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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

13 Civ. 6326 (TPG)

6 PREVEZON HOLDINGS, LTD. *et*  
7 *al.*,

8 Defendants.

9 New York, N.Y.  
10 March 9, 2015  
2:35 p.m.

11 Before:

12 HON. THOMAS P. GRIESA,

13 District Judge

14 APPEARANCES

15 PREET BHARARA  
16 United States Attorney for the  
17 Southern District of New York  
18 MARGARET GRAHAM  
19 PAUL MONTELEONI  
20 Assistant United States Attorney

21 BAKER & HOSTETLER, LLP  
22 Attorneys for Movants "The Prevezon Defendants"  
23 BY: MARK CYMROT  
24 JOHN W. MOSCOW  
25 LOURA ALAVERDI

26 BAKER BOTTS, LLP  
27 BY: SETH TAUBE

28 GIBSON, DUNN & CRUTCHER, LLP  
29 Attorneys for Non-party Browder  
30 BY: RANDY M. MASTRO  
31 LISA H. RUBIN  
32 RICHARD MARK

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1 (Case called)

2 THE COURT: Sit down, please.

3 Let's just get square on the procedural posture. What  
4 do we have here, procedurally, in the way of motions or  
5 whatever? What do we have?

6 MR. MASTRO: Your Honor, what we have is --

7 THE COURT: Your name, please.

8 MR. MASTRO: Yes, Randy Mastro, your Honor, Gibson  
9 Dunn, with my colleagues Lisa Rubin and Richard Mark,  
10 representing non-party William Browder who is the person on  
11 whom these subpoenas were directed.

12 THE COURT: All right.

13 MR. MASTRO: And purportedly served.

14 We are here today, your Honor, in connection with  
15 two --

16 THE COURT: Can you keep seated? Then the microphone  
17 will pick you up. Or, go to the lectern.

18 MR. MASTRO: Certainly, your Honor.

19 Your Honor, we are here today about two subpoenas that  
20 defendants -- we will call defendants Prevezon -- purported to  
21 serve on our client, William Browder.

22 THE COURT: Is it a motion? I want to get technical  
23 about the procedural posture. We are?

24 MR. MASTRO: Yes, your Honor; one, our motion to quash  
25 the Aspen subpoena.

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1 THE COURT: All right.

2 MR. MASTRO: Two, we are ordered to show cause about  
3 potential validity of the New York subpoena --

4 THE COURT: Okay.

5 MR. MASTRO: -- that Prevezon purported to serve in  
6 February.

7 THE COURT: So you have got a motion about the Aspen  
8 subpoena and then we will consider we are having a return on  
9 the order to show cause.

10 MR. MASTRO: Correct, your Honor; on the New York  
11 subpoena. They're both largely identical subpoenas and, your  
12 Honor, to be clear, your Honor directed this hearing on the  
13 limited issue of the following limited issues: One, whether  
14 either the Aspen or the New York subpoenas are valid under Rule  
15 45 of the Federal Rules of Civil Procedure; and two, whether  
16 they were properly -- either of them was properly served. So,  
17 we are here for that limited purpose. We are not here today  
18 about the scope of the subpoenas. We are not here today about  
19 the merits of the government's forfeiture case against Prevezon  
20 although I should note, your Honor, that in that case a motion  
21 to dismiss is pending, the case has not yet been defined for  
22 purposes of what scope it will be going forward after that  
23 motion. There is in fact party discovery hasn't gotten off the  
24 ground yet because of the posture that Prevezon has taken.

25 THE COURT: Look. I just asked you a very limited

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1 question.

2 MR. MASTRO: Certainly, your Honor. Certainly, your  
3 Honor.

4 THE COURT: Now, well, I would think on the merits to  
5 be discussed your side should go first.

6 MR. MASTRO: Thank you very much, your Honor. And I  
7 am prepared to go right to the heart of the matter because your  
8 Honor will recall, there was some heated rhetoric at prior  
9 hearings. I am here today to talk, your Honor, just about the  
10 application of the law to these two subpoenas and that law is  
11 Rule 45. And what does Rule 45 say? It says that a subpoena  
12 may not command a person "who is neither a party nor a party's  
13 officer, to travel more than 100 miles from where that person  
14 resides, is employed or regularly transacts business in  
15 person."

16 Now, your Honor, Rule 45 further requires that a  
17 subpoena that requires a person to comply beyond the  
18 geographical limits specified in Rule 45C cannot stand. It has  
19 to be quashed. This is not optional. It is not how important  
20 a witness may or may not be in a case. It is these geographic  
21 limitations are mandatory, quote, without exception in  
22 prevailing case law in this circuit.

23 So, if you are not the person to whom this subpoena is  
24 directed, if that person does not reside, is employed or  
25 regularly transacts business in person within a hundred miles

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1 of the jurisdiction, the subpoena must be quashed.

2 And, your Honor, we are going to spell out for you  
3 today as to how both the Aspen subpoena and the New York  
4 subpoena, controlling case law as to which there is no response  
5 by the other side and Rule 45 case law in this circuit mandates  
6 that these subpoenas be quashed under Rule 45.

7 Now, your Honor, if I may? Your Honor has already  
8 been over some of this territory in connection with Hermitage  
9 Global. Your Honor issued a ruling in recent weeks quashing  
10 the subpoenas to hermitage Global and recognized in that  
11 opinion these very limitations of Rule 45 and they apply with  
12 equal force to Mr. Browder. And in that opinion your Honor  
13 recognized that Browder is "a citizen of the United Kingdom"  
14 that Browder's residence "is in London," that's where he also  
15 works in his investment management business. And your Honor  
16 also recognized there that party discovery between the  
17 government and Prevezon which, as I said before, hasn't even  
18 really begun because of the pendency of a motion to dismiss,  
19 "could eliminate the need for Hermitage affiliated witnesses at  
20 trial." Yet, we are here today about multiple subpoenas  
21 directed to Mr. Browder before party discovery has even  
22 commenced.

23 Now, your Honor, let's talk about Aspen first, the  
24 Aspen subpoena and the thin read on which Prevezon seeks to  
25 predicate a Rule 45 subpoena on Mr. Browder.

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1           Mr. Browder does not reside in Aspen. It is not even  
2 alleged here that he, by Prevezon, that he works or regularly  
3 transacts business there. So, let's focus on whether  
4 Mr. Browder resides -- that's the word used in Rule 45 -- in  
5 Aspen.

6           Uncontroverted record, he does not own any real  
7 property in Aspen. He has been there from time to time with  
8 his family on vacations. He has stayed in a particular  
9 property that he does not own, either "directly or indirectly."

10           THE COURT: Who owns the house?

11           MR. MASTRO: It is owned by an LLC called Sundance  
12 Aspen, LLC.

13           THE COURT: Let me get the name. Sundance?

14           MR. MASTRO: Aspen, LLC. Sundance Aspen, LLC, and the  
15 manager of Sundance Aspen, LLC --

16           THE COURT: What is Sundance Aspen, LLC?

17           MR. MASTRO: It is a limited liability corporation.

18           THE COURT: Well, all right. That doesn't tell me  
19 anything. What is it?

20           MR. MASTRO: Well, your Honor, I can only tell you  
21 what it is. People often have had properties that the  
22 ownership of the property --

23           THE COURT: I asked you a question.

24           MR. MASTRO: Yes, your Honor.

25           THE COURT: And I would like an answer. What is

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1 Sundance Aspen, LLC?

2 MR. MASTRO: Your Honor --

3 THE COURT: What does it do?

4 MR. MASTRO: It exists, your Honor, simply as the  
5 vehicle for owning that piece of property. That's its sole  
6 interest, as I understand it. Sundance Aspen, LLC is the  
7 limited liability corporation whose sole asset is the ownership  
8 of that property.

9 THE COURT: And who owns Sundance Aspen, LLC?

10 MR. MASTRO: Your Honor, I can tell you that the  
11 uncontroverted record in this case is that it is -- as to who  
12 doesn't own it --

13 THE COURT: I want to know who does own it.

14 MR. MASTRO: Well, your Honor, the uncontroverted  
15 record in this case tells you who doesn't own it. William  
16 Browder does not own it. But, if your Honor wants us to get  
17 from Sundance Aspen, LLC the entity immediately in ownership  
18 line of the LLC, we will submit that information to the Court  
19 if your Honor requires that. But, I have to say, so your Honor  
20 knows, the record is uncontroverted, sworn statements by both  
21 Mr. Browder and the manager of Sundance Aspen, LLC -- that's  
22 docket 112, Exhibit 38, paragraph 7, that "William Browder does  
23 not, directly or indirectly, own Sundance Aspen, LLC."  
24 Mr. Browder says in his declaration, docket 185, paragraph 51,  
25 that he also does not "own, directly or indirectly, that piece

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1 of property." Mr. Browder makes clear that there are family  
2 members of his who indirectly own the property but he does not  
3 directly or indirectly own that property. And that's the  
4 uncontroverted, sworn statements of him and the manager of  
5 Sundance Aspen, LLC in this case.

6 THE COURT: In other words you have -- he is on the  
7 record in this case as not owning Sundance and not only that  
8 house, right?

9 MR. MASTRO: Correct, your Honor. He has sworn to it  
10 and so has the manager of Sundance Aspen, LLC.

11 THE COURT: Say that again?

12 MR. MASTRO: So, not only has Mr. Browder sworn to it,  
13 your Honor, but also the manager of Sundance Aspen, LLC.

14 Now, your Honor, what does their claim come down to?  
15 Because Mr. Browder was on a vacation with his family when  
16 there was an attempt to serve him in Aspen. Their argument  
17 comes down to, your Honor, that Mr. Browder acknowledges he has  
18 taken, from time to time, vacations in Aspen that he keeps --  
19 he has auto registration there, he keeps a vehicle there in his  
20 name. And he cites the place where he has stayed, this  
21 property Sundance Aspen, LLC.

22 Now, your Honor, the very slim read on which they try  
23 to establish that Browder resides in Aspen when we know he  
24 resides and works in London is the fact that he has had, from  
25 time to time, vacations in Aspen where he has stayed at this

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1 property he neither owns, directly nor indirectly, and has  
2 vehicle registration in his name identifying that property as  
3 the place where he stays in Aspen.

4 Now, your Honor, the case law is crystal clear in this  
5 circuit and elsewhere that that is woefully insufficient to  
6 come anywhere close to establishing for Rule 45 purposes that  
7 Mr. Browder resides in Colorado. Let me be more specific, your  
8 Honor. The leading case in this circuit decided by a New York  
9 District Court --

10 THE COURT: I am going to interrupt you.

11 MR. MASTRO: Certainly, your Honor.

12 THE COURT: I don't want you or any other lawyers  
13 waste their time. I would recommend that you not spend any  
14 more time on Aspen. We will hear what the defendant says and  
15 then you can reply, but I think that's the most efficient way  
16 to use your time and I think we had better switch to New York.  
17 We may come back to Aspen and that depends on what the  
18 defendant says, but I think what I need to hear from you about,  
19 really, is New York.

20 MR. MASTRO: I appreciate that, your Honor, and if I  
21 can just finish the one sentence that I was saying about the  
22 precedent in this circuit on Aspen it will close a loop and  
23 then I'm sure Prevezon's counsel will want to respond to it.

24 THE COURT: Okay.

25 MR. MASTRO: The leading case in this area decided by

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1 a New York District Court in this circuit is called Yukos. In  
2 Yukos, involving someone who had a relationship with Russian  
3 spent six months, nearly, in Auburn, New York; owned property  
4 there, maintained a driver's license there, voter registration  
5 and car registration, all of those things over a nearly  
6 six-month period. Nevertheless, the Court found when that  
7 person returned to Russia, as Mr. Browder returns and lives and  
8 resides in London, that there was no clear intent on his part  
9 to establish residence in Auburn, New York and that, therefore,  
10 Rule 45 was not meant despite all of those factors being  
11 present.

12 In our case Mr. Browder neither rents nor owns,  
13 directly or indirectly, in Aspen. The only indicia that they  
14 point to is vehicle registration which isn't enough. It isn't  
15 enough under the law here in New York. It isn't enough under  
16 the law of Colorado which they point to where vehicle  
17 registration, you are allowed to register a vehicle even though  
18 you don't reside there.

19 So, your Honor, I think it is very clear that Aspen --

20 THE COURT: Cover New York now.

21 MR. MASTRO: Yes, I will now.

22 THE COURT: Cover New York.

23 MR. MASTRO: Thank you, your Honor. I have no  
24 rejoinder to Yukos, your Honor.

25 Now, your Honor, let's talk about the New York

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1 subpoena because in New York, again, Mr. Browder does not  
2 reside here, he is not employed here, so their argument reduces  
3 to --

4 THE COURT: Well, was he served here?

5 MR. MASTRO: Your Honor, we are talking about Rule 45  
6 first but I am happy to address service as well.

7 THE COURT: Start with service.

8 MR. MASTRO: As to service, your Honor, as your Honor  
9 recognized in your recent ruling on Hermitage Global, there has  
10 to be personal service under Rule 45 and in Mr. Browder's  
11 case -- and I think when one looks at the videotape that was  
12 done -- it was not at all clear to him as he was entering his  
13 car, that given the credible threats the government has  
14 described exists now for Mr. Browder, that he was being --  
15 someone was attempting to serve him with a subpoena and he left  
16 his car. Someone rushes his car as he is getting in trying to  
17 close the door, and he left his vehicle in fear not knowing,  
18 walking away and then running if you watch the entire video,  
19 not knowing what was going on. To us, your Honor, that is not  
20 proper service. That is not proper personal service.

21 But, your Honor, more importantly, you don't even have  
22 to reach that question because under Rule 45 they can't  
23 possibly meet the standard for a valid subpoena on William  
24 Browder in New York. Let me explain.

25 Browder, it is not even alleged here that he resides

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1 here. He resides in London. It is not alleged here that he is  
2 employed here in New York. He is not. It comes down to the  
3 third Rule 45 factor which is related to the employment factor,  
4 it is whether Mr. Browder regularly transacts business --  
5 business -- in person in New York. And, your Honor, once  
6 again, the case law in this circuit, in this very district  
7 could not be clearer on the point and Prevezon has no rejoinder  
8 to it. Let me explain, your Honor.

9 Regularly transacting business in person. Business  
10 has a plain meaning. It involves employment, work, commercial  
11 activity. Mr. Browder's commercial activity is he has been  
12 running an investment management firm, an investment management  
13 firm that now invests his own assets accumulated over time, but  
14 that has been an investment management firm for more than two  
15 decades.

16 Now, your Honor, that's his business. On that basis  
17 where Courts have consistently interpreted Rule 45 to mean your  
18 work or your employment, the advisory committee notes on Rule  
19 45 refer to where a person is employed or transacts business in  
20 person means where the person works. That's the word from the  
21 advisory.

22 And, your Honor, the case law consistently, including  
23 in the Second Circuit itself, talks about where someone has  
24 their home or works. The Edelman case on which they purport to  
25 rely, Edelman and the Kohne case which talks about regularly

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1 transact business in person means just what it says, where the  
2 person works: In a commercial business activity.

3 Having said that, your Honor, here is the clear case  
4 law to which they have no rejoinder. Judge Chin, right here in  
5 the Southern District now on the Second Circuit, one of your  
6 colleagues for many years, Judge Chin issued really what we  
7 consider to be the applicable if not controlling authority in  
8 this area. A case involving someone from the UK -- a UK  
9 resident like Browder -- who came to New York on business,  
10 commercial business, an average of between seven and a half to  
11 almost 10 days a year on average. And the person I have to  
12 add, your Honor, had a concrete interest in the litigation, a  
13 pecuniary interest. Remember your Honor pointed out that  
14 Mr. Browder has no pecuniary interest in this litigation, he is  
15 a mere potential witness. In that case Judge Chin was faced  
16 with someone subpoenaed who was paying the attorneys' fees of  
17 the plaintiff and actually had a right to a share of the  
18 judgment if the plaintiff proceeded and Judge Chin ruled --  
19 ruled -- seven and a half to nearly 10 days a year is not --  
20 not -- regularly transacting business in person in New York.

21 THE COURT: That's very nice to hear about that case.  
22 What are the facts here?

23 MR. MASTRO: Thank you, your Honor, which is exactly  
24 where I was going to come next. Thank you.

25 Here Mr. Browder has explained in his sworn

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1 declaration that starting in 2010 he has been in New York for  
2 work relating to his investment management business 33 days  
3 since the beginning of 2010.

4 THE COURT: Starting in 2010?

5 MR. MASTRO: Yes. So, your Honor, we can do the math,  
6 and the math is --

7 THE COURT: Wait a minute. Repeat the number.

8 MR. MASTRO: Yes. 33 days here in New York on  
9 investment management business. That's six years if you count  
10 2015 so that would be about five and a half days a year. If  
11 you take 2015 out where he has only had one day here on  
12 investment management business, that's 32 days between 2010 and  
13 2014, that would be an average of less than six days a year or  
14 just barely six days a year.

15 THE COURT: What about other activities because he  
16 certainly has other activities.

17 MR. MASTRO: That's correct, your Honor, but those  
18 other activities, to be a human rights advocate, to be here on  
19 issues relating to personal beliefs that are not commercial  
20 activity, your Honor, that is not here on business.

21 Mr. Browder has a right to come to New York to visit. That  
22 doesn't count towards Rule 45.

23 The fact of the matter is that what the defendants try  
24 to conflate here is that Mr. Browder being here as a human  
25 rights or a civil rights advocate, the unpaid activism for

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1 which he is here, that that should count towards "regularly  
2 transacting business, in person, in New York." There is not a  
3 single case, they cite none and we are aware of none, where any  
4 court has ever held in the Rule 45 context that non-commercial  
5 activity counts at all, one wit, towards determining whether  
6 someone is regularly transacting business.

7 THE COURT: You are saying it cannot.

8 MR. MASTRO: Correct.

9 THE COURT: In other words there are things called  
10 non-profits.

11 MR. MASTRO: Correct, your Honor.

12 THE COURT: And they engage in all kinds of activities  
13 and can a non-profit which is active in some cause, can't that  
14 be the transaction of business within the meaning of Rule 45?

15 MR. MASTRO: Well, your Honor, they've cited no case  
16 to that effect but I'm going to take your Honor's hypothetical.

17 THE COURT: I'm asking you whether as a matter of  
18 principle.

19 MR. MASTRO: And, your Honor, the principle, if I work  
20 for a non-profit, if I were the president of the Legal Aid  
21 Society, I happen to be a volunteer vice chair, not a paid  
22 president of the Legal Aid Society, your Honor, if I were the  
23 paid president of the Legal Aid Society I would be here, in  
24 that sense, in my employment.

25 THE COURT: I'm not understanding you now. Say that

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1 again.

2 MR. MASTRO: Your Honor, if I were paid staff of a not  
3 for profit that would be my employment and I would be covered  
4 by Rule 45 because Rule 45 says where I reside, am employed or  
5 regularly transact business in person. But when I am here of  
6 my own free will volunteering as part of a cause of advocacy,  
7 I'm an unpaid activist who cares about the cause, your Honor,  
8 it is no more consistent with Rule 45 to say that when Martin  
9 Luther King was Marching in Selma because he was compelled by  
10 that cause, that he would be subjecting himself to Rule 45  
11 subpoena power when he was there of his own volition as a  
12 volunteer leading a march. And that's what Bill Browder does  
13 in his advocacy. He has never taken a dime for his advocacy,  
14 your Honor. His advocacy is about a human rights campaign and  
15 he has written a book. He is not taking a dime from his book  
16 he is giving it all to that cause. Volunteer, that is not  
17 transacting business.

18 THE COURT: What cause is that?

19 MR. MASTRO: Your Honor, it is the human rights cause  
20 about the oppression and corruption of the Putin scheme and  
21 what they did to Mr. Browder's Russian lawyer, Sergei  
22 Magnitsky, imprisoning him, torturing him, and murdering him  
23 and advocating that the Putin regime in Russia -- we have all  
24 seen the horrors -- the regime in Russia is corrupt to its core  
25 and he wants to expose that internationally. That's his human

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1 rights advocacy, your Honor. In the memory of his one Russian  
2 lawyer and to expose the corruption in Russia. He has a right  
3 to do that in his free time.

4 Your Honor, I have been involved in some causes in my  
5 day too and I have gone to multiple jurisdictions to advocate  
6 on behalf of those causes. When I am an unpaid volunteer and I  
7 am going there because I care about the cause, I am not  
8 subjecting myself to Rule 45 jurisdiction subpoena power for  
9 regularly transacting business in person there because it is  
10 not business, it is not commercial activity.

11 Now they point to, your Honor, only one case -- one  
12 case -- it is called Operation Rescue. It is not a Rule 45  
13 case. Rule 45, it is a very clear mandate. You have to  
14 reside, be employed, or regularly transact business in person  
15 in a jurisdiction to have a Rule 45 subpoena be valid. They  
16 point to the Operation Rescue case which was about long-arm  
17 personal jurisdiction in New York, a different standard about  
18 doing business or transacting business under New York Law for  
19 purposes of long-arm jurisdiction as to whether you could be  
20 made a party to a case, completely different standard. Court  
21 after Court, including Kohne in California and others, have  
22 rejected just that and said what a state views as longarm  
23 jurisdiction has nothing do with Rule 45. Rule 45, as the  
24 Kohne Court said means just what it says: You have to be  
25 regularly transacting business, a commercial activity, in

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1 person in the jurisdiction.

2 Now, your Honor, they do not cite to a single case in  
3 this country, anywhere, where any Court has ever held that you  
4 can be regularly transacting business as person in a  
5 jurisdiction simply for showing up as an unpaid advocate. No  
6 place, no how, no Court, yet they ask you to do that, your  
7 Honor. We are aware of no case but we are aware of Judge  
8 Chin's decision.

9 THE COURT: All right. I have heard about that.

10 MR. MASTRO: And just to be crystal clear, your  
11 Honor --

12 THE COURT: All right.

13 MR. MASTRO: -- it wouldn't -- they've had Bill  
14 Browder trailed for a long time; investigators trying to find  
15 out where he is, what he is doing. They crow to you in this  
16 case, in this particular application, that they've managed to  
17 track down what they say are 20 other days when Bill Browder  
18 was in New York. That's how closely they're monitoring him, 20  
19 other days since 2010 when Bill Browder has been in New York on  
20 his unpaid human rights campaign and they ask you to count  
21 those days.

22 Now, your Honor, we explain in our papers, and of  
23 course if Browder had been here they would know because they've  
24 been trailing him, they're on him like a cheap suit like they  
25 say about the investigative trade, and they have an army of

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1 people trying to track him but they came up with what they say  
2 are 20 extra days on top of the business days when Browder was  
3 here since 2010.

4 Now, your Honor, we went over those days. They only  
5 actually identify 19 dates in their papers but we went over  
6 them and some of them, they are basing that on something like a  
7 TV interview or something that showed up in the press when, in  
8 fact, Browder was not here in New York on those days. Some of  
9 them are duplicates of days that Browder has acknowledged of  
10 having been here on business for his investment firm. But, the  
11 fact of the matter is even if you counted all 20 of the extra  
12 days they want you to count, it is a wrong count, it is  
13 overinflated, but they want you to count those 20 days. That's  
14 53 days since 2010, 10 of them they say have been in 2015 since  
15 the book came out and there was more advocacy work in  
16 connection with the book coming out, again, a book where Bill  
17 Browder is not making a dime, it is all for the campaign. He  
18 has not made a dime on his advocacy work at all, it is not  
19 business for him.

20 If you use just the 43 days from 2010 through 2014  
21 that's less than nine days a year. If you included 2015 --

22 THE COURT: I am going to interrupt you.

23 MR. MASTRO: Certainly, your Honor.

24 THE COURT: There obviously has been an extensive  
25 amount of work, investigative work, other kinds of work, legal

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1 work on the issue of Mr. Browder's deposition. I am going to  
2 tell you as a Judge listening to all of this, this is all way  
3 out of line. He can be deposed. He can be deposed in England  
4 where he resides and I just have to tell all of you that the  
5 amount of observance and calculation and so forth about what he  
6 does or does not do in the United States of America is such a  
7 colossal waste.

8 He is not the only witness in the case, there will be  
9 other witnesses, presumably called by the government and called  
10 by the defense. And it may very well be that Mr. Browder has  
11 testimony to give which is germane to the case but the way to  
12 get it is to go to his residence in England.

13 MR. MASTRO: Correct, your Honor.

14 MR. CYMROT: May I speak to that your Honor?

15 MR. MASTRO: If your Honor --

16 THE COURT: The thing is the effort of investigators,  
17 the effort of lawyers with respect to whether he is deposed in  
18 the United States to me has not been not a useful exercise. In  
19 the first place if he stays in England, he can't be deposed in  
20 New York City or Aspen or anywhere else in the United States.

21 Now, I'm sort of short changing you in a way in your  
22 argument but I am going to have to tell all of you, as a  
23 federal judge I feel that we could carry on, this is all very  
24 well done, very good legal work on your part and the other  
25 people who will speak but when all is said and done, if he is

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1 in England he can't be deposed in New York City or Aspen or  
2 anywhere else here. That's where he resides.

3 MR. CYMROT: May I speak to that your Honor?

4 THE COURT: Yes.

5 MR. MASTRO: Your Honor, I would --

6 MR. CYMROT: Thank you.

7 MR. MASTRO: Your Honor, may I just respond briefly?  
8 I am almost done, your Honor.

9 THE COURT: You go ahead.

10 MR. MASTRO: Thank you very much.

11 THE COURT: You are doing fine but I have to make that  
12 comment and I will hear from the other people, of course.

13 MR. MASTRO: I appreciate it, your Honor, because I,  
14 in one sense I have to say, I couldn't agree more with what  
15 your Honor just said, and it is something that we have been  
16 saying. Our client got these subpoenas. Our client recognizes  
17 that in London, through the Hague Convention and other  
18 mechanisms, he could be deposed in London. And, your Honor,  
19 the only point that I was making about counting the days is no  
20 matter how you count them, about regularly transacting business  
21 in New York under Judge Chin's M'Baye decision, it is less days  
22 here even though all the days they want you to count than Judge  
23 Chin found to be insufficient for regularly transacting  
24 business now having said that.

25 THE COURT: What you are presenting is very relevant

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1 to the issues that have, are being discussed here, of course  
2 they are.

3 MR. MASTRO: I understand, your Honor. And I  
4 appreciate I have to present them because Rule 45 is mandatory  
5 and they cite no case that would permit a Rule 45 subpoena to  
6 stand against Bill Browder in New York or Aspen, but I had to  
7 litigate those things for Bill Browder because Bill Browder is  
8 not consenting to jurisdiction in the United States. He has  
9 not even agreed to be a witness in this case and we have told  
10 the government that and in our papers that he has not agreed to  
11 appear here or be subject to subpoena here for trial. But,  
12 your Honor, the fact of the matter is --

13 THE COURT: I don't understand what you are saying  
14 right now. Please.

15 MR. MASTRO: I am saying, your Honor, he has not  
16 consented to be a witness at this trial. He has told the  
17 government that he doesn't agree that he could be subpoenaed by  
18 either Prevezon or the government. But your Honor is  
19 absolutely right, we have three things that should have been  
20 done here, we think, before Mr. Browder was hounded around the  
21 world, literally, to try and throw a subpoena at him if he  
22 showed up someplace for a vacation or showed up someplace for  
23 his advocacy.

24 Now, your Honor, one, there is party discovery.

25 THE COURT: What?

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1 MR. MASTRO: There is party discovery. The party  
2 discovery. Whatever Browder has given to the government that  
3 will be the subject of party discovery eventually and may  
4 obviate the need, as your Honor pointed out, for Browder to be  
5 a witness in the case. Two --

6 THE COURT: Well, I don't agree with you on that. A  
7 party can subpoena and take the deposition of a non-party.

8 MR. MASTRO: Correct, your Honor.

9 THE COURT: And they don't have to -- they're not  
10 limited to the parties. Don't waste time on that.

11 MR. MASTRO: No, not suggesting they're limited, your  
12 Honor, suggesting that when you are talking about a non-party  
13 foreigner, typically party discovery occurs first and there is  
14 a legion of cases on this, your Honor, and to reduce the burden  
15 on the non-party foreigner. Not suggesting it would obviate  
16 any testimony necessarily but it certainly is how things  
17 typically happen. Number one.

18 Number two, the Hague Convention provides a mechanism  
19 for obtaining both deposition in London and specifically  
20 identified documents. The other side has told you, your Honor,  
21 incorrectly, that England has restricted that in some way. The  
22 actual rules of England are submitted in the materials to you  
23 and you will see that under the Hague Convention they can get a  
24 deposition of Browder in London and they can get specifically  
25 identified documents.

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1           Finally, your Honor, the fact of the matter is that  
2 there will be no prejudice to Prevezon here from Rule 45 being  
3 applied as it's mandatorily required to be applied under the  
4 federal rules.

5           The question of Browder now as opposed to Browder  
6 after party discovery or Browder after Hague Convention or  
7 whether Browder would ever even be a witness at the trial  
8 because, as your Honor has noted, the government's theories  
9 have changed. The other side has said Browder may not have  
10 anything relevant to say that this case given that he didn't  
11 even live in Russia when the money laundering occurred.

12           Your Honor, my point is a simple one. The defendants  
13 are not prejudiced in any way by having party discovery first,  
14 pursuing other options. We are simply pointing out under  
15 well-established case law, Rule 45 -- and I am forced to  
16 litigate these issues, your Honor, because my client was  
17 purportedly served with subpoenas and I have to respond, so I  
18 have had to make these legal arguments, they are mandatory.  
19 That's what Judge Chin said right here in this court house and  
20 that's all I have to say, your Honor.

21           THE COURT: Look. Wait a minute.

22           We do have the issue about whether there was proper  
23 service in New York.

24           MR. MASTRO: Correct, your Honor.

25           THE COURT: And of course there is the issue which you

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1 have addressed and devoted time quite properly on and that is  
2 the other aspect of Rule 45. But what I would suggest to you  
3 is that you suspend now and if it is necessary for you to come  
4 back and discuss further the service or anything, but so we can  
5 move along, let's hear from the other side now and we will be  
6 back to you, if necessary.

7 MR. MASTRO: Thank you, your Honor. It is covered in  
8 our papers, the proper service. I just wanted the Court to  
9 know how disproportionate this effort is to try to force  
10 Browder into a subpoena where Rule 45 doesn't permit it.

11 Thank you, your Honor.

12 THE COURT: Thank you.

13 MR. CYMROT: Thank you, your Honor. Mark Cymrot for  
14 Prevezon.

15 First of all, your Honor, Mr. Mastro has misdescribed  
16 Rule 45 because 45(c) says that a subpoena can be served  
17 anywhere in the United States. The place of compliance has  
18 been separated when they made amendments and that is a place  
19 where the person resides or transacts business.

20 So, what did we do first? We went to his lawyers and  
21 we said, Will you sit for a deposition under the U.S. rules?  
22 And he said, No. Under no circumstances. And he points to the  
23 Hague Convention. And the Hague Convention cannot be used for  
24 pretrial discovery. In England there is a specific reservation  
25 and the Second Circuit has described pretrial deposition in

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1 England under the Hague Convention as not helpful and it is  
2 not, it is extremely limited, and for our purposes would be  
3 largely useless.

4 If he had agreed to a U.S.-style deposition in London,  
5 none of this would have happened but he refused.

6 THE COURT: Say that again.

7 MR. CYMROT: If Mr. Browder had said he would sit for  
8 a deposition under the Federal Rules of Civil Procedure, in  
9 London, we would have accepted that and none of this would have  
10 been necessary. But he said no.

11 So, we then served him through a registered agent, the  
12 least imposition on an individual. He challenged that and you  
13 quashed it. So then we have the issue we have to personally  
14 serve him. So, we served him, personally, in Aspen, Colorado.  
15 Now, he says he does not reside in Aspen, Colorado. But, he  
16 has put in the DMV records of Colorado an admission that this  
17 is his residence. It is an admission subject to penalty of  
18 perjury. End of inquiry, he resides there whether he owns the  
19 house or he doesn't own the house or he put the house in shell  
20 corporations owned by members of the family, all of that is  
21 irrelevant. He has an admission --

22 THE COURT: Wait a minute. Can I interrupt you?

23 MR. CYMROT: Yes.

24 THE COURT: In what form and exactly what is the  
25 language about him, as you say, admitting residence in

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1 Colorado?

2 MR. CYMROT: It is docket 189, 12 and 13. Let me get  
3 it right here.

4 MR. MASTRO: Your Honor, I'm happy to hand it up, your  
5 Honor. It refers to legal address in Aspen, not residence. I  
6 am happy to hand it up to your Honor, a very different thing.  
7 That's the legal address in Colorado where the car is going to  
8 be kept, it is not residence.

9 Thank you.

10 THE COURT: Where on this form? My eyes don't travel  
11 that fast.

12 MR. MASTRO: Sorry, your Honor.

13 MR. CYMROT: Sorry, your Honor. Let me point it out.  
14 Legal address.

15 MR. MASTRO: Legal address.

16 THE COURT: Oh, I see. All right. All right.

17 MR. CYMROT: And what he says about that is, your  
18 Honor, that he doesn't own it personally, it is owned by  
19 Sundance. We subpoenaed Sundance to find out who owns it and  
20 Sundance, represented by the same lawyers, objected to that  
21 subpoena; that is in front of you today. If there is any  
22 question about the legal residence you can let us proceed with  
23 those subpoenas.

24 But this is a house he admits his family owns and he  
25 appeared there and he has registered two cars there. This

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1 isn't some occasional place that he goes to. But, the fact of  
2 the matter is if he served there, which we say he was, then you  
3 can order a deposition in London under the Federal Rules of  
4 Civil Procedure. What we will not do voluntarily and go under  
5 the Hague Convention where he has already had and he admits in  
6 his papers, he has had subpoenas quashed under the Hague  
7 Convention.

8 THE COURT: I don't understand what you are saying  
9 now. Go over that again, please.

10 MR. CYMROT: Yes.

11 The procedure Mr. Browder wants us to follow is the  
12 Hague Convention on the taking of evidence abroad except  
13 England, when it acceded to the convention, made a resolution.  
14 The resolution is it cannot be used for pretrial discovery.  
15 This is in our papers we have attached the relevant documents.

16 So, the Hague Convention and the Second Circuit has  
17 said the Hague Convention is not a useful procedure for  
18 depositions in London but once he is served in the United  
19 States under Rule 45(c) you have jurisdiction over him and you  
20 can order him to a deposition under the Federal Rules of Civil  
21 Procedure in London. And you are right, that would put an end  
22 to all of this. But he wouldn't agree to it. We offered that.

23 THE COURT: Let's pause there just a minute.

24 MR. CYMROT: Yes.

25 THE COURT: I want to make sure I understand what you

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1 are saying.

2 MR. CYMROT: Yes.

3 THE COURT: Let's assume -- and I haven't held yet but  
4 let's assume -- that he was properly served in New York City.

5 MR. CYMROT: Correct.

6 THE COURT: Now, are you saying that he could be  
7 ordered to be deposed in London? Do I understand you? I'm not  
8 sure I understand you.

9 MR. CYMROT: That's correct. If you look, there is  
10 45(c) which says the subpoena can be served anywhere in the  
11 United States. Once the subpoena is served you have  
12 jurisdiction. Then there is 45(b)(2), a subpoena can be served  
13 anywhere in the United States.

14 THE COURT: Just a minute. I want to be with you.

15 MR. CYMROT: (b)(2).

16 THE COURT: For some reason I don't see what you are  
17 talking about.

18 MR. CYMROT: Can I hand up a copy of the rules that  
19 has been marked, your Honor?

20 THE COURT: I have the rule in my hand.

21 MR. CYMROT: Okay. 2, service in the United States, a  
22 subpoena may be served at any place in the United States.

23 THE COURT: I heard D, as in David. I'm sorry.

24 MR. CYMROT: Okay, (b)(2).

25 THE COURT: You are talking about B as in boy.

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1 MR. CYMROT: Yes.

2 THE COURT: All right. Let me look at that.

3 (pause)

4 Let me see if I understand you and you are going to  
5 need to correct me but I will try.

6 What you are saying is under 45(b)(2) a subpoena may  
7 be served at any place within the United States. Okay. Let's  
8 assume that a subpoena was served.

9 MR. CYMROT: Correct.

10 THE COURT: Somewhere in the United States. Then we  
11 go to 45(c).

12 MR. CYMROT: 45(c).

13 THE COURT: Place of compliance. Now, how have you  
14 applied, in your argument before me, how have you applied  
15 45(c)? Can you go over that again, please?

16 MR. CYMROT: Once the subpoena is served, the Court  
17 has jurisdiction over the deponent and can order him to appear  
18 within 100 miles of where he resides or transacts business.  
19 So, it doesn't have to be you serve him in New York and it has  
20 to be the deposition in New York. We say he transacts business  
21 here but if you disagree with us, you would say I find there is  
22 no dispute on the record that he resides and transacts business  
23 in London, I am ordering him to a deposition in London under  
24 the Federal Rules of Civil Procedure.

25 THE COURT: Let me go with that again, slowly, with

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1 you.

2 MR. CYMROT: Yes.

3 THE COURT: If he has been served then you are saying  
4 that the place of the deposition does not have to be in the  
5 United States. Is that what you are saying?

6 MR. CYMROT: Exactly.

7 THE COURT: Are you sure of that?

8 MR. CYMROT: There is no case law on this, your Honor,  
9 either way. There is a case where you exercise your discretion  
10 not to order a deposition in Switzerland but Swiss wouldn't  
11 allow a U.S. deposition. So --

12 MR. MASTRO: It is your decision, your Honor.

13 MR. CYMROT: Excuse me.

14 MR. MASTRO: I'm sorry. I'm happy to hand it up to  
15 your Honor.

16 MR. CYMROT: I didn't interrupt you.

17 MR. MASTRO: I'm just trying to be helpful.

18 MR. CYMROT: I just told him about it. You exercised  
19 your discretion not to order a deposition in Switzerland but  
20 Switzerland would find it illegal to have a U.S. deposition in  
21 Switzerland. England does not find it illegal to have a U.S.  
22 deposition in England. So, you could order a deposition in  
23 England. There are no cases either way on this, your Honor.

24 THE COURT: Mr. Mastro, you stood up?

25 MR. MASTRO: Yes, your Honor.

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1           Actually, there is a case right on point, it is your  
2 decision in NML Capital, and your Honor will recall there was  
3 proper service on a Mr. Caruana in New York, and this very  
4 argument was made to you. Rule 45, there was no ability to  
5 have a valid subpoena. He was properly served but Rule 45 said  
6 no valid subpoena and the argument was made that you could  
7 order him to give a deposition in Switzerland. I am going to  
8 give it to you, by written question and you ruled: Neither  
9 Caruana nor anyone else at BIS would be required to travel more  
10 than 100 miles, however, the Court does not believe that Rule  
11 45 is a device for having the discovery rendered in a foreign  
12 country as plaintiffs suggest.

13           You have ruled on it. Definitive on it. Rule 45  
14 doesn't permit you to order the deposition in a foreign  
15 country. And I am going to hand it up to your Honor. So, I  
16 think that answers the question, your Honor has answered it.

17           And we have other cases that reach the same  
18 conclusion, your Honor, including the Fortress case by Judge  
19 Lynch, same conclusion. Rule 45 doesn't allow the subpoena to  
20 be valid even though properly served, can't order the discovery  
21 in a foreign country.

22           MR. CYMROT: Your Honor, once you have jurisdiction  
23 over him under (c), 45(c), which you gain by the service of the  
24 subpoena, there is nothing -- I'm sorry, (b) -- under 45(b)  
25 there is nothing in 45(c) that limits it to the United States.

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1           There is nothing in the commentary, there is nothing  
2 in the rule itself. You have jurisdiction over him.

3           Now I can go on to talk about residence and doing  
4 business in New York.

5           THE COURT: Okay. Go ahead. You address that.

6           MR. CYMROT: All right.

7           THE COURT: You address that.

8           MR. CYMROT: So, as I said, we have talked about Aspen  
9 and the DMV records. If you need more evidence on that, then  
10 we have subpoenas to the agent, Ms. Tarantino, who would have  
11 additional records about who is paying for that house and whose  
12 residence it is.

13          THE COURT: You are talking about Aspen?

14          MR. CYMROT: That's Aspen. I will move to New York.

15          THE COURT: Let's move to New York.

16          MR. CYMROT: All right. Mr. Moscow reminds me that it  
17 is Mr. Mastro who represents the agent and it is Mr. Mastro who  
18 represents Mr. Browder. It is Mr. Mastro who represents all of  
19 these companies suggesting that there is a single set of  
20 ownership here but the --

21          MR. MASTRO: I represent only Mr. Browder, your Honor,  
22 no one else.

23          MR. CYMROT: You represent Tarantino and you filed the  
24 motion to quash the other subpoenas to the agents.

25          THE COURT: Please, let's not get off into that.

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1 MR. CYMROT: Okay.

2 THE COURT: Let's stick to the point.

3 MR. CYMROT: Now, in New York what Mr. Browder has  
4 told you is he does investment business in New York. All  
5 right. Well, that's business in New York. He has sold a book  
6 this year in New York, he contracted with Simon & Schuster. He  
7 has been advertising. He has been in New York 10 days in  
8 February. He has only admitted to two days. We have not been  
9 trailing him. He has a tweet and other internet-type  
10 disclosures, it is advertised where he is. 10 days in February  
11 for a book. He says, Well, I'm not keeping the money. That's  
12 not the point. Publishing a book, getting the income out of  
13 New York is business by any definition. How he spends his  
14 money is his own business.

15 But, publishing a book in New York, which he has done,  
16 and advertising that book and marketing that book in New York  
17 which he has done at least on 10 days in February alone, is  
18 doing business on top of his investment business.

19 THE COURT: What do you say are the 10 days again?

20 MR. CYMROT: Your Honor, we put a chart together.

21 Mr. Mastro would like to correct himself. He signed a  
22 pleading for Sundance, Aspen, Michael --

23 THE COURT: I can't hear you.

24 MR. CYMROT: I'm sorry. Mr. Mastro would like to  
25 correct himself that he actually represents all of these

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1 companies to which subpoenas were issued about the Aspen  
2 property.

3 MR. MASTRO: Yes, your Honor. We have appeared on  
4 behalf of them as well but I am not really sure why we  
5 interrupted the proceedings for that. But anyway, go ahead.

6 MR. CYMROT: So, Mr. Browder admits to 33 days in New  
7 York between 2010 and 2015. His math is a little off because  
8 we have only begun 2015 but I won't get into that.

9 These additional times in New York come from the  
10 public record and the cites are right there. They come from  
11 websites of appearances in New York. He says he wasn't there  
12 on the particular day of the broadcast. He hasn't said that he  
13 wasn't there to do the interview. And all of this could be  
14 solved, your Honor, if Mr. Browder would give you his passport  
15 which would tell you --

16 THE COURT: His what?

17 MR. CYMROT: He should give up his passport to you.  
18 It will show you exactly how many times he has been to New York  
19 over the last five years conducting business. But he hasn't.  
20 What he has done is he has narrowly defined business and then  
21 he has told you only about his investment business. He hasn't  
22 told you about his book business which is clearly business, the  
23 sale of a book in New York, and he hasn't told you about his  
24 non-profit business because he says that that is not doing  
25 business when it, as you pointed out, non-profit business is

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1 business and he has admitted that as CEO of Hermitage, his  
2 company, that Hermitage is engaged in this worldwide human  
3 rights campaign that he describes that as business. He says  
4 that is my principal occupation now. That is what his  
5 affidavits say. He is now engaged in non-profit business and  
6 he hasn't disclosed to you the times he has been in New York or  
7 Aspen or other places for that business.

8 So, what he does is he defines a term very narrowly,  
9 he discloses only as to that term, and he does not give you  
10 full disclosure about transacting business in New York. And  
11 from the public record we could show 10 days in February, while  
12 we are trying to get his deposition, and Rule 45 was amended,  
13 45(c) was created for the convenience of the witness. Any one  
14 of those 10 days, a day before or a day after he could have sat  
15 for a deposition. He chose not to, he chose to run away. He  
16 is being irresponsible. We would have taken a deposition in  
17 London and none of this would have been necessary as long as it  
18 was under the federal rules.

19 Let me go to the issue of party discovery. We have  
20 taken party discovery to the extent of a Rule 30(b)6 deposition  
21 and what did we learn? We learned from that 30(b)6 deposition,  
22 on at least three occasions, the government said they got the  
23 documents from Mr. Browder and the government doesn't know  
24 where he got them from. So, we have to go to Mr. Browder.  
25 This is central to the case, your Honor -- central to the case.

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1 THE COURT: I am not clear what you are saying now.

2 MR. CYMROT: I am saying why take Mr. Browder's  
3 deposition? The government and Mr. Browder says take party  
4 deposition first, take party discovery first. We did that. We  
5 took a Rule 30(b)6 deposition of the government and the  
6 government, on three occasions, said we got the key documents  
7 that link Mr. Katsyv to the alleged fraud. We got those  
8 documents from Mr. Browder and we do not know where he got  
9 them. Let me quote page 174, line 18, of the deposition:

10 "Q How did Browder get the records he gave you?

11 "A You have to ask Mr. Browder."

12 175, line 7:

13 "Q How did Browder obtain the bank records that he gave you?"

14 Then the witness consults with counsel, the Assistant  
15 U.S. Attorney. Answer page 176, line 6:

16 "A You have to ask Hermitage. Bill Browder never told me  
17 where he was getting some of the information."

18 And that is then repeated at the bottom of the page:  
19 He didn't tell us where he was getting his records.

20 177, line 7:

21 "Q Did you ask about the source and the authenticity of the  
22 records?

23 Let me start that again, line 5:

24 "Q In the course of your investigation before you froze the  
25 property, did you ask about the source and authenticity of the

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1 records?

2 "A Yes, we did. And Mr. Browder, to the best of my knowledge,  
3 wouldn't reveal the source of some of his records."

4 This is the key link. There is the first 100  
5 paragraphs of the complaint that tell the story about Russia  
6 and the government and the theft and then there is this thin  
7 link of these bank records that is the reason that the  
8 government says Prevezon got some of the money. And  
9 Mr. Browder gave those records to the government and would not  
10 tell the government where he got them or whether they were  
11 authentic. And, you know, how they could have proceeded takes  
12 my breath away but they proceeded and now we are entitled to  
13 take discovery of Mr. Browder about where those records came  
14 from and whether they are authentic. And no matter how many  
15 witnesses the government comes up with, Mr. Browder is the  
16 source of those documents.

17 I might say, your Honor, we filed an affidavit. The  
18 government says it has new witnesses. We filed an affidavit  
19 with our papers from a Mr. Lurie who is a reporter in Russia  
20 who spoke with Mr. Magnitsky in prison, they were both in  
21 prison and Mr. Lurie says that he was approached by people  
22 representing themselves to be representatives of Browder and  
23 offered a bribe to change his story.

24 MR. MASTRO: Your Honor --

25 MR. CYMROT: So the government is coming --

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1 MR. MASTRO: Your Honor, I object to this.

2 MR. CYMROT: Sit down. I listened to you.

3 MR. MASTRO: This is a Lurie ambush to smear our  
4 client, your Honor. We object to this.

5 MR. MONTELEONI: Your Honor, if the Court wishes --

6 MR. CYMROT: Excuse me, Mr. Monteleoni. I did not  
7 interrupt --

8 THE COURT: There is one lawyer at the podium and I  
9 don't think we have to have a bunch of other lawyers standing  
10 up and speaking. We will take one at a time.

11 MR. CYMROT: My point, your Honor, is no matter how  
12 many witnesses the government comes up with, Browder's  
13 deposition is still a legitimate and necessary deposition in  
14 this case and we will take it if you will order it in London  
15 pursuant to the Federal Rules of Civil Procedure but we are  
16 entitled to take it in New York. And the advantage of New  
17 York, your Honor, is you could assign a magistrate to oversee  
18 that deposition, sit in, resolve any disputes that come up in  
19 that deposition because the way this has been litigated, that  
20 deposition is going to be very difficult without a court  
21 ordered officer present. And we would ask that it be ordered  
22 in New York because he regularly transacts business in New  
23 York. He has not been candid with you about how many times he  
24 comes to New York and it would be better to be taken in New  
25 York in front of a court officer who could resolve any disputes

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1 that would arise in the deposition.

2 THE COURT: Thank you.

3 MR. CYMROT: Thank you, your Honor.

4 THE COURT: Government?

5 MR. MONTELEONI: Yes, your Honor.

6 The government doesn't believe that it is necessary to  
7 get into some of the points that Mr. Cymrot was making about  
8 the deposition or these documents to resolve the issues that  
9 are before the Court now, but if the Court has any questions  
10 about that, I would be happy to explain some things that I  
11 believe Mr. Cymrot was describing and didn't provide the full  
12 picture.

13 So, I can explain if you want, but I don't need to be  
14 heard if the Court isn't interested.

15 THE COURT: Thank you very much.

16 MR. MASTRO: Your Honor, just very briefly, and again,  
17 I said we are not here today to get into the merits but  
18 Mr. Cymrot has previously told you and your Honor noted it in  
19 your Honor's opinion quashing the subpoena issued to Hermitage  
20 Global that, "defendants claimed that, quote, Browder was not  
21 in Russia when the key events in the verified complaint are  
22 alleged to have occurred, has limited competent evidence on  
23 peripheral subjects with no competent evidence about key issues  
24 affecting defendants."

25 So, we hear something different today, but the fact of

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1 the matter is even the government has told you in the letter  
2 that they submitted on March 6th that "it is not clear what  
3 role, if any, Browder will play at trial of this case and to  
4 what extent, if at all, he possesses relevant information not  
5 obtainable through party discovery" because the government's  
6 theory of the case has changed and have put in an amended  
7 pleading, as your Honor is well aware.

8 Now, your Honor, two things: Mr. Cymrot asked you to  
9 go where no Court in this country has ever gone and he cites no  
10 case that has ever gone there. And he ignores your own  
11 decision in NML where your Honor was asked to do exactly this:  
12 A subpoena properly served in the Southern District but in  
13 violation of Rule 45 and it was argued to you, you should  
14 nevertheless order that person to sit for a deposition by  
15 written question in Switzerland and your Honor said not doing  
16 that. Can't do that.

17 THE COURT: Whoever can answer this, answer it:

18 The New York subpoena, I know I have got it in papers  
19 before me but save me a little time.

20 MR. MASTRO: Yes, your Honor.

21 THE COURT: The New York subpoena was served when?

22 MR. MASTRO: February 3rd, your Honor; as Mr. Browder  
23 was leaving a television interview that he gave in connection  
24 with the human rights campaign and the book in the evening --  
25 early evening of that day.

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1 THE COURT: All right. Now look. It is obvious that  
2 the issue about taking Mr. Browder's deposition has been under  
3 review, discussion and so forth for at least since very early  
4 February. Now, I think it was Mr. Cymrot who gave me this  
5 sheet that says Browder's New York appearances. Is that what  
6 you gave me?

7 MR. CYMROT: Yes, your Honor.

8 THE COURT: Now, what this shows is that Mr. Browder,  
9 since February 2, has been in New York for a book signing, for  
10 appearance on television shows, etc., etc., numerous times. I  
11 am not making rulings at the moment but I want to discuss  
12 something.

13 MR. MASTRO: Certainly, your Honor.

14 THE COURT: All the lawyers here knew that the taking  
15 of his deposition was a very hotly, highly discussed topic.  
16 Why wasn't his deposition taken? He was in New York.

17 MR. CYMROT: He wouldn't agree, your Honor, and we had  
18 to serve him and he ran away. That's why.

19 MR. MASTRO: Your Honor, if I can please address that?

20 THE COURT: I simply do not understand why his  
21 deposition was not taken when he was in New York. Maybe during  
22 that whole time of the first half of February or maybe he was  
23 in and out of New York, but he was in New York over at least,  
24 if not continually, over and over and over during early  
25 February.

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1 MR. CYMROT: Your Honor, he is --

2 THE COURT: Why? His deposition will ultimately be  
3 taken if it has to be taken in England. It will be taken  
4 unless the defendant gives up on it. And I don't see any sign  
5 of the defendant giving up on it.

6 Now, why were things not simplified so that he was  
7 deposed in February when he was in New York either continually  
8 or in and out of New York all the time? What an unbelievable  
9 waste to be going through all of this when he should have been  
10 deposed during that time.

11 MR. MASTRO: May I address that, your Honor?

12 THE COURT: Yes. You must have known they wanted his  
13 deposition, didn't you.

14 MR. MASTRO: Your Honor --

15 THE COURT: The answer is yes, isn't it?

16 MR. MASTRO: The answer is yes.

17 THE COURT: Of course, it is. Why wasn't he deposed?  
18 Why didn't you produce him?

19 MR. MASTRO: Your Honor, whether they want his  
20 deposition or not, my client, a non-party to these proceedings,  
21 does not have to consent to being deposed and to having the  
22 burden which he has already sworn to the Court would cost  
23 hundreds of millions of dollars to collect his documents that  
24 they've requested.

25 THE COURT: Oh please. Please. Please.

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1 MR. MASTRO: My client, your Honor.

2 THE COURT: Please.

3 MR. MASTRO: My client does not have to consent to a  
4 deposition just because they want one. My client has not even  
5 agreed to appear here as a witness in the trial. My client  
6 lives and works in England and has not agreed to be a witness  
7 in this case.

8 THE COURT: You are really, really getting off the  
9 point that I am trying to address.

10 MR. MASTRO: Please, your Honor. I want to address  
11 your point.

12 THE COURT: It is a very simple, direct point. I have  
13 a calendar which shows that he was in New York during the time  
14 when he and all the lawyers knew that there was a desire for  
15 his deposition. Now, of course he didn't need to consent to  
16 it. I know that. But, there are times when people consent to  
17 things and lawyers work with their clients to simplify and  
18 prevent extensive and useless litigation and that's what should  
19 have been done here.

20 MR. MASTRO: Your Honor, and I say this with great  
21 humility, Mr. Browder finds himself as a human rights activist  
22 standing up to the Putin regime in Russia as someone who the  
23 government informed him there are credible threats going to his  
24 personal security. He has very concerned about those issues --

25 THE COURT: Well, apparently --

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1 MR. MASTRO: -- and not subjecting himself --

2 THE COURT: Apparently the credible threats did not  
3 prevent him from going on The Daily Show on February 3, Fox and  
4 Friends on February 3, appearing on Sirius on February 3, going  
5 on CNBC Squawk Box on February 3, going on MSNBC on February 5,  
6 going on Greg Greenberg's program on February 6th.

7 Apparently the threats didn't prevent him from doing  
8 that. Now why could he not have been deposed?

9 MR. MASTRO: That is correct, your Honor, and if you  
10 actually aggregate those instances it occurs over a five to  
11 six-day period.

12 THE COURT: A very important five or six-day period.

13 MR. MASTRO: I understand, your Honor, but  
14 Mr. Browder -- Mr. Browder has put himself at risk to promote  
15 the human rights campaign that he cares so deeply about but he  
16 is not required and has not agreed to be a witness in this case  
17 or to consent to being questioned in this case and Rule 45.

18 THE COURT: I know that. I know that. I know that  
19 very well but I think it is regrettable because ultimately he  
20 will, undoubtedly, be deposed, and it would have been so much  
21 simpler to get it over with and have it in New York. That's  
22 all I'm saying.

23 MR. MASTRO: Well, your Honor, I understand what your  
24 Honor is saying. I respect what your Honor is saying. The  
25 calendar that is in front of you is not actually accurate as to

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1 what days Mr. Browder was actually here as opposed to some  
2 things having been taped and then played on a subsequent date,  
3 so we would ask to be able to correct the record in that regard  
4 but more importantly, your Honor, Mr. Browder has in fact not  
5 agreed to be a witness in this case.

6 If they had gone through the Hague Convention which  
7 they can do and there is no restriction in England on a  
8 deposition -- the Hague convection restrictions of England are  
9 at 184 of this record -- he could do that. And the fact of the  
10 matter is they never asked us, in reality, because other  
11 counsel who has worked on this matter is here before us here,  
12 in this courtroom, and says that they never asked us or  
13 Hermitage Global's counsel for a London deposition consistent  
14 with those procedures.

15 Your Honor, what the fact of the matter is that Rule  
16 45 exists for a reason. It means that unless somebody actually  
17 resides, is employed or regularly transacts business in a  
18 jurisdiction, they can't be subject to a Rule 45 subpoena.

19 THE COURT: I know. I am pretty familiar with Rule  
20 45.

21 MR. MASTRO: I understand.

22 Your Honor, I just wanted to say that these extra days  
23 that they're talking about, even if you counted all of them and  
24 they're wrong in the count and we would be happy to put in an  
25 additional submission to explain to you why they're wrong in

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1 the count and that it wouldn't move the needle the times he has  
2 been here in connection with non-commercial activity, the fact  
3 of the matter is that even if you counted all of their days in  
4 the count, it would be less than nine days a year and Judge  
5 Chin ruled that that is not enough for transacting business  
6 even if you considered his human rights activity to be part of  
7 that.

8 So, on the record before your Honor --

9 THE COURT: Let me interrupt you. I'm sorry.

10 MR. MASTRO: Certainly, your Honor.

11 THE COURT: I want to rule now on some things that  
12 have not been completely discussed but they are on the record  
13 here but they are discussed in the papers at length and I want  
14 to rule on certain things before we go forward.

15 I want to rule on whether Mr. Browder was served in  
16 Aspen and whether he can be deposed in Aspen under Rule 45. I  
17 want to rule on whether he was served in New York and can be  
18 deposed in New York under Rule 45. I want to rule on that  
19 because it has been discussed very thoroughly in the papers and  
20 time is going on this afternoon. So, if you could sit down I  
21 will make my rulings.

22 Thank you.

23 MR. MASTRO: Certainly, your Honor.

24 THE COURT: My ruling is, as far as Aspen, as follows:  
25 Although he may have been served in Aspen, he cannot be

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1 required to attend a deposition pursuant to that service.

2 My ruling and finding is that he does not reside in  
3 Aspen, nor does he regularly transact business in Aspen and he  
4 cannot be deposed in Aspen. So, if there are subpoenas  
5 requiring him to be deposed in Aspen, those subpoenas are  
6 quashed.

7 Let's come to New York:

8 I have reviewed the affidavits and declarations on the  
9 issue of whether Browder was served properly in New York. I  
10 have also seen a video of the events attending what occurred in  
11 New York and it is my ruling that Browder was properly served  
12 with process in New York City.

13 I do not accept the argument that somehow that service  
14 of process was ineffective because of some fear of harm from  
15 Russian officials. My ruling is that he was served in New York  
16 City and properly served.

17 The next question is whether he is subject to  
18 deposition in New York under Rule 45 and we are talking about  
19 Rule 45(c), and it provides that a subpoena may command a  
20 person to attend a deposition within 100 miles of where the  
21 person resides, is employed, or regularly transacts business in  
22 person. He certainly does not reside in New York but it is my  
23 finding and holding that he has regularly transacted business  
24 in New York, in person. During the years 2010 through 2014 he  
25 has been in New York on a reasonably regular basis to discuss

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1 the matters occurring in Russia about Magnitsky that was not  
2 commercial business but it was obviously important to him in  
3 his human rights activity which he has become more and more  
4 involved in. In my view, if you become an activist in a cause  
5 for human rights or some specific aspect of human rights  
6 dealing with the Russian government, for instance, then that is  
7 the doing of business within the meaning of the rule, not  
8 commercial business but it was a business that he undertook and  
9 was in.

10 When we came around to February which was obviously  
11 very recent, the records show he was very active in his human  
12 rights activity and, in my view, looking at the record, I  
13 conclude and find that he has started to become regularly  
14 involved in the transaction of his human rights activity and  
15 that is within the meaning of Rule 45(c) and places him within  
16 the realm of being deposed in New York.

17 Now, therefore, I think there is a motion to quash  
18 subpoena or subpoenas -- plural -- served in New York and that  
19 subpoena or those subpoenas will not be quashed.

20 Now, Mr. Browder resides in England. As far as the  
21 Court knows he is not in New York now and of course there is no  
22 process by which this Court can direct him to come from his  
23 home in England to New York or anywhere else in the United  
24 States. So, although there has been service and there would be  
25 a proper occasion for a deposition under Rule 45, the Court

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1 cannot order any deposition because he simply is, as far as the  
2 Court knows, he is in England and that's where that stands.

3 MR. CYMROT: Your Honor?

4 THE COURT: Yes.

5 MR. CYMROT: You have found that he was properly  
6 served in New York. You have jurisdiction over him and you can  
7 tell him to come to New York and produce documents and give a  
8 deposition. That's the whole point of serving a subpoena in  
9 New York.

10 I would point out, your Honor, that he has already  
11 announced he is going to be in Washington, D.C. on April 30th,  
12 and so it is not a real inconvenience for him to come to New  
13 York and give the deposition before or after that appearance in  
14 Washington, D.C. And I would ask that you order him to do that  
15 because you have jurisdiction over him, you found that. He  
16 regularly transacts business in New York and it is not an  
17 inconvenience for him to be here. And certainly, your Honor,  
18 you can order him, even from England, to produce documents here  
19 pursuant to that subpoena.

20 THE COURT: Let's take a short recess, please.

21 (recess)

22 THE COURT: The subpoena of Mr. Browder was adjourned  
23 from its original date until the time of the hearing which has  
24 occurred today. Therefore, the subpoena needs to have a new  
25 date and the subpoena will now be returnable Wednesday, April

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1 15.

2 Now, it is time to get going on other aspects of this  
3 litigation. This litigation is not all about Mr. Browder or  
4 his deposition so the parties need to move forward on the  
5 litigation, on the aspects that are central to the litigation,  
6 and I think we need to have a conference on that. You work  
7 that date out with my deputy clerk sometime in the next few  
8 days and work out a schedule for the litigation as a whole.

9 As far as Mr. Browder is concerned, I have given you a  
10 new date for his deposition. If there are any application  
11 relating to his deposition we want to reduce the legal work and  
12 paperwork to, I hope, zero, or almost zero. Therefore, if  
13 there is any application about his deposition, anything about  
14 his deposition further, we will cover it in a telephone  
15 conference call on the record and that will be that. And  
16 please do not file letters and other documents. No paperwork.  
17 We have had enough of it and we don't need any more about  
18 Mr. Browder's deposition.

19 That concludes today. We will have a conference about  
20 the litigation as a whole at a time which you will work out  
21 with my deputy clerk.

22 Thank you.

23 MR. MONTELEONI: Your Honor, may I be heard briefly?

24 THE COURT: What?

25 MR. MONTELEONI: It is true that there has been a

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1 great deal of paperwork about aspects of Mr. Browder's  
2 deposition but the government has not yet had an opportunity to  
3 submit motions that both parties have long known that it  
4 intended to submit raising issues about certain extremely  
5 important areas of the scope of the deposition. There are some  
6 questions that the answers to which could potentially, in the  
7 government's view, put people at risk and the government does  
8 intend to seek a modification of the deposition and has always  
9 intended to file this motion. That's why the service issues  
10 came first. But the government does need an opportunity to do  
11 that and that is going to have to be done on paper.

12 I would propose, if we are already going to have a  
13 conference with the deputy in a few days, that between now and  
14 then the government can talk to defense counsel about working  
15 out a schedule for that --

16 THE COURT: No.

17 MR. MONTELEONI: Well, your Honor.

18 THE COURT: I mean it. We are having a conference.  
19 Anything you need to raise can be raised on the record on a  
20 sealed record and under no circumstances are we going to start  
21 having a lot of more voluminous motions.

22 We can do everything we need on the record orally and  
23 those records can be sealed if there is confidentiality  
24 involved. That's the way we are going to proceed. We are not  
25 going to start another round of voluminous motions. We won't

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do it. You come to the conference next week and you will see.

Okay?

Thank you.

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