case. In brief, this matter stems from defendants' admitted practice, between 2001 and 2007, of deceptively facilitating U.S. Dollar transactions by Iranian clients, in violation of U.S. sanctions and various New York and federal banking regulations. *See* Dkt. 18[1] (Second Amended Complaint, or "SAC") ¶¶ 27–32. Following a multi-year, multi-agency investigation, defendants entered into a 2012 Deferred Prosecution Agreement ("DPA") with the Department of Justice ("DOJ")—and related settlements or consent agreements with the Office of Foreign Asset Control ("OFAC"), the Federal Reserve, the New York County District Attorney's Office ("DANY"), and the New York Department of Financial Services ("DFS")—to resolve the matter, for which defendants paid hundreds of millions of dollars in fines and penalties. *See id.*; *id.*, Ex. A. The 2012 DPA was publicly announced on December 10, 2012. *Id.* ¶ 29.

On December 17, 2012, relator—an entity formed by Julian Knight and Robert Marcellus for the purpose of pursuing this action—filed a *qui tam* action that was assigned to Judge Forrest, in which it alleged that the defendants had misled the Government in negotiating the 2012 DPA. *United States ex rel. Brutus Trading, LLC v. Standard Chartered Bank et al.*, No. 12 Civ. 9160 (KBF) ("*Brutus Trading I*"), Dkt. 36. Specifically, relator alleged that defendants had continued to engage in sanctions-violating conduct beyond 2007, notwithstanding their representations to the Government that they had thereafter ceased doing so.

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[1] Except where specified, citations to the docket refer to the docket of the instant case, No. 18 Civ. 11117 (PAE).

Id. ¶¶ 25–34. The Government, as discussed *infra*, investigated relator's allegations but ultimately found them unsupported.

In approximately August 2013, the Government informed relator's counsel that it intended to decline to intervene in the case. Dkt. 31 ("Gov't Mem.") at 8; Dkt. 32 ("Komar Decl.") ¶¶ 24–25. The Government kept the complaint under seal, however, while it pursued a separate investigation of potential Iran sanctions violations by defendants (the "2013 Investigation"). Gov't Mem. at 8; Komar Decl. ¶ 31. On May 10, 2017, Judge Forrest unsealed the case, *Brutus Trading I*, Dkt. 19, and on July 14, 2017, the Government informed Judge Forrest that it would not be intervening, *id.*, Dkt. 24. On September 19, 2017, relator dismissed its complaint without prejudice. *Id.*, Dkt. 35.

On November 29, 2018, relator re-filed its complaint. *See* SAC ¶ 37. It was assigned to this Court, Judge Forrest having left the bench. Dkt. 1. In March 2019, the Government again declined to intervene, Gov't Mem. at 12, and the case was later unsealed, Dkt. 3. On April 9, 2019, DOJ announced a new DPA (the "2019 DPA") with defendants—and OFAC, the Federal Reserve, and DFS announced new settlement or consent agreements with defendants—stemming from the results of the 2013 Investigation. *See* SAC ¶¶ 60–61; *see also* Dkt. 35 ("Bryan Decl.") ¶¶ 11–16; Dkt. 58 ("Nochlin Decl.") ¶¶ 13–14. On July 19, 2019, relator filed its First Amended Complaint, Dkt. 15 ("FAC"), in which, *inter alia*, it added the allegation that the 2019 DPA, like the 2012 DPA, "did not address the broader course of conduct by [defendants] in violation of the Iran sanctions" alleged by relator's complaint, *id.* ¶ 62. The FAC also advanced a new theory of recovery based on alleged

reverse false claims, *see* 31 U.S.C. § 3729(a)(1)(G), by defendants. *Id.* ¶¶ 63–65. On September 20, 2019, relator filed its Second Amended Complaint, in which it added allegations that it had been the initial source of the information leading to the 2019 DPA and related agreements, *see* SAC ¶¶ 64–65, and was therefore entitled to a share of the Government's recovery from those agreements, *id.* ¶ 69.

On November 21, 2019, the Government filed a motion to dismiss the SAC, Dkt. 30; a supporting memorandum of law, Gov't Mem.; the declaration of FBI Special Agent Matthew Komar, Komar Decl., with attached exhibits; the declaration of FBI Special Agent Wayne Boddy, Dkt. 33 ("Boddy Decl."), with attached exhibits; the declaration of Alexandre Manfull, Dkt. 34 ("Manfull Decl."), with attached exhibits; and the declaration of Patrick Bryan, Bryan Decl., with attached exhibits. On January 10, 2020, relator filed a memorandum of law in opposition, Dkts. 48–49 ("Relator Mem."), with attached exhibits, including the declaration of Robert Marcellus, Dkt. 48-1 ("Marcellus Decl."), the declaration of Julian Knight, Dkt. 48-2 ("Knight Decl."), the declaration of Anshuman Chandra, Dkt. 48-3 ("Chandra Decl."), and the declaration of Dennis Sweeney, Dkt. 48-4 ("Sweeney Decl."). On February 28, 2020, the Government filed a reply memorandum of law, Dkt. 54 ("Gov't Reply"); the reply affirmation of Agent Komar, Dkt. 55 ("Komar Reply Decl."); the reply affirmation of Agent Boddy, Dkt. 56 ("Boddy Reply Decl."), with attached exhibits; the reply affirmation of Alexandre Manfull, Dkt. 57 ("Manfull Reply Decl."); and the affirmation of Elizabeth Nochlin, Nochlin Decl., with attached exhibits. On March 13, 2020, relator filed a sur-reply, Dkt. 61 ("Relator Sur-Reply"), with attached exhibits.

II. Standard of Review

The False Claims Act ("FCA" or the "Act"), 31 U.S.C. § 3729 *et seq.*, permits a private party (a "relator") to bring a civil suit, known as *qui tam* action, in the name of the United States to enforce the Act's prohibitions of the submission of false claims to the Government. *See id.* § 3730(b)(1). The Government retains the ability to exercise significant control over such suits. *See id.* § 3730(b)–(c). Among other rights, the FCA permits the Government to intervene in such suits, *id.* § 3703(b)(2), and, relevant here, to move to dismiss them even when it has declined to intervene, *see id.* § 3703(c)(2)(A).

The Second Circuit has not definitively established the standard of review for a motion by the Government to dismiss a *qui tam* action. *See U.S. ex rel. Stevens v. State of Vt. Agency of Nat. Res.*, 162 F.3d 195, 201 (2d Cir. 1998). In general, courts have followed one of two approaches. The first, articulated by the D.C. Circuit in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), analogizes the United States' motion to dismiss a *qui tam* action to a decision not to prosecute. Thus, at least where a defendant has not yet been served, the D.C. Circuit has concluded that dismissal is the Government's "unfettered right," and all but unreviewable absent fraud on the court. *Swift*, 318 F.3d at 252–53; *see also Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). The second approach, set out by the Ninth Circuit in *United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), is somewhat less deferential. Under the *Sequoia Orange* standard, the Government must first identify "a valid government purpose" and "a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145; *see also Ridenour v. Kaiser-Hill Co.*, 397 F.3d

925, 936 (10th Cir. 2005) (adopting the *Sequoia Orange* standard). The burden then shifts to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange*, 151 F.3d at 1145.

Like other courts in this District to have considered this question, the Court concludes that it need not definitively determine the appropriate standard of review to resolve this case. That is because the Government has carried its burden even under the more searching *Sequoia Orange* standard. *See United States ex rel. Borzilleri v. AbbVie, Inc.*, No. 15 Civ. 7881 (JMF), 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019) ("The Court need not take a side in the dispute, however, because it concludes that the Government may dismiss the case even under the more stringent standard articulated in *Sequoia Orange*."); *United States ex rel. Amico v. Citigroup, Inc.*, No. 14 Civ. 4370 (CS), 2015 WL 13814187, at *4 (S.D.N.Y. Aug. 7, 2015) ("While this Court is more inclined toward *Swift* than *Sequoia*, the question need not be resolved because dismissal is required under either standard."); *see also U.S. ex rel. Piacentile v. Amgen Inc.*, No. 04 Civ. 3983 (SJ), 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) ("[E]ven if the government's right to dismiss ought to be conditioned on a demonstrable nexus to a valid government purpose, this Court finds that nexus to be present."). *But see United States v. Cooperatieve Bank U.A.*, No. 17 Civ. 2708 (LGS), 2019 WL 5593302, at *3 (S.D.N.Y. Oct. 30, 2019) ("The Court adopts the *Sequoia* standard[.]").

III. Discussion

Although the Government advocates application of the *Swift* test, Gov't Mem. at 16–19, in recognition of

the potential use of a more searching inquiry it proffers three independent bases for its decision to move to dismiss relator's complaint, *id.* at 19–30. The Court need only address the first two, each of which it finds satisfy *Sequoia Orange*'s threshold test.

First, the Government represents that relator's allegations did not lead to the discovery of any new FCA violations by defendants and were not the impetus for the 2013 Investigation. *Id.* at 23–28; Gov't Reply at 8–14. In support, the Government has submitted declarations from the successive lead FBI case agents on the investigation, *see* Komar Decl.; Boddy Decl.; Komar Reply Decl.; Boddy Reply Decl. It has also submitted declarations from leading members of the investigation teams of OFAC, *see* Manfull Decl.; Manfull Reply Decl.; the Federal Reserve, *see* Bryan Decl.; and DFS, *see* Nochlin Decl. These declarations describe in detail the Government's investigation of defendants, the steps that the agencies took to investigate relator's claims, and the reasons why the investigating agencies concluded that the evidence did not substantiate relator's allegations that defendants had engaged in additional sanctions-violating conduct. *See* Komar Decl. ¶¶ 7–25; Manfull Decl. ¶¶ 22–38; Bryan Decl. ¶¶ 5–10; Nochlin Decl. ¶¶ 6–10, 20; Manfull Reply Decl. ¶¶ 20–25, 29. These declarations also explain concretely the reasons why the information provided by relator did not contribute to the 2013 Investigation that resulted in the 2019 DPA. *See* Komar Decl. ¶¶ 26–41; Boddy Decl. ¶¶ 4–10, 16–18; Manfull Decl. ¶¶ 39–56; Bryan Decl. ¶¶ 11–16; Manfull Reply Decl. ¶¶ 26–30, 34; Nochlin Decl. ¶¶ 12–20; *see generally* Komar Reply Decl.

On the detailed record presented, the Court has no difficulty finding that the Government has proffered

"a valid government purpose" for seeking to dismiss the *qui tam* action—namely, the early termination of actions as to which the Government has determined that the factual allegations are meritless—and has articulated a more than "rational relation between dismissal and accomplishment of th[at] purpose." *Sequoia Orange*, 151 F.3d at 1145; *see, e.g.*, *United States v. Gilead Scis., Inc.*, No. 11 Civ. 941 (EMC), 2019 WL 5722618, at *7 (N.D. Cal. Nov. 5, 2019); *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 490 (E.D. Pa. 2019); *Nasuti ex rel. U.S. v. Savage Farms, Inc.*, No. 12 Civ. 30121 (GAO), 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), *aff'd sub nom. Nasuti v. Savage Farms Inc.*, No. 14-1362, 2015 WL 9598315 (1st Cir. Mar. 12, 2015).

Second, the Government argues that dismissal is appropriate because, were the case to proceed to discovery, the Government would be required to expend resources on a matter that it has found meritless. Gov't Mem. at 28–30; Gov't Reply at 14. This is a well-established basis for the dismissal of a *qui tam* complaint. *See Cooperatieve Bank*, 2019 WL 5593302, at *3; *Borzilleri*, 2019 WL 3203000, at *2; *Amico*, 2015 WL 13814187, at *4; *see also Sequoia Orange*, 151 F.3d at 1146. It is particularly compelling in this case, where the Government has already recovered hundreds of millions of dollars from defendants after two multi-agency investigations that spanned nearly a decade. *See* Gov't Mem. at 4–5 & n.1, 10–11 & n.5. The Court finds the Government's considered decision not to expend additional resources on this litigation to be an independent "valid

government purpose" justifying dismissal. *Sequoia Orange*, 151 F.3d at 1145.[2]

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[2] Having found the Government's first two proffered bases for dismissing this action to be well-founded, the Court does not need to delve into the third: that the theory underpinning relator's reverse false claim allegations is legally unsupported. *See Borzilleri*, 2019 WL 3203000, at *2 (court may grant Government's motion to dismiss under the *Sequoia Orange* test so long as it has "demonstrate[d] at least one valid government purpose for seeking dismissal" (internal quotation marks omitted)). Relator contends that *all* funds involved in *any* sanctions-violating transactions are *automatically* forfeited to the Government "by operation of statute." *See* SAC ¶¶ 8, 66, 71; Relator Opp'n at 17 ("Thus, the billions of dollars involved in the Defendants' illegal clearing transactions became, at the time of those transactions, the property of the United States, though still in the hands of the Defendants."). The Government argues that this is a "facially invalid legal theory," because "an act giving rise to a potential civil forfeiture, even once the United States files a forfeiture action, does not create an obligation owed by the holder of the forfeitable party to the United States, and therefore does not constitute a reverse false claim to the Government." Gov't Mem. at 20–21. The Court need not resolve this dispute in light of the independent bases for dismissal. But even assuming *arguendo* that such a theory were legally viable—and the Court views that premise with skepticism—there would be good reasons for dismissal under the *Sequoia Orange* framework. Relator "asserts a never-before-recognized liability theory that is a long way from striking pay dirt. Even if [relator] prevails at the trial-court level, [defendants] would no doubt force [it] to defend [its] novel liability theory on appeal." *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15 Civ. 767 (DPJ), 2020 WL 2323077, at *12 (S.D. Miss. May 11, 2020). The Government, as a repeat player with a vested stake in the precedential impact of such a legal theory, would thus need to expend time and resources monitoring, if not actively participating in, each stage of the litigation, thereby increasing the burden of costs from a matter it considers meritless, against defendants from which it has already recovered millions of dollars.

"Because the Government offers a valid purpose for dismissal, the burden shifts to [relator] to show that the dismissal is nonetheless 'fraudulent, arbitrary and capricious, or illegal.'" *Borzilleri*, 2019 WL 3203000, at *2 (quoting *Sequoia Orange*, 151 F.3d at 1145). Relator has failed to carry its burden. As to the Government's contention that it investigated relator's claims and found them to be without merit, as well as its contention that relator's submissions were not the source of the 2013 Investigation, relator argues that the Government either failed to properly investigate its contentions or failed to understand the import of the evidence it provided. Relator Mem. at 1–14, 20–30. But "[t]he Government's memoranda reveal, and the Court has no basis to doubt, that the Government undertook a lengthy, costly, and substantial investigation into [relator]'s claims that spanned several years and multiple offices and agencies. [Relator]'s subjective disagreement with the Government's investigative strategy and ultimate decision does not provide the Court with a basis to second-guess the Government's decision to dismiss the case." *Borzilleri*, 2019 WL 3203000, at *2 (internal citations omitted); *see also Cooperatieve Bank*, 2019 WL 5593302, at *3; *EMD Serono, Inc.*, 370 F. Supp. 3d 483, 490 (E.D. Pa. 2019); *Piacentile*, 2013 WL 5460640, at *3. That relator would have reached a different result than the one reached by two U.S. Attorney's Offices, the FBI, OFAC, the Federal Reserve, DANY, and DFS does not make the Government's decision arbitrary and capricious.

Relator makes a similarly ineffective attempt to undercut the Government's argument that dismissing this case would preserve Government resources. Relator argues that such an argument is irrational because the Government "makes no effort to come to

grips with the information [r]elator has produced," Relator Mem. at 22, and characterizes the Government's investigation as an "inexcusable expenditure of time, taxpayer money and other resources," *id.* at 30, because it did not reach the conclusion that relator deems correct. For the reasons discussed above, on the record proffered by the Government, relator's difference of opinion is insufficient to transform the Government's decision into one that is arbitrary and capricious.

Because the Court finds that relator has failed to establish that either of the Government's stated reasons for moving to dismiss the complaint are arbitrary and capricious, and relator has not alleged that the decision was fraudulent or illegal, relator has not carried its burden under *Sequoia Orange*.

CONCLUSION

For the reasons stated above, the Court finds that at least two of the reasons proffered by the Government in support of dismissal qualify as "valid government purpose[s]" and that the Government has articulated "a rational relation between dismissal and accomplishment of th[ose] purpose[s]." *Sequoia Orange*, 151 F.3d at 1145. The Court further finds that relator has not carried its burden of showing that either, let alone both, of these reasons "is fraudulent, arbitrary and capricious, or illegal." *Id.* The Court therefore grants the Government's motion to dismiss the Second Amended Complaint.

The Clerk of Court is respectfully directed to terminate the motion pending at docket 30 and close this case.

SO ORDERED.

/s/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: July 2, 2020
New York, New York

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[STAMP]

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DATE FILED: 7/2/2020

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18 CIVIL 1117 (PAE)

UNITED STATES OF AMERICA,
ex rel. BRUTUS TRADING, LLC,

Plaintiffs,

—against—

STANDARD CHARTERED BANK, STANDARD CHARTERED PLC, and STANDARD CHARTERED TRADE SERVICES CORPORATION,

Defendants.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion & Order dated July 2, 2020, the

Court finds that at least two of the reasons proffered by the Government in support of dismissal qualify as "valid government purpose[s]." and that the Government has articulated "a rational relation between dismissal and accomplishment of th[ose] purpose[s]." Sequoia Orange, 151 F.3d at 1145. The Court further finds that relator has not carried its burden of showing that either, let alone both, of these reasons "is fraudulent, arbitrary and capricious, or illegal." Id. The Government's motion to dismiss the Second Amended Complaint is granted; accordingly, this case is closed.

Dated: New York, New York
July 2, 2020

RUBY J. KRAJICK
Clerk of Court
BY: /s/ K. Mango
Deputy Clerk

Appendix C

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 27th day of October, two thousand twenty-three.

ORDER

Docket No: 20-2578

Brutus Trading, LLC,

Plaintiff-Appellant,

—v.—

Standard Chartered Bank, Standard Chartered PLC, Standard Chartered Trade Services Corporation,

Defendants-Appellees,

United States of America,

Interested Third-Party-Appellee.

Appellant, Brutus Trading, LLC, 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*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix D

MANDATE

20-2578
Brutus Trading, LLC v. Standard Chartered Bank

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 21st day of August, two thousand twenty-three.

PRESENT:

RICHARD J. SULLIVAN,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

No. 20-2578

BRUTUS TRADING, LLC,

Plaintiff-Appellant,

—v.—

STANDARD CHARTERED BANK, STANDARD CHARTERED PLC, STANDARD CHARTERED TRADE SERVICES CORPORATION,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Interested Third-Party-Appellee.

MANDATE ISSUED ON 11/03/2023

For Plaintiff-Appellant:

ROBERT J. CYNKAR, McSweeney Cynkar & Kachouroff, PLLC, Great Falls, VA (Patrick M. McSweeney, McSweeney Cynkar & Kachouroff, PLLC, Powhatan, VA, *on the brief*).

For Interested Third-Party Appellee:

JEAN-DAVID BARNEA (Benjamin H. Torrance, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Brutus Trading, LLC ("Brutus") – the *qui tam* relator that initiated this False Claims Act ("FCA") suit – appeals from the district court's decisions (1) granting the government's motion to dismiss the *qui tam* action, (2) dismissing Brutus's action without holding an evidentiary hearing, and (3) denying Brutus's motion for an indicative ruling under Rule 62.1 of the Federal Rules of Civil Procedure. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Brutus's operative complaint alleged that Standard Chartered Bank, Standard Chartered PLC, and Standard Chartered Trade Services Corporation (collectively, "Standard Chartered") facilitated illegal banking transactions "on behalf of individuals, businesses, and financial institutions that were subject to U.S. economic sanctions because of their links to Iran." J. App'x at 60. The complaint further alleged that Standard Chartered defrauded the government by concealing the extent of its illegal activities when it entered into a deferred-prosecution agreement with various law-enforcement agencies in 2012. In addition, because Brutus believes that it

provided the government with the information that led to a separate investigation and settlement with Standard Chartered in 2019, Brutus also claimed that it was entitled to a share of Standard Chartered's forfeiture payment from that settlement.

Although it initially declined to intervene, the government moved in November 2019 to dismiss Brutus's action under 31 U.S.C. § 3730(c)(2)(A). In its motion, the government argued that dismissal was appropriate because Brutus's factual allegations were unsupported, its legal theory was not cognizable, and the continuation of the suit would waste considerable government resources. Brutus filed a substantial memorandum of law in opposition, together with a number of exhibits, to which the government filed a reply, and Brutus then filed a sur-reply. The district court granted the motion on the papers without holding an evidentiary hearing. Brutus timely appealed.

While the appeal was pending, Brutus moved under Rule 62.1 for the district court to issue a ruling indicating its willingness to reopen the proceedings pursuant to Rule 60 but for the divestiture of jurisdiction that resulted from the appeal. Brutus argued that several *Buzzfeed News* articles postdating the dismissal constituted newly discovered evidence warranting relief from the judgment. The district court denied the motion, finding that the *Buzzfeed News* articles were inadmissible hearsay and, in any event, cast no doubt on its prior rulings.

In June 2022, also while this appeal was pending, the Supreme Court granted certiorari to resolve a circuit split regarding the standard that district courts should apply in ruling on motions to dismiss under section 3730(c)(2)(A). *United States ex rel.*

Polansky v. Exec. Health Res., Inc., 142 S. Ct. 2834 (2022). We, in turn, entered an order holding Brutus's appeal in abeyance pending the Supreme Court's decision in *Polansky*. The Supreme Court issued its decision on June 16, 2023, holding that district courts should assess section 3730(c)(2)(A) motions using the standards provided by Federal Rule of Civil Procedure 41(a). *See United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1733–34 (2023). The parties thereafter filed supplemental briefs regarding the impact of the Supreme Court's decision on the pending appeal. We address each of Brutus's arguments in turn.[1]

I. Dismissal under Section 3730(c)(2)(A)

Brutus contends that the district court erroneously granted the government's motion to dismiss under section 3730(c)(2)(A). We disagree.

The FCA permits a relator to bring a *qui tam* action "in the name of the [g]overnment" against those who knowingly defraud the United States. 31 U.S.C. § 3730(b)(1). After such an action is filed, the government may intervene and litigate the case. *Id.* § 3730(b)(2). If the government intervenes, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person

[1] In its supplemental brief, Brutus contends that certain of its previously asserted arguments are "not strictly before this Court," and that the relevant question on appeal is "whether the district court, by refusing to hold an evidentiary hearing[,] . . . failed to satisfy the requirement of a 'hearing'" mandated by section 3730(c)(2) and by due process. Brutus Supp. Br. at 5. As discussed in greater detail below, because we discern no error in the district court's decision to dismiss Brutus's case without first conducting an evidentiary hearing, we address Brutus's other arguments on appeal herein.

bringing the action." *Id.* § 3730(c)(1). Although the person who brought the *qui tam* action has the right to continue as a party after the government has intervened, "[t]he [g]overnment may dismiss the action notwithstanding the objections of the person initiating the action[,] if the person has been notified by the [g]overnment of the filing of the motion [to dismiss] and the court has provided the person with an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A).

Here, Brutus does not oppose the conclusion that the government's motion to dismiss also constituted a motion to intervene, which the district court implicitly granted. *See* Brutus Supp. Br. at 1 n.1. As such, we construe the government's motion to dismiss as including a motion to intervene in this case. *See Polansky*, 143 S. Ct. at 1729 & n.2 (describing the Third Circuit's conclusion that the government's request to dismiss the suit "itself established good cause to intervene").

Because Standard Chartered has not answered Brutus's complaint or moved for summary judgment, Rule 41(a)(1) applies. *See* Fed. R. Civ. P. 41(a)(1)(A)(i) ("[T]he plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."). In this context, a movant – typically the plaintiff who commenced the action – is usually "entitle[d] . . . to a dismissal; the district court has no adjudicatory role." *Polansky*, 143 S. Ct. at 1734 n.4. The Supreme Court suggested in *Polansky* that – in order to comply with the FCA's hearing requirement in this context – a district court might inquire as to whether a Rule 41(a)(1) dismissal would violate the relator's constitutional rights to due process or equal protection. *See id.*

Polansky thus confirms that, in order to comply with the FCA's "hearing" requirement, a district court must exercise some degree of scrutiny in evaluating the government's motion to dismiss; in other words, the government does not have an unfettered right to dismiss a *qui tam* action. Therefore, we do not disagree with Brutus's assertion that the government does not have unqualified "free rein" in dismissing *qui tam* cases. Brutus Br. at 16. We do, however, disagree with its contention that the district court in this case "held no hearing of any kind." *Id.* at 24. As Brutus itself recognizes, *Polansky* "did not mandate universal requirements for [the FCA] hearing in every case." Brutus Supp. Br. at 3. Here, the district court met the hearing requirement by carefully considering the parties' written submissions.

In light of the Supreme Court's guidance in *Polansky*, there is no reason to believe that dismissal was unwarranted here. The record reflects that Brutus was notified of – and did not oppose – the government's filing of the motion to dismiss and that the district court afforded Brutus the opportunity to be heard via its written submissions. Indeed, the district court explicitly considered the parties' voluminous briefs, declarations, and exhibits before granting the government's motion. Under these circumstances, we cannot agree that the district court failed to satisfy the FCA's hearing requirement.

Nor are we persuaded that the dismissal violated Brutus's right to due process. In its supplemental brief, Brutus argues that the district court violated its due process rights by failing to allow it to test the credibility of the government's witnesses, by improperly crediting the government's factual declarations over the competing declarations and

documents presented by Brutus, and by failing to allow Brutus to depose the former General Counsel of the Department of Financial Services, Daniel Alter. Again, we disagree.

As an initial matter, we note that, because Brutus did not raise its procedural due process argument before the district court, this argument is forfeited. *See Phoenix Light SF Ltd. v. Bank of N.Y. Mellon*, 66 F.4th 365, 372 (2d Cir. 2023). But even if it were not forfeited, the argument fails on the merits. As the district court noted, Brutus's arguments boil down to nothing more than a "subjective disagreement" with the government's investigation and its ultimate decision as to Brutus's claims. Sp. App'x at 8 (internal quotation marks omitted). Brutus has failed to show that the government's investigation was inadequate, that its decision to dismiss the case was unreasonable, or that its decision was based on arbitrary or improper considerations. *See Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 44 (1st Cir. 2022) (emphasizing that "the burden is always on the relator to demonstrate that the government is transgressing constitutional limits"); *see also Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376, 390 n.17 (3d Cir. 2021) ("Only the most egregious official conduct can be said to be arbitrary in the constitutional sense." (internal quotation marks and alterations omitted)). Likewise, Brutus's requests to conduct limited document discovery and to depose Alter were properly denied, because Brutus failed to make a "substantial threshold showing" of government impropriety sufficient to warrant discovery on this issue. *See Borzilleri*, 24 F.4th at 44.

Having considered Brutus's arguments and the record as a whole, we conclude that dismissal of

Brutus's action pursuant to section 3730(c)(2)(A) was appropriate.[2]

II. Settlement Approval under Section 3730(c)(2)(B)

Brutus additionally argues that the district court erred by failing to consider whether the government's settlements with Standard Chartered were "fair, adequate, and reasonable" under 31 U.S.C. § 3730(c)(2)(B). *See* Brutus Supp. Br. at 5–6. But section 3730(c)(2)(B) applies only when the government *settles* a *qui tam* action with a defendant. Here, the government moved to *dismiss* Brutus's action, so the language of section 3730(c)(2)(B) is irrelevant. And to the extent that Brutus argues that Standard Chartered's deferred-prosecution agreements with the government provide a valid basis for the application of section 3730(c)(2)(B), *see* Brutus Br. at 38–41, those agreements resolved criminal charges and administrative violations against Standard Chartered unrelated to the FCA, *see* J. App'x at 194–

[2] Brutus also insists that the district court wrongly dismissed its action because it "has stated a valid reverse false claim" against Standard Chartered under 31 U.S.C. § 3729(a)(1)(G). Brutus Br. at 41 (capitalizations omitted). By "reverse false claim," Brutus in essence argues that any "proceeds traceable" to a sanctions violation are automatically forfeitable to the United States, and "[b]y concealing the true amount of money" involved in its illegal banking activities, Standard Chartered "knowingly concealed . . . and improperly avoided . . . an obligation to pay . . . the [g]overnment." J. App'x at 78–79. In light of our determination that dismissal of Brutus's action was appropriate, we see no reason to address the merits of its reverse-false-claim arguments, which the district court did not reach or rely on in its dismissal order. *See Sulzer Mixpac AG v. A&N Trading Co.*, 988 F.3d 174, 184 (2d Cir. 2021) ("We generally refrain from considering issues not decided by the district court.").

285, and have no bearing on Brutus's complaint or the issues on appeal.

Accordingly, we reject Brutus's contention that the district court was required to consider whether the government's settlements with Standard Chartered were "fair, adequate, and reasonable" and decline to remand the case on this basis.

III. Indicative Ruling

Finally, Brutus asserts that the district court erred when it denied Brutus's Rule 62.1 motion for an indicative ruling based on what Brutus characterized as newly discovered evidence of Standard Chartered's malfeasance contained in several *Buzzfeed News* articles that postdated the dismissal. Specifically, Brutus argues that "[t]he district court erred by not addressing the question of whether the matter presented by [its] motion raises a substantial issue that warrants further consideration." Brutus Br. at 57. Again, we disagree.

> Rule 62.1(a) provides:
>
> If a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending, the [district] court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or
>
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Civ. P. 62.1(a). The district court here chose the second option when it denied the motion. Brutus's argument that the district court must also address

whether the motion raises a substantial issue simply ignores the "ordinary disjunctive meaning of 'or,'" connecting Rules 62.1(a)(1), (2), and (3). *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018). Brutus cites no authority supporting its novel interpretation, and we are aware of no basis for concluding that the district court abused its discretion in denying Brutus's Rule 62.1 motion. *See LFoundry Rousset, SAS v. Atmel Corp.*, 690 F. App'x 748, 750 (2d Cir. 2017) (collecting cases indicating that denials of indicative relief pursuant to Rule 62.1 are reviewed for abuse of discretion).

* * *

We have considered all of Brutus's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 CIVIL 1117 (PAE)

UNITED STATES OF AMERICA,
ex rel. BRUTUS TRADING, LLC,

Plaintiff,

—v.—

STANDARD CHARTERED BANK, STANDARD CHARTERED PLC, and STANDARD CHARTERED TRADE SERVICES CORPORATION,

Defendants.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

In this *qui tam* action brought on behalf of the United States, relator Brutus Trading, LLC ("Brutus" or "relator"), has alleged that defendants Standard Chartered Bank, Standard Chartered PLC, and Standard Chartered Trade Services Corporation (together, "defendants" or "Standard Chartered") engaged in banking practices that violated U.S. sanctions against Iran. In a July 2020 decision, the Court dismissed relator's complaint. It found that the Government had articulated multiple valid purposes served by dismissal, and that relator had not carried

its burden to show that a dismissal would be "fraudulent, arbitrary or capricious, or illegal." Relator's appeal of that dismissal is pending before the Second Circuit.

Relator now moves for an indicative ruling under Federal Rule of Civil Procedure 62.1 to the effect that, had it had jurisdiction to do so, the Court, based on disclosures in a post-dismissal BuzzFeed news report, would vacate the dismissal under Federal Rules of Civil Procedure 60(b)(2), 60(b)(1), 60(b)(3), or 60(d)(3). For the reasons that follow, the Court denies the motion for such indicative relief.

I. Background

A. The Motion to Dismiss

The Court assumes familiarity with the facts and procedural history of this case. In brief, this matter stems from defendants' admitted practice, between 2001 and 2007, of deceptively facilitating U.S. Dollar transactions by Iranian clients, in violation of U.S. sanctions and various New York and federal banking regulations. *See* Dkt. 18[1] (Second Amended Complaint, or "SAC") ¶¶ 27-32. Following a multi-year, multi-agency investigation, defendants entered into a 2012 Deferred Prosecution Agreement ("DPA") with the Department of Justice ("DOJ")—and related settlements or consent agreements with the Office of Foreign Asset Control ("OFAC"), the Federal Reserve, the New York County District Attorney's Office ("DANY"), and the New York Department of Financial Services ("DFS")—to resolve the matter, under which defendants paid hundreds of millions of dollars in fines and penalties. *See id.*; *id.,* Ex. A. The

[1] Except where specified, citations to the docket refer to the docket of this case, No. 18 Civ. 11117 (PAE).

2012 DPA was publicly announced on December 10, 2012. *Id.* ¶ 29.

On December 17, 2012, relator—an entity formed by Julian Knight and Robert Marcellus for the purpose of pursuing this action—filed a *qui tam* action that was assigned to Judge Forrest. Relator alleged that defendants had misled the Government in negotiating the 2012 DPA. *United States ex rel. Brutus Trading, LLC v. Standard Chartered Bank et al.*, No. 12 Civ. 9160 (KBF) ("*Brutus Trading I*"), Dkt. 36. Specifically, relator alleged that defendants had continued to violate the sanctions after 2007, notwithstanding their representations to the Government that they had ceased to do so. *Id.* ¶¶ 25-34. The Government investigated relator's allegations but found them unsupported.

In approximately August 2013, the Government informed relator's counsel that it intended to decline to intervene in the case. Dkt. 31 ("Nov. 2019 Gov't Mem.") at 8; Dkt. 32 ("Nov. 2019 Komar Decl.") ¶¶ 24-25. The Government kept the complaint under seal, however, while it pursued a separate investigation of potential Iran sanctions violations by defendants (the "2013 Investigation"). Nov. 2019 Gov't Mem. at 8; Nov. 2019 Komar Decl. ¶ 31. On May 10, 2017, Judge Forrest unsealed the case, *Brutus Trading I*, Dkt. 19; on July 14, 2017, the Government informed Judge Forrest that it would not be intervening, *id.*, Dkt. 24. On September 19, 2017, relator dismissed its complaint without prejudice. *Id.*, Dkt. 35.

On November 29, 2018, relator re-filed its complaint, *see* SAC ¶ 37, which was assigned to this Court, Judge Forrest having left the bench. Dkt. 1. In March 2019, the Government again declined to

intervene, Nov. 2019 Gov't Mem. at 12, and the case was later unsealed, Dkt. 3. On April 9, 2019, DOJ announced a new DPA (the "2019 DPA") with defendants—and OFAC, the Federal Reserve, and DFS announced new settlement or consent agreements with defendants—stemming from the results of the 2013 Investigation. *See* SAC ¶¶ 60-61; *see also* Dkt. 35 ¶¶ 11-16; Dkt. 58 ¶¶ 13-14.

On July 19, 2019, relator filed its First Amended Complaint, Dkt. 15 ("FAC"), in which, *inter alia,* it added the allegation that the 2019 DPA, like the 2012 DPA, "did not address the broader course of conduct by [defendants] in violation of the Iran sanctions" alleged by relator's complaint, *id.* ¶ 62. The FAC also advanced a new theory of recovery based on alleged reverse false claims, *see* 31 U.S.C. § 3729(a)(1)(G), by defendants, FAC ¶¶ 63-65.

On September 20, 2019, relator filed its Second Amended Complaint, in which it added allegations that it had been the initial source of the information leading to the 2019 DPA and related agreements, *see* SAC, 64-65, and was thus entitled to a share of the Government's recovery from those agreements, *id.* ¶ 69.

On November 21, 2019, the Government filed a motion to dismiss the SAC, Dkt. 30, a supporting memorandum of law, Dkt. 31, and declarations.[2] On January 10, 2020, relator filed a memorandum oflaw in opposition, Dkts. 48-49, with attached exhibits and

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[2] These included the declarations, each with attached exhibits, of FBI Special Agent Matthew Komar, Dkt. 32, of FBI Special Agent Wayne Boddy, Dkt. 33, of Alexandre Manfull, Dkt. 34, and of Patrick Bryan, Dkt. 35.

declarations.[3] On February 28, 2020, the Government filed a reply memorandum of law, Dkt. 54, and associated exhibits and affamations.[4] On March 13, 2020, relator filed a sur-reply, Dkt. 61, with attached exhibits.

On July 2, 2020, this Court granted the Government's motion to dismiss relator's *qui tam* complaint. Dkt. 62 ("July Op."). The Court held that the Government had proffered at least two valid reasons for dismissal of relator's suit, and that relator had not carried its burden to show that dismissal would be fraudulent, arbitrary and capricious, or illegal. *See id.* at 8-9. On August 3, 2020, relator filed a notice of appeal. Dkt. 66.

B. The Instant Motion

On October 27, 2020, relator filed a motion to reopen the case, Dkt. 67 ("Relator Mot."), and a brief in support of its motion for an indicative ruling that, had the Court retained jurisdiction, it would have vacated the dismissal, Dkt. 68 ("Relator Mem.").

The basis for relator's motion was a series of Buzzfeed News reports, the first of which was published on September 20, 2020. Relator argues that these news reports (the "BuzzFeed News Reports") justified vacating the dismissal. Relator Mot. ¶¶ 10, 17. It argues that the BuzzFeed News Reports constitute "[n]ewly discovered evidence" which "exposes

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[3] These included the declarations of Robert Marcellus, Dkt. 48-1, Julian Knight, Dkt. 48-2, Anshuman Chandra, Dkt. 48-3, and Dennis Sweeney, Dkt. 48-4.

[4] These included the reply affirmations of Agent Komar, Dkt. 55; Agent Boddy, Dkt. 56, Alexandre Manfull, Dkt. 57; and Elizabeth Nochlin, Dkt. 58.

the Government's representations [in its motion to dismiss filings] as untrue." Relator Mem. at 1.

Relator's arguments are not models of clarity. But relator appears, in essence, to argue that (1) the BuzzFeed News Reports show that defendants had engaged in transactions with sanctioned Iranian entities after 2007, and (2) that this contradicts a premise of the Government at the time it moved for the dismissal of relator's claims. As its factual basis for claiming that there were post-2007 transactions, relator represents that it gave internal Standard Chartered documents to the BuzzFeed reporters responsible for the news reports, and that these reporters compared these documents to records of Suspicious Activity Reports ("SARs") that the reporters had obtained.[5] Relator Mem. at 4-5. BuzzFeed then reported that at least 31 companies whose names appeared in Standard Chartered's internal records also appeared in one or more of 35 SARs relating to such transactions. *Id.* at 5; *see* Dkt. 73 ("Gov't Mem.") at 7. Relator quotes an excerpt from the BuzzFeed News Reports that "Standard Chartered processed hundreds of millions of dollars for companies it suspected were circumventing sanctions against Iran until at least 2017." Relator Mem. at 5. Relator further accuses the Government of

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[5] SARs are confidential reports "filed by financial institutions when they suspect a customer or a transaction might be involved in illegal or other suspicious activity." Dkt. 73 ("Gov't Mem.") at 1 n.2 (citing Dkt. 75 ("Manfull Decl.") ¶¶ 8-10); *see also id.* at 9-10 (explaining that as a matter of law, the Government "cannot confirm or deny ... the veracity of any descriptions in the [BuzzFeed News Reports] of alleged leaked SARs or otherwise discuss the contents of any SAR," but that, to resolve relator's instant motion, there is no need for the Court to review the SARs at issue).

failing to acknowledge in its filings pursuing dismissal that it had known about the SARs later reported by BuzzFeed. *Id.* at 9. Relater concludes that, given the ostensible revelations made by BuzzFeed, "it cannot be true" either that "the Government closely examined the records produced by relater" or that "Government investigators honestly came to the conclusion that Relator's allegations were meritless." *Id.* at 10.[6]

On October 27, 2020, this Court directed the Government to respond to relator's motion to reopen the case and for an indicative ruling that, if empowered to do so, the Court would vacate the dismissal. Dkt. 69. On November 12, 2020, the Second Circuit granted relator's motion to hold its appeal in abeyance pending the resolution of that motion. Dkt. 71.

On December 22, 2020, the Government filed a memorandum in opposition to relator's motion, Dkt. 73, and supplemental declarations of Agent Komar, Dkt. 74 ("Komar Decl."), and Alexandre Manfull, Dkt. 75 ("Manfull Decl."). On January 11, 2021, relater filed a reply, Dkt. 76 ("Relator Reply"),[7] and, the next day, the second supplemental declaration of Robert G. Marcellus, Dkt. 77 ("Marcellus Decl."); and the

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[6] Relator also faults DOJ and the Department of the Treasury for failing to implement President Trump's campaign to put Iran under "maximum pressure." Relator Mem. at 7. Whatever the merits of that commentary, it addresses matters outside the scope of this suit, which pertains to relator's claims that transactions between defendants and sanctioned Iranian entities continued past 2007.

[7] The same document also appears at docket entry 79.

supplemental declaration of Anshuman Chandra, Dkt. 78 ("Chandra Decl.").[8]

On February 2, 2021, the Court granted the Government leave, over relator's objection, to file a sur-reply brief. Dkts. 81-83. On March 8, 2021, the Government filed a sur-reply, Dlct. 86 ("Gov't Sur-reply"), and the third supplemental declarations of Agent Komar, Dkt. 87 ("Komar Supp. Decl."), and Manfull, Dkt. 88 ("Manfull Supp. Decl.").[9] Relator also submitted a letter with an offer of proof in response to the Government's sur-reply. Dkt. 91.[10]

II. Applicable Legal Standards

A. Indicative Ruling

Because relator has filed a notice of appeal, this Court presently lacks jurisdiction over this case. Under Federal Rule of Civil Procedure 62.1, however, a court that lacks jurisdiction because of a pending

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[8] Much of this filing seeks to relitigate-independent of the BuzzFeed News Reports-the reasoning behind the Court's grant of the motion to dismiss. *See* Relator Reply at 1-2 (discussion of relator's earlier documentation submitted to the Government); *id.* at 2-6 (terming Agent Komar and Manfull's testimony "implausible"); *id.* at 8 (referring Court to relator's opening brief on appeal); *id.* at 9-10 (arguing that Court's decision violates due process "[g]iven the conflicting record here").

[9] On March 8, 2021, the Government moved to place under seal portions of docket entries 76, 77, and 79. Dkt. 89. On March 12, 2021, the Court granted that motion. Dkt. 90.

[10] Relator also made filings without leave, including four copies of its sur-reply memorandum of law at docket entries 92-95, with a different exhibit attached to each, *see* Dkt. 92-1, Dkt. 93-1, Dkt. 94-1, Dkt. 95-1. These unauthorized submissions would not, if properly considered, alter the disposition of the pending motion.

appeal may issue an indicative ruling. That rule provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Civ. P. 62.1(a); *see also, e.g., Knopf v. Esposito*, No. 17 Civ. 5833 (DLC), 2018 WL 1961105, at *1 (S.D.N.Y. Apr. 24, 2018).

B. Rule 60(b)

Here, relator seeks relief under three provisions of Rule 60(b), as more fully explicated below. Rule 60(b) provides that"[o]n motion and just terms, the court may relieve a party ... from a final judgment, order, or proceeding[.]" The rule should, "[p]roperly applied ... strike[] a balance between serving the ends of justice and preserving the finality of judgments." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *see also*, *e.g.*, *Det. Badge #379 Angel Santiago v. ID&TISFX Mysteryland LLC*, No. 17 Civ. 101 (PAE), 2018 WL 1918612, at *1 (S.D.N.Y. Apr. 19, 2018). However, "[m]otions under Rule 60(b) are addressed to the sound discretion of the district court and are generally granted only upon a showing of exceptional circumstances." *Mendell, in Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990); *see also Nemaizer*, 793 F.2d at 61 ("Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances.").

C. Rule 60(d)

Relator also seeks relief under Rule 60(d). Rule 60(d) allows the court to "entertain an independent action to relieve a party from judgment," Fed. R. Civ. P. 60(d)(1), or to "set aside a judgment for fraud on the court," Fed. R. Civ. P. 60(d)(3), the provision that relator invokes here. The bar for invoking Rule 60(d) is high. "Rule 60(d) actions are warranted only when necessary 'to prevent a grave miscarriage of justice.'" *LinkCo, Inc. v. Naoyuki Akikusa*, 367 F. App'x 180, 182 (2d Cir. 2010) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)).

III. Discussion

Relator principally seeks relief under Rule 60(b)(2), and, in the alternative, under Rules 60(b)(1); 60(b)(3); and 60(d)(3). *See* Relator Mot. 1117-19. The Court considers each ground for relief in tum, treating 60(b)(3) and 60(d)(3), which both concern fraud, together.

A. Rule 60(b)(2)

Rule 60(b)(2) allows a court to vacate a previously entered final judgment because of "newly discovered evidence that, with reasonable diligence, could not have been discovered" within 28 days after the entry of judgment. Fed. R. Civ. P. 60(b)(2). A motion pursuant to this rule is disfavored and "properly granted only upon a showing of exceptional circumstances." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370,391 (2d Cir. 2001); *see also*, *e.g.*, *Reese v. McGraw-Hill Cos., Inc.*, 293 F.R.D. 617, 621 (S.D.N.Y. 2013), *aff'd sub nom. Reese v. Bahash*, 574 F. App'x 21 (2d Cir. 2014). A party seeking relief under Rule 60(b)(2) has the "onerous" burden of demonstrating four elements:

> (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.

Teamsters, 247 F.3d at 392.

Here, relator argues that the information in the BuzzFeed News Reports "is of such credibility and gravity" that the Court should set aside its order dismissing relator's claims. Relator Mot. ¶ 17. Relator, however, fails for multiple reasons to show that exceptional circumstances are present. For present purposes, the Court focuses on the most glaring deficiency: relator's failure to show, as required by the third element above, that the BuzzFeed News Reports would be admissible or is of such importance as likely to have changed the outcome of the earlier motion to dismiss.

As to admissibility, it is black letter law that newspaper articles are hearsay under Federal Rules of Evidence 801, and hence inadmissible if offered for the truth of the matter(s) asserted therein. *See*, *e.g.*, *Tokio Marine & Fire Ins. Co. v. Rosner*, 206 F. App'x 90, 95 (2d Cir. 2006). That, however, is precisely the purpose for which the relator proposes to put the BuzzFeed News Reports: as ostensible proof of the truth of the matters described therein relating to the purported content of the SARs, and how they ostensibly contradict the Government's assertions.

Nor can the SARs themselves clear the third element of the Rule 60(b)(2) bar. These reports, of

course, have not been produced to relator—relator relies merely on BuzzFeed's secondhand description of them. And even if the SARs were physically in hand, it is likely that they, too, would constitute hearsay, insofar as SARs, by their nature, are reports of observations made by financial institutions, often on the basis of documents in their custody, and as such are themselves secondhand conduits of information. In any event, the SARs, even assuming away these impediments, would not be admissible in this litigation. Per federal regulation, SARs, and information that would reveal their existence, "are confidential and shall not be disclosed except as authorized" in that paragraph. 31 C.F.R. § 1020.320(e); *see also* 12 C.F.R. §21.11(k)(Office of the Comptroller of the Currency regulation). The First Circuit has recently synthesized the caselaw concerning these regulations governing SARs. It noted that "[d]istrict courts have extrapolated from the statute and regulations an unqualified discovery and evidentiary privilege. that cannot be waived." *In re JPMorgan Chase Bank, NA.*, 799 F.3d 36, 39-40 (1st Cir. 2015) (cleaned up); *see also Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797 (RWS), 2004 WL 2624673, at *5-6 (S.D.N.Y. Nov. 18, 2004), *as modified on reconsideration sub nom. Bank of China, NY. Branch v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797 (RWS), 2005 WL 580502 (S.D.N.Y. Mar. 10, 2005). Accordingly, even if BuzzFeed were subpoenaed for and produced the SARs that its reporting described, and even if the contents of the SARs was non-hearsay under Rule 801, the SARs would still not be admissible.

In any event, even if they were admissible, neither the BuzzFeed News Reports nor the SARs as described therein are "of such importance that [they]

probably would have changed the outcome" on the Government's motion to dismiss. *See Teamsters*, 247 F.3d at 392. Critically, the Government represented in moving to dismiss that it had undertaken an investigation of relator's claims, and that it had found transactions by Standard Chartered after 2007, but that these had already been reported to the Government, and "were largely winding-down of preexisting (*i.e.*, pre-2007) transactions or otherwise did not appear to violate any sanctions rules." Gov't Mem. at 13. The Court found that the Government had thereby demonstrated a valid government purpose to dismiss the *qui tam* action, and the Government's "considered decision not to expend additional resources on this litigation," which the Government had found meritless, to be an additional, independent valid governmental purpose. July Op. at 6-7. Nothing in the BuzzFeed News Reports' account of the SARs would disturb that finding. As the Government convincingly explains, none of the SARs discussed in the article contradict its representations about the character of Standard Chartered's post-2007 transactions or that they had been discovered and reported to the Court. Nor do, or by nature could, they unsettle the Government's representations, on which the Court relied, as to the Government's purposes for moving to dismiss this case. *See* Gov't Mem. at 16 (explaining that the alleged SARs that referred to known Iranian entities "would add nothing to the Government's investigation"); Manfull Decl. ¶ 13 ("Whether SCB filed any alleged SARs related to these known Iranian clients is irrelevant because the principal question under investigation was whether the Bank's own post-2007 transactions with those Iranian entities violated any sanctions rules."); *id.* ¶¶ 17-22 (reviewing the BuzzFeed News

Reports' allegations and arguing that they do not support relator's claims). Relator therefore fails to show the exceptional circumstances required for relief under Rule 60(b)(2).

B. Rule 60(b)(1)

Under Rule 60(b)(1), "the court may relieve a party ... from a final judgment" upon a showing of "mistake ... or excusable neglect." Fed. R. Civ. P. 60(b)(1). Relator argues that the Government's representations of relator's claims "were based ... on a mistake or excusable neglect." Relator Mot. ¶ 18; *see also* Relator Mem. at 2 (describing "serious misrepresentations arising out of the Government's 'mistake' or 'excusable neglect'").

1. Mistake

A party may seek relief under Rule 60(b)(1)'s mistake provision "to remedy the mistake of a party or his representatives," *In re Matter of Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981), or "when the judge has made a substantive mistake of law or fact in the final judgment or order," *Howard v. MTA Metro-N. Commuter R.R.*, 866 F. Supp. 2d 196, 210 (S.D.N.Y. 2011) (internal quotation marks omitted), in which case the movant "must show that the district court committed a specific error," *id.* (quoting *Lugo v. Artus*, No. 05 Civ. 1998 (SAS), 2008 WL 312298, at *2 (S.D.N.Y. Jan. 31, 2008)).

2. Excusable Neglect

The determination of excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assoc., Ltd.*, 507 U.S. 380, 395 (1993). In evaluating such a claim, courts look to the following factors:

"[1] the danger of prejudice to [the nonmoving party], [2] the length of delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.; see also Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994); *United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993); *Santiago,* 2018 WL 1918612, at *1.

3. Application

Relator has not shown that it is entitled to relief under 60(b)(1) based on either a mistake or excusable neglect. As to the former, relator has not stated that this Court committed a specific substantive error or made a substantive mistake. Nor has it stated that it seeks relief from an error it or its representatives made.

Instead, relator attributes the mistake to the Government. It does not specify what that mistake was. (Inferentially, relator appears to claim that the Government had been unaware of Standard Chartered's post-2007 transactions, but, as noted, the Government has refuted that claim.) Relator instead makes only the blurry claim that the Government "submitted numerous misrepresentations," Relator Mem. at 7, and that these "ar[o]s[e] out of the Government's 'mistake,'" *id.* at 2. These bland generalities do not establish the exceptional circumstances required by Rule 60(b)(2), or the specific circumstances required by Rule 60(b)(1).

As to excusable neglect, the Rule is aimed at circumstances where the movant seeks relief from its *own* such neglect. *See*, *e.g.*, *Pioneer Inv. Servs.*, 507 U.S. at 393-95; *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 386 (E.D.N.Y. 1998) (in analyzing whether relief

under Rule 60(b)(1) is warranted, "a court must first determine whether the order from which relief is sought was the consequence of 'excusable neglect' by the movant or the movant's counsel"). That circumstance does not exist here. The Government, whom relator faults for ostensibly neglecting to uncover Standard Chartered's post-2007 transactions, is not seeking relief. In any event, as *Pioneer Investment Services* reflects, Rule 60(b)(1) is intended to empower a party to attempt to avoid the hard consequences of its own procedural lapse, not to provide a do-over based on the ostensible emergence of new substantive evidence. Rule 60(b)(1) is not triggered here. And, as noted, insofar as relator's claims sound in newly discovered evidence, they are governed by Rule 60(b)(2)—whose requirements it fails to satisfy—"and should not be labeled as if brought under a different provision of Rule 60(b)." *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004) (cleaned up).

C. Rule 60(b)(3) and 60(d)(3)

Under Rule 60(b)(3), a district court may relieve a party from a final judgment for fraud or fraud on the court. Fed. R. Civ. P. 60(b)(3); *State St. Bank*, 374 F.3d at 176 (citing *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 661 (2d Cir. 1997)). To succeed on a Rule 60(b)(3) motion, "a movant must show that the conduct complained of prevented the moving party from fully and fairly presenting his case." *State St. Bank*, 374 F.3d at 176 (internal quotation marks omitted). The movant must show "clear and convincing evidence of material misrepresentations." *Fleming v. New York Univ.*, 865 F.2d 478, 484 (2d Cir. 1989). The motion "cannot serve as an attempt to relitigate the merits." *Id.*

Like Rule 60(b)(3), Rule 60(d)(3) allows a court to set aside a judgment for fraud on the court, but without Rule 60(b)(3)'s limitations period.[11] *Shah v. New York State Dep't of Civ. Serv.*, No. 94 Civ. 9193 (RPP), 2014 WL 3583506, at *3 (S.D.N.Y. July 17, 2014) (citing *Anderson v. New York*, 07 Civ. 9599 (SAS), 2012 WL 4513410, at *5 (S.D.N.Y. Oct. 2, 2012)). Fraud satisfying Rule 60(d)(3) "is narrower in scope than that which is sufficient for relief" under Rule 60(b)(3). *Id.* (quoting *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995)). To meet the rule's "stringent and narrow" requirements for relief, *Anderson*, 2012 WL 4513410, at *4, the movant must show that the fraud "seriously affects the integrity of the normal process of adjudication," by clear and convincing evidence, and that "the fraud, misrepresentation or conduct ... actually deceived the court." *Id.* (cleaned up). "[S]uch fraud must seriously affect the integrity of the normal process of adjudication." *LinkCo*, 367 F. App'x at 182 (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988)) (cleaned up). In other words, claims of fraud under Rule 60(d) "embrace[] only that species ... which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court ..." *Hadges*, 48 F.3d at 1325.

Relator does not come close to showing such a fraud here. Relator states that, "should the Court determine that the false representations made by the Government in support of its motion to dismiss were made intentionally and for an improper purpose that would constitute fraud on the Court." Relator Mot.

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[11] A motion under Rule 60(b)(1), (2), or (3) must be made within a year after the entry of the judgment, order, or the date of the proceeding. *See* Fed. R. Civ. P. 60(c)(1).

19. The Court, however, does not and cannot find that a false representation was made. Relator also fails to establish any requirement of Rule 60(b)(3) and 60(d)(3) for fraud. Relator cannot show, let alone by clear and convincing evidence, that the BuzzFeed News Reports reveal material representations that impeded relator from presenting its case, or that the Court was deceived, and the integrity of its processes affected, by false representations. Rather, as discussed above, relater has not demonstrated that the Court's decision to dismiss relator's claims was the product of any misrepresentation whatsoever. Relator falls far short of the exacting standard required to demonstrate fraud or fraud on the Court.

CONCLUSION

For the foregoing reasons, the Court denies relator's motion for an indicative ruling that, if it had jurisdiction to do so, it would grant relater relief under Rule 60. Quite to the contrary, were the Court of Appeals to remand this case, the Court would deny relator's motion for relief under Rule 60.

The Clerk of Court is respectfully directed to terminate the motion pending at docket number 67. This case remains within the jurisdiction of the Court of Appeals.

SO ORDERED.

/s/ Paul A. Engelmayer
PAUL A. ENGELMAYER
United States District Judge

Dated: October 13, 2021
New York, New York

Appendix F

[ROYAL COURTS OF JUSTICE SEAL]

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES FINANCIAL LIST (ChD)

Neutral Citation Number: [2023] EWHC 2756 (Ch)

Case Nos: FL-2020-000038
FL-2020-000011
FL-2020-000009
FL-2020-000023

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/11/2023

Before:

THE HON MR JUSTICE MICHAEL GREEN

Between:

VARIOUS CLAIMANTS

Claimants

—and—

STANDARD CHARTERED PLC

Defendant

Graham Chapman KC, Shail Patel and William Harman (instructed by **Brown Rudnick LLP**)
for the **Claimants**

Adrian Beltrami KC and Dominic Kennelly
(instructed by **Herbert Smith Freehills LLP**)
for the **Defendant**

Hearing dates: 3, 4, & 5 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

THE HON MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

Introduction

1. Between 3 and 5 October 2023, I heard the first Case Management Conference ("CMC") in these proceedings that had been started some three years earlier. The bulk of the hearing was concerned with the Defendant's applications for certain parts of the case to be struck out and/or for reverse summary judgment to be entered; and for the Claimants to provide further information of their case pursuant to CPR Part 18. This is my reserved judgment on those applications.

2. I am pleased to say that the other issues on the CMC, including in particular the structure of the proceedings going forward in relation to whether there should be a split trial and if so where the split should be, were resolved by agreement between the parties and I have made an Order dealing with that. It essentially defers a decision on those matters to a second CMC to be held in Spring 2024 when the parties and the Court should be in a better position to deal with them.

3. There are four claims before the Court brought by a total of 230 Claimants against Standard Chartered plc ("**SC plc**") under sections 90 and 90A of and Schedule 10A to the Financial Services and Markets Act 2000 ("**FSMA**"). SC plc is the parent of Standard Chartered Bank (the "**Bank**") and its subsidiaries (collectively, the "**Group**"). Although there are four claims, there is a single consolidated set of pleadings and I have directed that the claims are to be managed and tried together.

4. The Claimants allege that SC plc made untrue and misleading market statements in 3 prospectuses and some 45 other items of published information over a period of 12 years (2007 to 2019) relating to non-compliance with sanctions against Iran, financial crime control failures and alleged bribery by members of the Group. The Claimants, as institutional investors in SC plc, say that they relied on those representations in acquiring, disposing or continuing to hold their securities issued by SC plc and have suffered loss as a result.

5. The Claimants were represented before me by Mr Graham Chapman KC, leading Mr Shail Patel and Mr William Harman. SC plc was represented by Mr Adrian Beltrami KC, leading Mr Dominic Kennelly. I am grateful to them for their clear and well-crafted submissions, both in writing and orally.

6. Mr Beltrami KC had a number of complaints about the claim, some of which were specifically related to the application to strike out, and others in relation to proper case management. These included issues about the standing of individual Claimants about whom he said that there had been inadequate investigation as to whether they were properly Claimants or even whether they exist as a matter of law. Mr Beltrami KC also complained about the lack of information provided by the Claimants as to important parts of their case, including, standing, reliance, loss and limitation. One of the applications I will be dealing with later in this judgment is SC plc's CPR Part 18 Request for Further Information.

7. The main application is SC plc's application to strike out and/or for reverse summary judgment in relation to the following parts of the claim:

   (1) The so-called "**Brutus Allegations**" which are to the effect that the Group's non-compliance with the sanctions were far wider and more systematic than it had admitted to in its two settlements with the US authorities in 2012 and 2019;

   (2) The allegation that there were "*person[s] discharging managerial responsibility*" ("**PDMR**") in SC plc who knew of or were

reckless as to the alleged bribery scheme in a Singaporean company called Maxpower Group PTE ("**Maxpower**") which was approximately 47% owned by the Group; and

(3) The Claimants' individual reliance claims.

8. Before turning to the application I should set out some more factual background and the legal context of the issuer liability regime.

Factual Background

9. There is an agreed summary of the factual background to this dispute set out in the Case Memorandum and List of Common Ground and Issues. The facts and matters set out below are largely derived from those documents.

10. As I said above, the Claimants are 230 institutional investors who claim to have acquired securities in SC plc, via 1,646 individual funds and/or accounts during the period February 2007 to April 2019. SC plc is a public company listed on the main market of the London Stock Exchange and the Hong Kong Stock Exchange. It is the parent company of the Bank which is a company incorporated by Royal Charter. The Group operates as a global retail, wholesale and investment banking institution through a network of branches and subsidiaries.

11. In September and December 2012, the Bank entered into settlement agreements with various US authorities relating to historic sanctions non-compliance (the "**2012 Settlements**"). As part of the 2012 Settlements, the Bank agreed to forfeit $227 million and admitted that "*[s]tarting in early 2001 and*

ending in 2007" it had violated US and New York State law by illegally sending payments through the US financial system on behalf of entities subject to US economic sanctions. The Bank admitted that it sought to conceal the involvement of sanctioned counterparties by manipulating and falsifying electronic payment information. The 2012 Settlements also stated that the Bank "*made the decision to exit the Iranian business*" in October 2006, ended its US-dollar business for Iranian banks by March 2007, and suspended all new Iranian business in any currency by August 2007.

12. On 17 December 2012, Brutus Trading LLC ("**Brutus**") filed a "*qui tam*" action in the US District Court for the Southern District of New York (the "**First Brutus Action**"). *Qui tam* actions are claims brought by private individuals or entities (known as "**relators**") on behalf of the US Government seeking monetary recovery which is shared between the US Government and the relators. Brutus was founded by a former employee of the Bank called Mr Julian Knight and an individual who previously worked with (but not for) the Bank called Mr Robert Marcellus. In the First Brutus Action, Brutus alleged, among other things, that the Bank had misled the US authorities in the run up to the 2012 Settlements by failing to disclose sanctions violations involving Iranian clients after 2007.

13. From March 2013, SC plc's annual and half-year reports and other announcements contained disclosures, the adequacy of which is disputed by the Claimants, about, amongst other things,

the ongoing investigations by the US and UK authorities.

14. In October 2014, media outlets reported that US authorities had reopened investigations into the Bank in respect of sanctions violations. Further, in November 2015, SC plc announced that the investigations related to the period after 2007 and the completeness of the Bank's disclosures to the US authorities at the time of the 2012 Settlements.

15. From April 2016, global news agencies reported allegations that Maxpower had engaged in a corrupt scheme between 2012 and 2015 to bribe Indonesian government (and other) officials to win or renew contracts or obtain other advantages such as quicker payments (the "**Bribery Scheme**"). SC plc does not admit that Maxpower engaged in the Bribery Scheme and denies that the Group or its employees made, directed or condoned any improper payments. Maxpower was not a subsidiary or member of the Group. The Bank voluntarily disclosed to the US and UK authorities the alleged Bribery Scheme. It was investigated by the US Department of Justice, which closed its inquiry without bringing any prosecution against any member of the Group. SC plc understands that there are no ongoing investigations in relation to this by any authority.

16. In February and April 2019, the Bank and various US and UK authorities entered into further settlement agreements in respect of non-compliance with US sanctions law and in respect of UK anti-money laundering breaches (the "**2019 Settlements**"). By the 2019

Settlements, the US authorities imposed a further financial penalty of some $947 million and the UK Financial Conduct Authority (the "**FCA**") imposed a penalty of £102 million. The Bank admitted that, from at least November 2007 to 2014, the Bank and its New York branch facilitated payments worth $600 million in violation of US sanctions from clients resident in Iran, and payments worth $20 million involving entities from other sanctioned countries. The FCA found that there were "*serious and sustained*" shortcomings in the Group's financial crime controls, customer due diligence and ongoing monitoring.

17. In September 2018, Brutus sought (and obtained) voluntary dismissal of the First Brutus Action and, in November 2018, filed a new *qui tam* action in the US District Court for the Southern District of New York (the "**Second Brutus Action**").

18. Brutus' case in the Second Brutus Action is summarised in a Complaint which was most recently amended on 20 September 2019, and was supported by Declarations dated 10 January 2020 from Mr Knight and Mr Marcellus. Brutus also relies on (among other documents) a Declaration from another former employee of the Bank called Mr Anshuman Chandra dated 10 January 2020.

19. In summary, Brutus alleges in the Second Brutus Action that:

    (1) The Bank's breaches of US sanctions were "*far more extensive and elaborate during the 2001 – 2007 period than had been portrayed*" to various US authorities.

Further, the Bank continued to engage in "*U.S. dollar clearing and other financial transactions with and for the benefit of Iranian government entities… until at least 2014*", and the 2019 Settlements "*addressed a relatively small subset of the course of conduct by [the Bank] in violation of Iran sanctions*".

(2) The Bank deliberately designed and implemented a scheme to evade US sanctions "*in a way that would not trigger software programs designed to identify and stop transactions involving sanctioned parties*" or leave a record in the Bank's internal systems. The scheme was "*known internally to high level [Bank] officials as 'Project Green'*". One of the Bank's internal departments, the Originations and Client Coverage Group, was deployed in Dubai to "*create fraudulent records that allowed Iranian-connected clients to open accounts without their Iranian connection being detected*", and a Bank committee known as the Iran Group Risk Committee was mandated to "*develop strategies to evade the Iran sanctions*".

(3) Brutus was the source of information that led to the 2019 Settlements such that Brutus is entitled to (and claims) a share of the financial penalties which were imposed on the Bank by the US authorities as part of the 2019 Settlements.

20. In November 2019, the US Government filed a motion to dismiss the Second Brutus Action. In

a Memorandum of Law in support of its application to dismiss the Brutus Action, the US Government alleged that Brutus' allegations had been thoroughly investigated by several government agencies who had formed the view that "*most of the transactions at issue were legitimate winding-down of the Bank's pre-existing relationships… and the remaining transactions were otherwise not problematic*".

21. In July 2020, the Second Brutus Action was dismissed by the US District Court for the Southern District of New York. In its Opinion and Order dismissing the Second Brutus Action, the District Court noted that there was a conflict in the authorities as to whether the US Government has an unfettered right of dismissal in *qui tam* actions (the so-called "***Swift* standard**") or must establish a valid governmental purpose and rationale behind dismissal, at which point the burden shifts to the relator to demonstrate that the dismissal was fraudulent, arbitrary and capricious, or illegal (the so-called "***Sequoia* standard**"). However, and in the event, the District Court held that it was not necessary to resolve that dispute because the US Government's application satisfied even the more onerous *Sequoia* standard for judicial review. In August 2023, an appeal from this order was dismissed.

22. Notwithstanding the dismissal of the Second Brutus Complaint, the Claimants plead the above allegations made in the Second Brutus Complaint and maintain that those allegations are true. They say that the dismissal of the Second Brutus Complaint was not on the merits. The Claimants refer to the conduct that was the

subject of the 2019 Settlements and the allegations made by Brutus as the "**Relevant Misconduct**" in their Statements of Case. SC plc admits the former, but denies the latter and seeks to strike those allegations out.

The Issuer Liability Regime

23. Section 90 FSMA is concerned with listing particulars, including prospectuses. Any person responsible for an untrue or misleading statement included in such particulars or for an omission from the particulars of any matter required to be included is liable to pay compensation to a person who has acquired securities to which the particulars apply and suffered loss as a result. There is a dispute as to whether the Claimants are required to prove reliance on the untrue or misleading statements or any omission from the particulars. The Claimants rely on prospectuses issued in 2008, 2010 and 2015 by SC plc in respect of rights issues.

24. Section 90 FSMA is subject to exemptions provided by Schedule 10 FSMA, including an exemption from liability where at the time when the listing particulars were submitted to the FCA, the person responsible for the listing particulars reasonably believed (having made such enquiries, if any, as were reasonable) that the statement was true and not misleading or the matter whose omission caused the loss was properly omitted. SC plc relies on this defence.

25. Section 90A and (following amendments introduced on 1 October 2010) Schedule 10A FSMA make provision for the liability of issuers of securities to pay compensation to persons who

have suffered loss as a result of a misleading statement or dishonest omission in certain "*published information*" (namely, market publications) relating to the securities or a dishonest delay in publishing such information.

26. Under para 3(2) of Schedule 10A FSMA, an issuer is liable in respect of an untrue or misleading statement only if a PDMR within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading. Paragraphs 3(3) and 5(2) impose an equivalent PDMR knowledge requirement on claims in respect of material omissions and dishonest delay. It is clear that s.90A FSMA requires dishonesty of a PDMR to be proved.

27. Para 8(5)(a) provides that for the purposes of Schedule 10A the definition of a PDMR of an issuer whose affairs are not managed by its members is "*any director of the issuer (or person occupying the position of director, by whatever name called)*". In *Allianz Global Investors GmbH & Ors v G4S Ltd* [2022] EWHC 1081 (Ch), ("***G4S***") Miles J held that this definition confines PDMRs to directors of the issuer as understood in the context of company law. Accordingly, only *de jure*, *de facto* or (possibly) shadow directors of the issuer are PDMRs. This is relevant to the Bribery Scheme allegations and is dealt with in more detail below.

28. Further, the effect of paras 3(1) and 3(4) of Schedule 10A FSMA is that an issuer is only liable to pay compensation to a person who acquires, continues to hold or disposes of the securities in reasonable reliance on published

information to which Schedule 10A applies and suffers loss in respect of the securities as a result of any untrue or misleading statements in that published information or the omission from that published information of any matter required to be included in it.

29. In the case of dishonest delay, an issuer is liable under para 5(1) of Schedule 10A FSMA to pay compensation to any person who acquires, continues to hold or disposes of the securities and suffers loss in respect of the securities as a result of delay by the issuer in publishing the information. In other words, there is no reasonable reliance requirement in dishonest delay claims.

Summary of Parties' Pleadings

30. The Claimants' claims under s.90A FSMA concern approximately 45 items of published information issued by SC plc over a period of 12 years between 2007 and 2019. The information is set out in a 170-page Annex A to the Amended Particulars of Claim. The Claimants have extracted 275 passages from the published information and have alleged that these convey (expressly, or by necessary implication) the 12 representations pleaded at [32] of the Amended Particulars of Claim. These included alleged representations as to the knowledge of the Bank's senior management from time to time, which the Claimants have termed the "**Bank Knowledge Representations**".

31. The representations are said to have been rendered untrue or misleading in the light of the Relevant Misconduct and/or the Bribery Scheme. Further or alternatively the Claimants

allege that the published information omitted to disclose the Relevant Misconduct and/or the Bribery Scheme, and/or that it delayed disclosing these matters.

32. As to the PDMRs, the Claimants allege that at least one PDMR in SC plc knew of or was reckless as to the Relevant Misconduct, the Bribery Scheme and/or the untrue or misleading statements, omissions and/or delay. The Claimants have identified 12 named individuals with the relevant state of mind relating to the Relevant Misconduct. Some of those individuals were, for at least some of the relevant period, *de jure* directors of SC plc. Otherwise, the Claimants contend that they were PDMRs on the basis that they were *de facto* directors of SC plc. SC plc does not seek to strike out those allegations.

33. But in relation to the Bribery Scheme, SC plc does seek to strike out the allegation as to the identification of relevant PDMRs. The Claimants allege that SC plc's Group Executive and four employees of Standard Chartered Private Equity Limited ("**SCPE**") and/or Standard Chartered IL&FS Asia Infrastructure Growth Fund Company PTE Limited ("**SC IL&FS**"), who sat on Maxpower's board as the Bank's nominees, were PDMRs in SC plc with the relevant state of mind relating to the Bribery Scheme. There is no allegation pleaded that those four employees were *de facto* directors of SC plc but the Claimants wish to argue at trial that they were PDMRs in SC plc, despite Miles J's judgment in *G4S*.

34. In relation to reliance, the Claimants plead two forms:

    (1) "***Common Reliance Claims***" which SC plc says are "*legally novel*" and which depend on the notion that, even though the Claimants did not specifically rely on the published information, they did indirectly rely on it by reference to the price at which SC plc's shares traded in the market which the Claimants say was inflated as it reflected the false statements in the published information; and

    (2) "***Individual Reliance Claims***" which SC plc does seek to strike out, alternatively seek further information, because they have been pleaded on a purely generic basis whereby each Claimant is said to have read the relevant published information or to have relied on other unspecified information such as from corporate brokers that acted as some form of conduit for the published information.

35. As I have already said, SC plc admits the conduct which was the subject of the 2019 Settlements, denies that the matters alleged in the Second Brutus Action are true, and does not admit that Maxpower engaged in the Bribery Scheme.

36. In addition by way of defence to the claims under section 90A and Schedule 10A FSMA:

    (1) SC plc puts the Claimants to proof as to whether they have standing, that is whether (a) they have legal personality and (b) acquired, continued to hold or disposed

of securities issued by SC plc (or interests therein) in the relevant period.

(2) SC plc denies that its published information contained the representations pleaded at [32] of the Amended Particulars of Claim (including the Bank Knowledge Representations) and, in any event, denies that any of the published information on which the Claimants rely were untrue or misleading and/or that the published information omitted matters which were required to be included. SC plc also denies that SC plc delayed in publishing true information.

(3) SC plc denies that a PDMR within SC plc had the relevant knowledge in respect of any untrue or misleading statements, omissions and/or delay. SC plc also denies that a PDMR within SC plc was reckless as to any untrue or misleading statements. Further, SC plc denies that any of the individuals who are said to have been *de facto* directors (and, therefore, PDMRs) were in fact *de facto* directors. Further and in any event, SC plc also denies that its senior management had the knowledge which is the subject of the Bank Knowledge Representations.

(4) SC plc denies that the Common Reliance Claims satisfy the requirement of reliance under section 90A and Schedule 10A FSMA and contends that the Individual Reliance Claims are inadequately pleaded and/or in any event do not satisfy the relevant requirements.

(5) No admissions are made in relation to causation and loss.

37. Some of the Claimants also advance claims under section 90 FSMA. In summary:

(1) They allege that the prospectuses published in November 2008, October 2010 and November 2015 for which SC plc was responsible conveyed (expressly, or by necessary implication) the representations pleaded at [32] of and Annex B to the Amended Particulars of Claim (including the Bank Knowledge Representations), and that those statements were untrue or misleading and/or the prospectuses omitted matters which were required to be included in light of the Relevant Misconduct and/or the Bribery Scheme.

(2) Further, those Claimants say that they acquired securities to which the prospectuses applied and suffered loss as a result of the untrue or misleading statements and/or omissions.

38. SC plc defends the claims under section 90 FSMA on the following broad bases:

(1) Again SC plc puts the relevant Claimants to proof as to whether they have standing, both as to whether they (a) have legal personality and (b) acquired securities to which the prospectuses applied. SC plc says that it is totally unclear which Claimants are pursuing claims under section 90 FSMA.

(2) SC plc denies that the prospectuses contained the representations pleaded at

[32] of the Amended Particulars of Claim and, in any event, denies that any of the statements on which the Claimants rely were untrue or misleading and/or that the prospectuses omitted matters which were required to be included.

(3) No admissions are made in respect of causation and loss. SC plc complains that little or no information has been provided as to the Claimants' alleged losses.

(4) SC plc contends that it is in any event exempted from liability because at the time that the prospectuses were submitted to the FCA for approval, each of the then directors of SC plc believed (having made all reasonable enquiries) that all statements were true and not misleading and no matter required to be included had been omitted.

(5) SC plc also requires the Claimants to prove that their cause of action(s) accrued less than 6 years before the relevant claim form was issued and/or that the limitation period has been postponed pursuant to section 32 of the Limitation Act 1980. Again SC plc complains that there is no information about limitation including in particular in relation to the 2008 and 2010 prospectuses which were published 12 and 10 years before the proceedings were commenced.

Strike out / Summary Judgment legal principles

39. There was little dispute between the parties as to the principles to be applied when the court is considering a strike out or reverse summary judgment application. It should not be forgotten that SC plc only seeks to strike out part of the claims and that the remainder will continue on in the usual way.

40. Mr Chapman KC raised the preliminary procedural issue as to whether it is appropriate for the court to consider the application where it would involve prolonged serious argument and where it will not obviate the need for a trial or substantially reduce the burden of the trial. He relied in particular on what Potter LJ said in *Partco Group Ltd v Wragg* [2004] BCC 782 at [27] – [28], which itself built on the House of Lords cases in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 and *Williams v Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368. Mr Chapman KC referred to the fact that the application did require prolonged argument – in the event it took up two full days – and he submitted that, even if it succeeded, it would not save much time at the trial as many of the issues would have to be explored anyway in the context of the remaining allegations.

41. I heard short argument on this procedural point. Mr Beltrami KC submitted that there would be substantial savings in trial time and preparation, particularly on disclosure without the Brutus Allegations, and without the Individual Reliance Claims. I was persuaded that there was sufficient benefit to hear the

application, particularly as 3 days had been allocated to the hearing including the other CMC aspects, which I then proceeded to do. Mr Chapman KC submitted that the points he made in relation to this remained important considerations on the substantive application as to whether it would be appropriate to grant summary judgment or strike out, including whether there may be another "*compelling reason [for] a trial*."

42. As to the legal principles in relation to strike out and/or summary judgment, Mr Chapman KC referred to the helpful summaries in: *Re Regis UK Limited (In Administration)* [2019] EWHC 3073 (Ch) at [22] for strike out; and *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] for summary judgment. Mr Chapman KC emphasised the following, which I accept:

    (1) On a strike out it must be assumed that the facts stated in the statement of case are true;

    (2) It is not appropriate to strike out a statement of case in an area of developing jurisprudence because novel points of law should be based on actual findings of fact; this may be relevant to the Claimants' plea as to the relevant PDMRs on the Bribery Scheme allegations;

    (3) It is not appropriate on a summary judgment application for the court to conduct a "*mini-trial*" to resolve conflicts of evidence – see *Swain v Hillman* [2001] 2 All ER 91;

(4) The court should hesitate before making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts, following disclosure and cross-examination, would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(5) Building on the latter point, Mr Chapman KC referred to the information imbalance, a feature of these cases, which means that the facts are primarily within the defendant's knowledge and may only later emerge through disclosure etc; he referred to Rimer J's (as he then was) comments in [44] of *Microsoft Corporation v P3 Com Ltd* [2007] EWHC 746.

43. Mr Beltrami KC did not dissent from the above principles but focused far more on the requirements of properly pleading such a case, particularly one of fraud or dishonesty. He submitted that any facts pleaded in the Particulars of Claim must have a sufficient evidential basis and that it would be improper to plead a speculative case for which there is no evidence: see *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 per Patten J, as he then was, at [21].

44. Mr Beltrami KC referred to Warby LJ's judgment at first instance in *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 1245 (Ch) in which he said at [54] that a party:

> "does not need to have sufficient evidence to prove its case in its possession at the time of pleading. It is entitled to gather such

> evidence through the litigation process. It must (1) believe the assertion to be true; (2) intend to support it with evidence at trial; and (3) either have reasonable evidence for the assertion or a reasonable basis for a belief that the evidence will be available at trial."

45. Mr Chapman KC picked up on point (3) in the above paragraph from Warby LJ's judgment and submitted that the evidence available to the Claimants at the time of the pleading may be inadmissible or privileged, but so long as they reasonably believe that there will be admissible evidence to prove their case at trial, the allegation can be pleaded.

46. However, Mr Beltrami KC seemed to be suggesting that something more was required and the Claimants had either to show that they had taken steps to verify their claims before they pleaded them or to plead fully all the evidence to support the allegation of fraud or dishonesty. He derived this obligation from the requirement for a statement of truth and the particular strictures in relation to pleading fraud or dishonesty. He relied on the following:

    (1) Sales LJ, as he then was, said *in Playboy Club London Ltd v Banca Nazionale Del Lavoro* [2018] EWCA Civ 2025, at [46]

        > "Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence".

    (2) The Commercial Court Guide provides that "*Full and specific details should be given of*

any allegation of fraud, dishonesty, malice or illegality", and that "*where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out*": see para C1.3(c). (PD16 is to similar effect.)

(3) As Lord Millett said in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 [2001] UKHL 16 at [186]:

> "the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

(4) Building on that, Flaux J, as he then was, said in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] that there must be some pleaded fact "*which tilts the balance and justifies an inference of dishonesty*".

(5) Mr Beltrami KC submitted that the primary facts which must be pleaded were described by Denning LJ, as he then was, in *British Launderers Association v Hendon Rating Authority* [1949] 1 KB 462 at pp 471-2, "*Primary facts are facts which are observed by the witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents.*"

47. However, the cases referred to by Mr Beltrami KC are more concerned with whether the pleaded facts are sufficient to found an allegation of fraud or dishonesty or whether they could also be consistent with, say, an allegation of negligence. That is not the issue before me, which is whether there is sufficient evidence for the plea of fraud and dishonesty to be made and whether enough of that evidence has been pleaded.

48. In this respect I bear in mind what Sales J, as he then was, said in the competition case of *Nokia Corp v AU Optronics* [2012] EWHC 731 (Ch) in [62] to [67] that a party pleading fraud (in that case, a secret cartel) is entitled to a "*measure of generosity*" because of the information imbalance and the fact that at early stages of the proceedings, that party does not have access to all relevant information and documents. However, this was subject to the procedural safeguards that Sales J described for the protection of the party against whom such an allegation is made, including the strict professional obligations on counsel pleading fraud or dishonesty. In *The Federal Deposit Insurance Corp v Barclays Bank plc* [2020]

EWHC 2001 (Ch) at [39], Snowden J, as he then was, said that the safeguards referred to by Sales J meant that parties should be reticent about pleading fraud and should not do so without a "*'solid foundation' in the evidence,* [to be] *contrasted with 'speculation and inference'*".

The Brutus Allegations

49. SC plc has advanced a number of arguments for striking out or summary judgment of the Brutus Allegations, some of which fell away in the course of Mr Beltrami KC's oral submissions. What Mr Beltrami KC concentrated on was the sufficiency of the pleading in accordance with the principles set out above and in particular:

    (1) The suggested requirement that the Claimants should have sought to verify the Brutus Allegations if they were intending to plead them in their claims, so as to ensure that there was a sufficient foundation in the evidence for making those allegations; and

    (2) That the "primary facts" in support of the allegations of fraud should have been pleaded.

50. Mr Beltrami KC had originally argued that the Claimants' pleadings were defective because they did not actually make the Brutus Allegations themselves; rather they seemed to be relying on the allegations in the Second Brutus Action as a form of proxy for their own allegations. It was also said that the Claimants' case was therefore based on the inadmissible opinion of third parties, namely the persons behind Brutus. These points were not pursued

once it became clear, if it was not before, that the Claimants are making the Brutus Allegations for themselves and averring that they are true. Furthermore, they are not relying on any third-party opinions for making the Brutus Allegations.

51. Mr Chapman KC submitted that the pleading of the Brutus Allegations has been properly done and is sufficiently particularised. He criticised the notion that the Claimants should be required to prove at this stage how they were satisfied that the allegations are properly founded so that they are able to plead them, accepting that they include allegations of fraud and dishonesty. His point was essentially that the Brutus Allegations have been adequately pleaded supported by a statement of truth and there is no basis for suggesting that the Claimants' counsel team have not complied with their professional obligations in relation to pleading fraud and dishonesty. He also said that SC plc has been able to plead a defence to the Brutus Allegations and it has at no time sought further information in relation to them. Accordingly, the application to strike out or for summary judgment in relation to the Brutus Allegations is misconceived and the Claimants have reasonable grounds for making those claims which have at least a real prospect of succeeding at trial.

52. I agree with Mr Chapman KC on the Brutus Allegations and I will dismiss SC plc's application in such respect. I will endeavour shortly to explain why that is so.

53. The structure of the Amended Particulars of Claim is as follows:

(1) In Section C.3, [20] to [24], the Claimants plead the Relevant Misconduct, based on the 2019 Settlements and the Brutus Allegations. [24] sets out the allegations of misconduct in the Second Brutus Action that the Claimants rely on and which makes clear that they go far wider than the misconduct disclosed in the 2019 Settlements, including the operation of a deliberate strategy to evade the Iran sanctions.

(2) In section C.4, at [25] to [27], the Relevant Misconduct is defined and explained. [25] states that the Relevant Misconduct is that which had been set out in the previous paragraphs, being the "*subject matter of the 2019 Settlements and the Brutus complaint*". In [26], the Claimants say that they are reliant on publicly available documents and reserve the right to plead further following disclosure.

(3) Then there is [27] which came in for much criticism by Mr Beltrami KC as being a wholly inadequate plea of fraud. However, as Mr Chapman KC pointed out, the evidential basis for [27] is found in [21] to [24], which is then summarised in [27] as the allegations that the Claimants rely on. It is in the following terms:

> "27. Without prejudice to the generality of the foregoing, the Relevant Misconduct comprised, in summary:

> 27.1. The deliberate and/or systemic course of conduct in the Bank developing its Iran business in breach of sanctions with a view to evading them;
> 27.2. The use of online and/or fax banking and/or other techniques as specified in the Brutus Complaint, by the Bank and/or its clients to evade sanctions laws and regulations;
> 27.3. Wholesale failures in AML controls, in particular in the Middle-East, and as applicable to customers which might pose financial crime and sanctions risks;
> 27.4. The continuation of Iranian business in breach or potential breach of sanctions from mid-2007, contrary to the impression given to the US authorities in 2012;
> 27.5. The misleading of the US authorities during the Initial Investigation to the effect that the Bank had ceased engaging in the transactions complained of in 2007 when it had not done so."

(4) SC plc only seeks to strike out [27.1] and [27.2]. This was not really explained but it must be based on its supposition that those two subparagraphs are wholly dependent on the Brutus Allegations, whereas the others are supported by the allegations based on the 2019 Settlements.

54. SC plc's Amended Defence at [30] admits the Relevant Misconduct insofar as it is based on the 2019 Settlements but denies it insofar it is

based on the Brutus Allegations. At [26.4] of the Amended Defence SC plc pleads that the Brutus Allegations are false and denied. The basis for that denial is principally the reasons why the Second Brutus Action was dismissed and the evidence adduced by the US authorities as to their investigations and conclusions on the Brutus Allegations. As Mr Chapman KC submitted, that defence appears to be based, at least in part, on the opinion of a third party, namely the US authorities, turning one of SC plc's criticisms of the Brutus Allegations back on itself.

55. The important point about the Amended Defence is that SC plc seems to have had no difficulty in understanding the case it has to meet. Nor is there any suggestion that the Claimants have not adequately pleaded the Brutus Allegations or that in some way this was an improper plea of fraud or dishonesty. It would not be uncommon to find in a defence an express reservation of the defendant's right to apply to strike out the allegation, but no such words appear in the Amended Defence. And as I have said above, there was no request for further information.

56. In [23] of the Amended Reply, the Claimants joined issue with SC plc's denial of the Brutus Allegations. They pleaded at [23.2.3]:

> "It is the Claimants' position that the additional allegations of misconduct set out in the Brutus Complaint are accurate and will be found proved following disclosure and oral evidence in these proceedings."

If there was any doubt in SC plc's mind as to whether the Claimants were actually making the Brutus Allegations, this was clarified by this plea in the Amended Reply.

57. Mr Chapman KC also referred to the Agreed Case Memorandum and submitted that the position adopted by SC plc in relation to the Brutus Allegations in this application is even more curious and untenable in the light of what it agreed to in that document. At [8] of the Agreed Case Memorandum the allegations in [24] of the Amended Particulars of Claim were summarised together with the defence to them. In [9], SC plc agreed the following wording:

> "The Claimants allege that the 2019 Settlements and the Brutus Complaint evidence relevant misconduct on the part of the Bank which is further particularised at paragraph 27 of the Amended Particulars of Claim…"

It is difficult to read that as anything other than an acceptance by SC plc that the claim, including the Brutus Allegations, was properly particularised in the Amended Particulars of Claim and that it was adequately pleaded. Furthermore, SC plc has been able to agree the lists of issues for the purposes of disclosure which includes what that would be if the Brutus Allegations remain in to be tried.

58. There has therefore been a rethink of SC plc's position on this and it has decided to pursue this application. Insofar as the application is based on inadequate pleading of the particulars, or "primary facts" as Mr Beltrami KC preferred to put it, I find it difficult to see how that can be properly suggested at this stage.

59. As to the purported requirement that the Claimants scrutinise and verify the underlying evidence that supports the Brutus Allegations, it is unclear where such a requirement comes from but also it potentially puts the Claimants in an awkward position of having to disclose their confidential and privileged investigations that have gone to support their claim. Mr Beltrami KC accused the Claimants of pleading only "*conclusory*" allegations without identifying the facts upon which they are based. But as I have said, it seems to me that this has been adequately particularised and the only further question raised by Mr Beltrami KC is whether the Claimants had available to them sufficient evidence of fraud and dishonesty so as to be able to plead such allegations.

60. The first point to make is that there is no basis for questioning whether the statement of truth was appropriately signed or whether the Claimants' counsel had what they considered to be sufficiently credible evidence to plead fraud and dishonesty at this stage. That should be an end to this matter as this is a substantial procedural safeguard, as Sales J put it in the *Nokia* case, that protects SC plc from unfounded allegations of fraud.

61. Even if more evidence is required on this, the Claimants' solicitor, Mr Neill Shrimpton, a partner in Brown Rudnick LLP, gave an explanation in his witness statement dated 1 September 2023 as to why the Claimants had reasonable grounds for making the Brutus Allegations. This included the following:

(1) The Brutus Allegations are founded on information provided by Mr Knight and Mr Chandra, former employees of the Bank, and Mr Marcellus who worked with the Bank and had direct knowledge of relevant events. All three made Declarations "*under penalty of perjury*" in the Second Brutus Action containing their evidence supporting that claim. For instance Mr Marcellus gave evidence as to an invitation he received in 2009 or 2010 to attend an event organised by the Bank for its Iranian customers on Kish Island in Iran.

(2) In Mr Knight's Declaration he referred to Bank documents that he was given when he left the Bank in 2011, and "*enormous volumes*" of records which were handed to Brutus by Mr Chandra between 2013 and 2016.

(3) Both Mr Knight and Mr Chandra claim to have been subjected to retaliatory acts by the Bank as a result of their whistle-blowing activities, assistance to the US Government and pursuit of the *qui tam* actions.

(4) As set out at [43.6] of Mr Shrimpton's witness statement, certain aspects of the Brutus Allegations have been proved to be demonstrably correct. For example, the core allegation, that the Bank misled the US authorities when entering into the 2012 Settlements, is accurate. SC plc admitted as much in the 2019 Settlements. Mr Beltrami KC took issue with whether the misleading was deliberate or not, but that

misses the point that Brutus had alleged that the US authorities had been misled and this turned out to be true.

(5) The Brutus Allegations do not have the look or feel of fabrication or speculation. To the contrary, the allegations are specific and display detailed knowledge of the Bank's internal procedures. Mr Shrimpton referred to the evidence concerning "*Project Green*" and the use of the Bank's "*OLT3*" system. Mr Beltrami KC said that this impressionistic assessment by Mr Shrimpton does not prove anything but it seems to me that this is a legitimate consideration when assessing the credibility of the evidence.

(6) While the Brutus Allegations are very serious in terms of their scale and alleged deliberate policy, the Bank has already admitted engaging in similarly serious misconduct in both the 2012 and 2019 Settlements.

(7) The Second Brutus Action was dismissed without the District Court making any findings on the substance of the Brutus Allegations. The District Court did no more than find that Brutus had not established the high burden of proving that the dismissal motion was fraudulent, arbitrary and capricious, or illegal. The District Court reached that conclusion without disclosure (or any response) from the Bank or cross-examination of any witnesses. As set out at [43.8] of Mr Shrimpton's witness statement, Brutus was denied the opportunity to depose a US Government

employee, Daniel Alter, who would have testified "*as to whether [the Bank] fully cooperated with the investigation"* and whether the Bank's "*consultant [i.e. Promontory LLC] altered records and computers*".

(8) While the US Government stated in support of its dismissal motion that it had formed the view that Brutus' allegations were inaccurate, there is evidence to suggest that it took that position premised on incomplete information and/or motivated by other factors, including embarrassment at having missed or overlooked information suggesting a much broader fraudulent scheme by the Bank and the potential conflict of having to hand over to Brutus some of the financial penalties imposed on the Bank in the 2019 Settlements.

62. Some of the above points are stronger than others but I consider that the Claimants and those advising them were entitled to take them into account in assessing whether there was sufficiently credible evidence before them to justify making the Brutus Allegations. There will no doubt have been other matters that were investigated and scrutinised before deciding to plead the Brutus Allegations in the way they did. I do not think that the Claimants have to explain what they have done in order to satisfy themselves as to the propriety of pleading fraud and dishonesty, so long as it is adequately pleaded in accordance with the requirements I have set out above.

63. In all the circumstances, I do not believe that the application to strike out or give reverse summary judgment on the Brutus Allegations has any real sustainable basis and those allegations should be allowed to go to trial.

The Maxpower Allegations

64. This part of the application is concerned with the s.90A FSMA claim in respect of the alleged Bribery Scheme. SC plc does not seek to strike out the Bribery Scheme or Maxpower aspects of the s.90 FSMA claim. It is therefore wholly focused on the identification of PDMRs in SC plc and whether the Claimants have adequately pleaded that such PDMRs knew of and acted dishonestly in relation to the Bribery Scheme. As explained above, a s.90A FSMA claim requires proof that a PDMR of the issuer has acted dishonestly.

65. The Claimants have identified the relevant PDMRs for the purposes of the Bribery Scheme allegations as comprising two groups: (1) SC plc's "*Group Executive*"; and (2) four employees of the Group who served as non-executive directors on the Maxpower board, namely Mr Greg Karpinski, Mr Kanad Virk, Mr Benjamin Soemartopo and Mr Nainesh Jaisingh. SC plc's arguments in relation to each group are different and will be dealt with separately.

(1) <u>Group Executive</u>

66. In [75.1] and [75.2] of the Amended Particulars of Claim, the Claimants allege that "*SC plc's Group Executive*" had the requisite guilty knowledge. SC plc's objections to this are twofold: (i) that it is unclear which individuals

are within the Claimants' definition of "*Group Executive*"; and (ii) there is an inadequate plea of knowledge or dishonesty in relation to those individual PDMRs.

67. Looking first at the Claimants' definition of "*Group Executive*", there have been some inconsistencies in this regard and Mr Chapman KC conceded that this was so. He confirmed that the definition relied on is that contained in [36] of the Amended Reply, which referred back to the categories set out in [70.1] to [70.3] of the Amended Particulars of Claim. (In Mr Shrimpton's witness statement, he had limited the definition to [70.1] of the Amended Particulars of Claim, but this was incorrect.) Those paragraphs said as follows:

> "70.1 *De jure* directors of SC plc, including executive and non-executive directors, and who sat on various board committees. In the various settlements the SC plc executive directors are (apparently) also referred to as the "Group Executive" or similar;
>
> 70.2 A Group Management Committee comprising the executive *de jure* directors of SC plc and other senior executives;
>
> 70.3 *De jure* directors of the Bank, comprising executive directors of SC plc and other senior executives in the group;…"

68. It is relevant to note that the Claimants rely on the same individuals comprising the "*Group Executive*" for their s.90A FSMA claim in relation to the Relevant Misconduct. However,

SC plc have not sought to strike out that allegation as being too vague.

69. SC plc sought further information in relation to the individuals who are comprised within the "*Group Executive*" for the purposes of the Claimants' allegations of PDMRs in relation to knowledge of the Relevant Misconduct. It also asked whether the Claimants were alleging that those who were not *de jure* directors of SC plc were *de facto* directors and, if so, the basis for such an allegation. The Claimants' response listed, as best they could prior to disclosure, a number of individuals alleged to have the requisite knowledge and then the basis for them being *de facto* directors of SC plc, if they were not *de jure* directors. These responses were given, as I have said, in relation to Relevant Misconduct, but Mr Chapman KC submitted that they equally apply to the "*Group Executive*" against whom the Bribery Scheme allegations are made.

70. So the position reached in relation to the alleged PDMRs in SC plc is that the Claimants say that they are either the *de jure* directors of SC plc or *de facto* directors of SC plc by virtue of being *de jure* directors of the Bank or otherwise members of the Group Management Committee. SC plc has said that this could comprise 62 individuals over the course of the relevant period and the Claimants need to do more to identify those individuals who have the requisite knowledge.

71. Mr Chapman KC said that, prior to disclosure, it is not possible for the Claimants to be more precise over this. Furthermore, they have requested further information from SC plc

including in relation to a detailed corporate structure and the identification of those individuals who sat on the Group Management Committee, but SC plc has refused to provide this, saying that the Claimants will have to wait for disclosure or witness statements. However, before that stage has been reached, SC plc is applying to strike out the allegation.

72. "*Group Executive*", the allegation that the individuals within the "*Group Executive*" are PDMRs for the purposes of the Bribery Scheme allegations is adequately pleaded at this stage. The Claimants fall within Miles J's definition of PDMR in *G4S* by alleging that the individuals were either *de jure* or *de facto* directors of SC plc.

73. As to whether the allegations of knowledge against the individuals said to be PDMRs are sufficiently pleaded by reference to the strict requirements in relation to allegations of fraud and dishonesty, the Claimants say that it is necessary to look not only at [75] of the Amended Particulars of Claim but also at [24] of the Amended Reply. This is said to support the Claimants' case that at least one or more of the PDMRs had the requisite state of mind in relation to the Bribery Scheme. It includes the following:

    (1) An article published in a global regulatory and financial news agency called MLex Market Insight on 25 April 2016 that referred expressly to the Bank being "*aware of the alleged wrongdoing*" at Maxpower. Mr Beltrami KC pointed out that this was a reference to individuals at

the Bank, not SC plc, but [75] of the Amended Particulars of Claim says that it should be inferred that this is a reference to the awareness of the Group Executive. Mr Chapman KC submitted that that was because those persons were the Bank's senior decision makers, and if a report of bribery had been made it is likely they would have been informed.

(2) Two whistle-blowers raised concerns about the Bribery Scheme directly to the Bank (including but not limited to the Group's Legal & Compliance Department and Group employees on the board of Maxpower) prior to the MLex article. The reports made by each whistle- blower are pleaded in [75.2] of the Amended Particulars of Claim and [24] of the Amended Reply. Again, the Claimants allege that it is to be inferred that the Group Executive would have been made aware of such whistle-blower allegations.

(3) Sidley Austin prepared a report in December 2015 which recorded that remedial anti-bribery measures were initiated at Maxpower in March 2015 when SCPE "*became more involved in the Company's operations*", but improper payments continued and Group employees on Maxpower's board did nothing to address serious whistle-blower allegations which had been made. Further, King & Spalding were also instructed to carry out investigations, and PwC were also involved. The Claimants allege that it should be inferred, particularly given the

2012 Settlements and monitoring period which accompanied the 2012 Settlements, that international legal and accountancy firms would not have been instructed and/or Group employees would not have failed to act on serious whistle- blower allegations without the Group Executive's knowledge.

(4) In December 2015, Maxpower terminated the contracts of employment of its three founding members. Again, the Claimants infer that such steps would not have been taken without the Group Executive's knowledge.

74. I consider that these are adequately pleaded at this stage and that the Claimants advance a credible case that members of the Group Executive must have known about the bribery allegations from the whistleblowers and that this was before the Bribery Scheme was exposed by journalists. They are entitled to take their s.90A FSMA claim in relation to the Bribery Scheme and Maxpower forward to trial insofar as it relies on the knowledge of alleged *de jure* or *de facto* directors of SC plc.

(2) <u>The Maxpower non-executive directors</u>

75. However, in relation to the four identified non-executive directors of Maxpower, the Claimants wish to take that case to trial despite not alleging, and I assume, not being able to allege, that they are *de facto* directors of SC plc. Accordingly, on the basis of *G4S*, they cannot be PDMRs and insofar as the s.90A FSMA case depends on their knowledge, it is bound to fail.

76. Mr Chapman KC did not seek to persuade me that *G4S* was wrongly decided; indeed he said that the court was likely to follow Miles J's decision. Instead Mr Chapman KC sought to argue that I should not strike out the claims under s.90A FSMA based on the Maxpower non-executive directors' knowledge for the following reasons:

    (1) Until after disclosure, the Claimants are not able to plead that the Maxpower directors were *de facto* directors of SC plc, and SC plc has refused to provide further information in respect of the Maxpower directors' roles and responsibilities within the Group.

    (2) The meaning of *de facto* directorship in the context of section 90A FSMA has not been investigated by any Court (and Mr Chapman KC referred back to the *In Regis* case and the reference to not striking out a claim in an area of developing jurisprudence). Furthermore, Miles J expressly identified the point that its meaning is specific to the context, that the question of *de facto* directorship is intensely fact specific and that there may be some elasticity in its factual contours (see [174], [175], [179] and [180] of *G4S*).

    (3) The Maxpower non-executive directors held senior positions in the Group and there is reason to believe that a fuller investigation into the facts of the case (including by disclosure and cross-examination) would add to or alter the available evidence.

(4) The Claimants would wish to reserve their right to challenge the conclusions of Miles J in *G4S*, including on appeal. That decision concerns an important point of law and practice in this context. If the claims are struck out now, Mr Chapman KC submitted that they would be unable to do so. He also said that it would be preferable for such an appeal to be on the basis of findings of fact after a trial, rather than at an interim stage.

(5) The Bribery Scheme will be a matter to be investigated at trial, and will form the subject of disclosure, in any event. If the allegations concerning the Group Executive are not struck out (and I have not struck them out) and there is the s.90 FSMA claim in relation to the Bribery Scheme which SC plc has not sought to strike out, both continuing to trial, there will have to be an examination of the facts at trial anyway, including whether the Bribery Scheme took place and the Bank's knowledge of it. There would therefore not be much of a saving in time or costs in striking out this allegation.

77. Despite the attractiveness of Mr Chapman KC's submissions on this, I do not think that that is the way the system works. As he accepts, the Claimants are unable presently to plead that the Maxpower non-executive directors were *de facto* (or possibly shadow) directors of SC plc. The current state of the law is Miles J's decision in *G4S*, which although not technically binding on me, was not suggested to be wrongly decided or such that I should not follow it. In any event,

it does seem to me that the carefully reasoned judgment of Miles J that took into account every possible argument as to a broader definition of PDMR appears unassailable.

78. Therefore, the Claimants' claim in this respect is unsustainable and there is no real prospect of them succeeding in establishing that the four non-executive directors of Maxpower were PDMRs of SC plc. Mr Chapman KC's submissions were really directed at whether there is some "*other compelling reason [for] a trial*" as per CPR 24.2(b). He wants to take the issue further in case evidence emerges that would enable the Claimants to plead *de facto* directorship, or so that he is able to challenge Miles J's judgment either at trial or on appeal.

79. As to the further evidence, it seems to me that if such does emerge following disclosure, then the striking out of the allegation now would not preclude an application to amend to plead that the Maxpower directors are *de facto* directors of SC plc. Mr Chapman KC's arguments about the precise scope of *de facto* directorship in the context of both SC plc's particular corporate structure and also in relation to the s.90A FSMA issuer liability regime will be open to him at the trial in the event that he is able to plead that they were *de facto* directors.

80. In relation to challenging Miles J's conclusion that PDMRs are limited to directors, I do not think that this would be a proper basis for allowing the issue to go to trial, even if there is not much impact on the trial itself. Mr Chapman KC could have addressed me on the correctness of *G4S* at this hearing and invited

me not to follow it. If he had done so and was displeased with my decision, the Claimants could have tried to appeal it. But he chose not to attack *G4S* at this stage and basically wanted to keep the issue alive to trial so that he could try to persuade the trial judge not to follow *G4S* and then to appeal.

81. It must not be forgotten that this is a dishonesty case, and the Claimants wish to keep in the four non-executive directors of Maxpower as PDMRs even though the case against them is unsustainable in law. Those directors will have to deal with the allegations of dishonesty made against them and probably appear at trial to answer them, despite the Claimants having no real prospect of succeeding in this respect.

82. I have come to the clear conclusion that I should strike out this allegation that the four named non-executive directors of Maxpower were PDMRs of SC plc. If the Claimants wish to proceed with this aspect of their claim, they must plead a sustainable allegation that they were in some way directors of SC plc at the material time.

Individual Reliance Claims

83. As noted above, SC plc has made a request for further information which includes further information in relation to the individual reliance claims and there has been correspondence between the parties in relation to this. To date, no further information has been provided and that is the reason why SC plc seeks an order under CPR Part 18. However, prior to that being considered, SC plc applies to strike out the individual reliance claims on the grounds that,

as Mr Beltrami KC submitted orally, the pleading is, in the circumstances, an abuse of process. This is because the individual reliance claims pleaded in very general fashion in [86] of the Amended Particulars of Claim have no factual basis as the Claimants had not apparently been asked, prior to the Amended Particulars of Claim being served, as to whether each of them had in fact relied on any one or more of the pieces of published information, representations and/or omissions.

84. I agree with Mr Beltrami KC that it is somewhat remarkable that some 3 years after the first claim form was issued there are still no further particulars of both the Claimants' standing to sue and their individual reliance claims. The Claimants' evidence explains the mammoth task facing them with so many Claimants and funds involved together with the overall numbers of published information and representations relied upon. Nevertheless, I would have expected more progress to have been made by this stage in a number of aspects of the claims.

85. I bear very much in mind submissions made to me by Mr Chapman KC as to what is becoming the normal way of managing these sorts of cases, involving multiple claimants where there are common and non-common issues. We discussed at the hearing a split trial and where that split would fall (although this issue was ultimately agreed to be postponed to the second CMC when a more informed decision could be taken). There seems little doubt that there will be a split trial and, if it follows the scheme directed in *Various Claimants v RSA*

(unpublished decision of Miles J, 28 February 2022), *Various Claimants v G4S Ltd* [2022] EWHC 1742 (Ch), and *Various Claimants v Serco Group plc* [2022] EWHC 2052 (Ch), both decisions of Falk J, as she then was, the non-common issues of reliance and quantum will be left to a second trial, which will only be held if the Claimants succeed on the common issues in relation to SC plc.

86. Furthermore, it is generally accepted that reliance issues should be tried by reference to a sample of Claimants that would be selected so that they can represent all of the other Claimants. In the *G4S* case, Falk J directed that the sampling process should begin before the first trial together with disclosure and witness statements on that issue. Mr Chapman KC submitted that this case is on a quite different scale to *G4S* and those directions might not be appropriate in this case. But that will be decided at the next CMC. At this stage, it is recognised that the Claimants must give more information about their individual reliance claims, but the context is that this is so that the sampling process can begin.

87. Returning to Mr Beltrami KC's point about whether this has been properly pleaded in the first place, I should set out [86] of the Amended Particulars of Claim. It states as follows:

> "86. In the alternative, the Claimants' claim that they relied on SC plc's Published Information encompasses:-
>
> 86.1 Claimants reading the Published Information;

86.2 Claimants relying on information communicated indirectly, by means of other sources of information that acted as a conduit for Published Information, including one or more of the following:

[86.2.1…86.2.7]

86.3 Claimants relying on SC plc's Published Information through the agency of a third party such as a fund manager or investment advisor;

86.4 Claimants relying on SC plc's Published Information in the operation of their governance and stewardship functions."

88. There is no doubt that this is a very generalised plea. The Claimants have long since recognised that further particulars are required but they see this as just a question of timing as to when such particulars should be provided. They also question the extent of the information that should be provided at this stage, given that it should only be such that is required to perform an effective sampling process.

89. Mr Beltrami KC submitted that this is an inherently objectionable form of pleading. He said that either it is not really a pleading of facts at all, just a theory as to how each Claimant might have relied on the published information; or it is purporting to be a pleading of facts but it was not confirmed to be true by each Claimant before the proceedings were begun and could not have been verified by a

statement of truth. He submitted that the case was pleaded on a "*hope and prayer*" and should never have been made.

90. Mr Chapman KC submitted that [86] of the Amended Particulars of Claim was a perfectly proper plea of reliance. The Claimants had made clear at [4] of the Amended Particulars of Claim that they were "*generic Particulars of Claim*" and, even though they initially resisted providing further information on the claims, they agreed to do so in or around August 2022, having seen the decisions of Miles J in *RSA* and Falk J in *G4S*.

91. In the Claimants' solicitors' letter of 5 April 2023, they said as follows:

> "As to paragraph 10 of your letter, and without waiver of any privilege, our firm had proper authority from the claimants to plead the matters contained in paragraph 86 of the Amended Particulars of Claim."

This was before the application to strike out was issued and it was a clear statement that the Claimants had given their solicitors authority to plead the claim and to sign the statement of truth. The point was repeated in Mr Shrimpton's witness statement.

92. In my view, this is a complete answer to the application to strike out the individual reliance claims. Mr Beltrami KC said that the fact that there was authority given to sign the statement of truth does not get over the fact that the Claimants' solicitors have admitted that there was not an information gathering exercise in relation to reliance prior to the claim form being

issued. However, neither he nor I know exactly the steps that were taken behind the veil of privilege to obtain the Claimants' authority (nor should we) except that Mr Shrimpton was so authorised to sign the statement of truth which included the facts contained in [86] of the Amended Particulars of Claim. Actually four Claimants were unable to give authority and they are excluded from the statement of truth (in accordance with a practice endorsed by the Court of Appeal) which rather demonstrates the fact that all the other Claimants did specifically authorise the signing of the statement of truth. As SC plc's solicitor, Mr Rupert Lewis, a partner in Herbert Smith Freehills LLP, accurately said in his witness statement dated 7 July 2023: "*Each Claimant separately has therefore authorised a statement of truth to be signed on its behalf to the effect that it individually relied upon SC's published information, either directly or indirectly*."

93. I therefore do think that it is a question of timing of the provision of further information and I will deal with that when considering the CPR Part 18 application. But the application to strike out the individual reliance claims is dismissed.

The Part 18 Application

94. SC plc's CPR Part 18 application was issued on 30 June 2023, before the strike out/summary judgment application on 7 July 2023. It covers four broad areas as follows:

(1) Standing;

(2) Reliance;

(3) Loss; and

(4) Knowledge of senior management.

95. The Claimants have agreed to provide further information in relation to standing, reliance and loss and the live issues concern the timing and extent of that further information. In relation to the knowledge of senior management the Claimants maintain that adequate particulars have been provided and SC plc is not entitled to anything more.

96. It is common ground that an order under CPR Part 18 will be confined to what is necessary and proportionate for the party to provide at that stage of the proceedings. The Commercial Court Guide at D14.1(c) states that: "*The Court will only order further information to be provided if satisfied that the information is strictly necessary to understand another party's case.*" Mr Chapman KC submitted that the context and likely progress of these proceedings, including in particular the probable case management directions in relation to sampling of claims and split trials, must be taken into account in deciding whether it is necessary and proportionate to order the further information now.

97. There is a draft order in relation to this application in which much is agreed and the areas of disagreement highlighted. I will deal with the outstanding issues as shortly as possible below.

(1) <u>Standing</u>

98. The Claimants have to have standing to bring their claims. Each one must exist and have legal

personality (it is possible that some of the Claimants do not). Further each one must have purchased, continued to hold or sold shares in SC plc in reliance on the published information. SC plc has been asking for some time for further information in relation to these two aspects of standing. And the Claimants have agreed to provide particulars of standing and are proposing to do so by 15 December 2023. SC plc says that this is long overdue and that it should be provided by 30 October 2023.

99. Mr Shrimpton's witness statement explained why it has taken so long. He said that since April 2021 his firm has been heavily engaged in collating not just the particulars of standing but also documentary evidence supporting that for each Claimant. But because the information involved is very substantial and complex having regard to the number of Claimants and funds/accounts and the complexity of the ownership structures involved this has taken far longer than they had originally anticipated. They have kept SC plc informed as to their progress on this issue and Mr Shrimpton maintained that it was unnecessary for the application to have been issued.

100. The Claimants have agreed to provide the following:

> "1. Particulars of Standing, certified by a statement of truth, which state all material facts and matters which each Claimant relies to establish that it has standing to bring claims against the Defendant under s.90 and/or s.90A of [FSMA].

2. Trading data in relation to any purchase, sale or holding of the Defendant's securities (or interests therein) that are subject of each Claimant's claims in these proceedings."

101. SC plc accepts this wording but wishes to add that the particulars in paragraph 1 should include the information that had been sought in a number of the requests in its original request for further information. Mr Chapman KC resisted this on the basis that SC plc would be getting much more than it would otherwise be entitled to by way of further information because underlying documentation supporting the particulars will also be provided. He said that this is what they have been collating and it is unnecessary to specify or seek to tie it in to the original specific requests. I agree that SC plc's extra wording is unnecessary in the circumstances. If it remains unhappy with the adequacy of the particulars of standing, it can pursue that, possibly at the next CMC. For now, I think that what the Claimants are offering is sufficient and that is what I shall order.

102. The only outstanding matter is timing. I think it is more sensible to have a realistic timetable for the provision of this information that will hopefully ensure that it is as helpful and comprehensive as it can be. I do not think that SC plc are really prejudiced by having to wait until 15 December 2023 for this information and that is what I propose to direct.

(2) Reliance

103. I have dealt with the individual reliance claims above in relation to the application to strike out.

Again there is no dispute that the Claimants should provide further information as to reliance. The Claimants have offered to provide the further information in the form of the responses to an amended questionnaire that has been sent to all Claimants. (The questionnaire has been referred to as "annex 1" because it has been annexed to the draft order; and in fact it was derived from the annex to the Order made by Falk J in *G4S*.) SC plc wants responses to the unamended annex and also to its specific original requests. There is also an issue of timing.

104. Mr Beltrami KC referred to Hildyard J's decision in *Various Claimants v Tesco plc* [2019] EWHC 2858 (Ch) for the proposition that the same rules of particularisation apply to claims brought by multiple claimants and that each claimant has to plead its case. In relation to reliance, Hildyard J said that: "*the court should be properly astute to ensure that sufficient particularity is supplied. That is both in order to ensure that the defendant knows precisely what is alleged, or sufficiently precisely what is alleged, and also to focus the mind of each of the individual claimants, who have brought very serious allegations, as to precisely the basis on which individually they have proceeded.*"

105. A brief chronology as to how this issue has developed is as follows:

    (1) On 2 February 2022, SC plc served its first request which included requests for further information regarding the individual reliance claims.

(2) On 1 April 2022, the Claimants stated in their response that it was not necessary to provide further particulars of the individual reliance claims for each Claimant at that stage, but acknowledged that further particulars (and/or evidence) would be required in due course.

(3) On 28 April 2022, the Claimants' solicitors wrote to SC plc's solicitors proposing (among other things) that reliance issues be left until after an initial trial on standing and common issues relating to SC plc's conduct, statements and knowledge. This followed Miles J's case management approach in the *RSA* litigation, mentioned above.

(4) SC plc took issue with that proposal in correspondence and, following the further case management decisions of Falk J in *G4S* and *Serco* (also referred to above), in a letter from their solicitors dated 2 August 2022, the Claimants agreed to consider the logistics of collecting individual reliance information at this stage.

(5) The annex 1, derived from the *G4S* annex, first emerged in SC plc's solicitors' letter dated 28 September 2022 and formed the basis for the further reliance information that SC plc was seeking. Annex 1 was presented as a list of 9 questions but in fact contained some 28 sub-questions. It also envisaged that all Claimants who relied on specific statements would identify the specific statements on which they relied, when and by which individual.

(6) On 30 November 2022, the Claimants' solicitors wrote to SC plc's solicitors identifying the logistical challenges which would be involved in providing the reliance information sought in circumstances where Annex A and B to the Amended Particulars of Claim identified 293 untrue or misleading statements and these proceedings involved (at that stage) 220 Claimants making claims in respect of more than 1,000 funds.

(7) Nonetheless, and following further correspondence from SC plc's solicitors, the Claimants' solicitors began investigating whether it might be possible to use technology solutions to provide at least some of the reliance information sought by SC plc in a reasonable and proportionate manner. Mr Shrimpton's witness statements explained that this initially involved his firm creating a software-based questionnaire, before subsequently engaging a third-party software company called Finlegal to design an interactive questionnaire and process for providing the questionnaire to the relevant individuals within the Claimant entities and/or their representatives. In a letter dated 5 April 2023, the Claimants' solicitors informed SC plc's solicitors that it would be using an interactive questionnaire and identified the information which would be provided.

(8) However, SC plc continued to press for further reliance information to be provided immediately, and ultimately issued the Part 18 application and then the strike

out/summary judgment application in July 2023.

106. The current position is, as I understand it, that the Claimants' solicitors have sent out the questionnaires in September 2023 and that this is basically the questions in their amended annex 1. The Claimants have deleted most of the sub-questions in annex 1 on the basis that the only necessary and proportionate information that should be provided to SC plc at this stage are answers to the main questions as to whether each individual Claimant relied on statements in the published information in acquiring, holding or disposing of shares in SC plc. The Claimants say that it would be disproportionate to ask the detailed sub-questions as to specifically what statements were read, when and by which individual. They suggested that asking all those questions would alone cost £500,000.

107. Mr Chapman KC submitted that the information received in response to the questionnaire is all that is necessary to be able to start the sampling process that will inevitably take place, probably before the first trial. It would enable the Claimants to be sorted into cohorts or sub-cohorts, from which it should be possible to select the representative Claimant for that cohort or sub-cohort. The further granular information that is covered by the sub-questions would then only need to be directed at those Claimants who have been selected in the sampling process. He submitted that this is a far more manageable, practical and proportionate way to proceed.

108. It does seem to me that that approach makes sense. Mr Beltrami KC's insistence on pursuing the provision of not only the unamended annex 1 information but also the Claimants' responses to the original requests, is unnecessary and disproportionate at this stage of the proceedings. I understand that SC plc is frustrated that after 3 years very little information has been forthcoming from the Claimants but it must also recognise the scale of the task and the likely case management of these proceedings. The original request was effectively superseded by the request to provide the information in response to the annex 1 questionnaire. It would therefore not be justified in returning to the original requests in the order that I make.

109. The questionnaire has gone out, with a deadline for responses in early November 2023 but Mr Shrimpton has anticipated that there will be some Claimants that will not be able to respond until the end of the year. On timing the Claimants have therefore suggested 31 January 2024, whereas SC plc wants 1 December 2023. There is no point having an unrealistic timetable for the provision of this important information and I will therefore direct that the responses to the amended annex 1 questionnaire be provided by 31 January 2024. Again, as with standing, if SC plc considers the information provided to be inadequate, it can seek to persuade me at the next CMC that more should be provided in accordance with the case management directions that will then be made.

(3) Loss

110. In relation to quantum, there is only an issue as to timing. The Claimants have always said that they would be providing particulars of quantum. Mr Shrimpton has again described the difficulties of gathering such information from so many Claimants and the investment that has been made in the significant resources that are required to complete this task. He has sought to keep SC plc updated as to how the Claimants were progressing on this front.

111. The difference between the parties is as to one month: the Claimants ask for 29 February 2024; SC plc wants 31 January 2024. Given that quantum issues will definitely only be tried in a second trial, there is clearly less urgency for this information. Having said that, the information does need to be provided as it may affect the parties' decision-making, particularly in relation to settlement. As I have already directed the reliance information to be provided by 31 January 2024, it would make sense to have a staged process with not everything being required at the same time. Accordingly I will direct the Claimants to provide their particulars of quantum by 29 February 2024.

(4) Bank Knowledge Representations

112. As referred to above, the Claimants plead the so-called Bank Knowledge Representations which are essentially that there were representations in the published information that the Bank did not know of any material failures in its programmes or systems or of the risk of further action in relation to sanctions or anti-money laundering breaches. Those representations are

alleged to be untrue or misleading because the Bank's "*senior management*", whose knowledge should be attributed to the Bank, knew of the Relevant Misconduct and the Bribery Scheme and therefore of the material failures and risk of further action by the authorities. The plea clearly overlaps with PDMR knowledge and is actually somewhat circuitous because if the Claimants establish PDMR knowledge of the falsity of a representation, they do not need to prove the extra layer of PDMR knowledge of the falsity of the Bank Knowledge Representations. Furthermore, if they do not prove PDMR knowledge of failures, it is difficult to see how they will prove PDMR knowledge that the Bank's senior management knew of those failures.

113. Nevertheless, the Claimants do wish to proceed with this allegation but they say that they are unable to provide any further information at this stage, in particular as to the identity of the individuals comprising the Bank's senior management. When SC plc sought further information in relation to this, the Claimants refused to answer on the basis that it was not "*strictly necessary*" to understand the Claimants' case. They now say that, before disclosure, they simply cannot further particularise their case.

114. Mr Chapman KC relied quite heavily on the Court of Appeal decision in *Sofer v Swiss-independent Trustees SA* [2020] EWCA Civ 699. At [32] of his judgment, Arnold LJ endorsed what Peter Gibson LJ had said in *Rigby v Decorating Den Systems Ltd* (unreported decision of two-judge Court of Appeal, dated 15 March 1999) and said:

> "I do not doubt that, where an allegation of dishonesty is made against a body corporate, it is necessary to plead the relevant state of knowledge of that body at the relevant time. I do not accept, however, that a mere failure to identify at the outset the directors, officers or employees who had that knowledge means that such an allegation is liable to be struck out without further ado. Clearly such particulars should be given as soon as is feasible and there may be situations in which the claimant's unwillingness or inability to give such particulars when requested to do so justifies striking out; but that is another matter".

115. The Claimants have pleaded the knowledge of the Bank, through the attribution of the knowledge of its senior management. On the basis of the *Sofer* decision, that is an adequate plea at the outset. Mr Chapman KC submitted that the Claimants are still effectively in the same position, two years on from the Particulars of Claim, and can provide no further particulars as to the individuals included in the term "*senior management*" and why their knowledge should be attributed to the Bank. SC plc has said that this could comprise over 250 individuals. In relation to PDMRs' knowledge, the Claimants have been able to provide further particulars, but Mr Chapman KC said that this was because they had received further information from SC plc as to the job titles and specific roles of potential PDMRs in SC plc that the Claimants had identified. The Claimants have not, however, sought further information

from SC plc as to who might be classed as senior management in the Bank.

116. It is an unsatisfactory position to be in. Mr Chapman KC says that this is adequately pleaded to enable the parties to deal with disclosure on this issue. He showed me how the parties have been attempting to agree the relevant custodians, date ranges and search terms for this disclosure issue. There will shortly be a hearing on disclosure issues where if the parties are not agreed, the court will have to determine how these allegations are dealt with. But for now, if it is simply impossible, pending that disclosure, for the Claimants to provide further information, it would not be right for me to order them to do so. Unfortunately, I will therefore not be making any order in this respect at this stage.

117. I should not leave this subject without expressing my concern and disappointment that the proceedings have generally moved at an extremely slow pace in the 3 years since the first claim form was issued. As I have noted above, I understand the vast scale of the undertaking on both sides but it should be particularly incumbent on the Claimants to have got their house in order and to have at least provided some further information on such fundamental issues as the Claimants' standing to sue and their individual reliance claims. There are extremely experienced solicitors and counsel acting for the Claimants and the fact that there are so many Claimants and funds, and so many separate items of published information relied upon, should not detract from the need for the Claimants properly to plead their individual

cases so as to ensure that SC plc knows the case it has to meet and that there can be sensible case management of the proceedings leading to a fair trial.

118. It may seem as though I have generally sided with the Claimants in my rulings as to the timing of the provision of information but this has been driven by the reality of the position that the parties are in at this present moment and to ensure that things can proceed as smoothly as possible from hereon in. Having given them the extra time that they have asked for, I would also encourage the Claimants to proceed with more urgency generally so that the parties will definitely be ready for a trial of whatever matters are directed in 2026. I recognise that much of the burden before that trial will be on SC plc in terms particularly of disclosure and witness statements, which is why it is so important to have the pleadings and further information sorted as soon as feasibly possible.

Conclusion

119. So by way of short summary of my conclusions to the points I have considered in this judgment:

(1) I dismiss SC plc's strike out/summary judgment application in relation to the Brutus Allegations and the individual reliance claims;

(2) I dismiss SC plc's strike out/summary judgment application in relation to the s.90A FSMA claim in respect of the Bribery Scheme and Maxpower, save that I will strike out the allegation, contained in

[75.3] of the Amended Particulars of Claim, that the four non-executive directors of Maxpower were PDMRs in SC plc;

(3) I order that further information in the form discussed above be provided by the Claimants in relation to standing, reliance and loss, by the dates set out above;

(4) I refuse to order the Claimants to provide further information on the Bank Knowledge Representations.

120. I hope that, in the light of the above, an order can be agreed between the parties. If there are any consequential matters that cannot be agreed, either I can deal with them on paper, or they could perhaps be dealt with on the next occasion this case is before me.

Appendix G

Constitutional Provisions and Statutes Involved

U.S. Const. amend. V

No person shall … be deprived of life, liberty, or property, without due process of law….

31 U.S.C. § 3729(a)(1)(G)

(a) Liability for certain acts.—

(1) In general.—[A]ny person who--

….

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 …, plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3730(b) & (c) (relevant provisions)

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the

Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

….

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

….

(c) Rights of the parties to qui tam actions.–(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person

initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

…..

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

18 U.S.C. § 981 (relevant provisions)

(a)(1) The following property is subject to forfeiture to the United States:

….

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to … any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title)….

….

(2) For purposes of paragraph (1), the term "proceeds" is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

….

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

18 U.S.C. § 1956(c)(7)(D) (relevant provision)

(c)(7) [T]he term "specified unlawful activity" means --

(D) an offense under … section 206 (relating to penalties) of the International Emergency Economic Powers Act….

50 U.S.C. § 1705(a)
[International Emergency Economic Powers Act, § 206(a)]

(a) Unlawful acts

It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.