

13-2545

To Be Argued By:
NDIDI N. MOSES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-2545

—
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

\$829,422.42, CURRENCY, U.S. seized from
account #202252771 at CITIBANK, N.A. held
i/n/o WESTERN LIABILITY MGMT INC.,
Defendant,

WESTERN LIABILITY MGMT INC.,
Claimant-Appellant.

—
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Dominic J. Squatrito, J.) had subject matter jurisdiction over this forfeiture action pursuant to 28 U.S.C. §§ 1345 and 1355. On June 12, 2013, the district court entered a final decree of forfeiture that resolved all claims in this case. Joint Appendix (“A__”) 14. On June 28, 2013, the claimant-appellant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). A14, A873. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

- I. Whether the district court abused its discretion when it held that certified documents, authenticated documents, and a sworn affidavit of the federal case agent assigned to the underlying case were admissible at summary judgment.
- II. Whether claimant Western Liability Management (“WLM”) lacked standing to contest the civil forfeiture of the Defendant Funds where it was a nominal owner of the funds held in the relevant bank account.
- III. Whether the Defendant Funds were forfeitable under 18 U.S.C. § 1960 when WLM knowingly transmitted funds without being licensed to do so and where WLM did not establish that it was an innocent owner.

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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is a direct appeal from the civil forfeiture of \$829,422.42 in United States funds (hereinafter the “Defendant Funds”). The government seized the Defendant Funds under 18 U.S.C. § 1956 (money laundering) and 18 U.S.C. 18 U.S.C. § 1960 (unlicensed money remitting) following an investigation into two unlicensed

money remitting businesses in Connecticut. Law enforcement learned that these two Connecticut businesses were wiring money to Citibank account number 202252771, which was held in the name of Western Liability Management, Inc. (“WLM”). Law enforcement also determined that WLM was also operating as an unlicensed money remitter.

WLM filed a claim to contest the civil forfeiture, claiming it was the owner of the Defendant Funds and that the funds were not involved in a violation of 18 U.S.C. § 1956 or § 1960. The district court rejected WLM’s claims, and ordered forfeiture of the funds after finding that WLM failed to establish standing to challenge the civil forfeiture, and that the Defendant Funds should be forfeited to the United States because of their involvement in a violation of 18 U.S.C. § 1960.

In this appeal, WLM argues that the district court improperly considered certain documents when it granted summary judgment to the government. In addition, WLM challenges the district court’s conclusions that it lacked standing to contest the forfeiture and that the funds were involved in a violation of § 1960. For the reasons set forth below, all of these claims lack merit. The district court judgment should be affirmed.

Statement of the Case

A. Federal investigation into violations of 18 U.S.C. § 1956 and 18 U.S.C. §1960¹

In 2006, federal law enforcement began an investigation into violations of 18 U.S.C. § 1956 (money laundering) and 18 U.S.C. § 1960 (unlicensed money remitting) violations by two businesses in Connecticut: RM Insurance, d/b/a Marrakesh, in Danbury and BrazUSA Enterprises, LLC (“BrazUSA”) in Bridgeport. A47, A842. During the investigation, the government learned that BrazUSA and Marrakesh were unlicensed money remitting businesses and were wiring money for their clients through Citibank account number 202252771, which was held in the name of WLM. A842-49. Between July 2007 and March 2008, Marrakesh and BrazUSA wired a total of \$4,144,520.00 to Citibank account number 202252771. A848-49.

From this information, the government began an investigation into WLM. WLM was a business operating out of California, and owned by Ariston DeOliveira. A843, A849-50. During the

¹ The following brief factual recitation is taken in part from the district court’s ruling on the government’s motions to dismiss and cross motions for summary judgment. That ruling can be found in both the Special Appendix (“SA__”) and the Joint Appendix at SA2 and A839. Additional relevant facts will be set forth below.

time period WLM was accepting money from Marrakesh and BrazUSA, WLM was not registered or licensed to transmit money with either the Financial Crimes Enforcement Network (“FinCen”) or the State of California. A849-51.

On March 17, 2008, the government obtained two search and seizure warrants for the contents of Citibank account number 202252771, held in the name of WLM, for violations of 18 U.S.C. §§ 1956 and 1960. A848. The warrants authorized the seizure of funds from Citibank account number 202252771, not to exceed \$3,480,220. A848. Ultimately, \$829,422.42 was seized from the account. A848.

B. Civil forfeiture of the Defendant Funds

On June 17, 2008, the government filed a verified complaint of forfeiture, pursuant to 18 U.S.C § 981(a)(1)(A), for the forfeiture of the Defendant Funds, alleging they were involved in a violation of 18 U.S.C. § 1956 and 18 U.S.C. § 1960. A3, A17. WLM filed an appearance as claimant of the Defendant Funds on August 7, 2008. A3, A15.

WLM filed several motions to dismiss the complaint, all of which were denied without prejudice by the district court. A4-5. On February 21, 2011, WLM filed a motion for summary judgment. A11. On May 25, 2011, the government filed its motion to dismiss and, alternatively, for summary judgment, arguing that WLM

lacked standing to contest the civil forfeiture of the Defendant Funds, that the Defendant Funds should be forfeited to the United States because of their involvement in a violation of 18 U.S.C. § 1960, and that WLM could not prove it was an innocent owner. A12, A155-210

On June 5, 2013, the district court granted the government's motion to dismiss for lack of standing, and alternatively, its motion for summary judgment. A13, A839. The district court denied WLM's motion for summary judgment. A13. The court entered a final order of forfeiture on June 12, 2013, A14, A871-72, and this appeal followed.

Summary of Argument

I. WLM waived many of the evidentiary objections it mentions in its brief by failing to raise those objections before the district court and by failing to properly present them to this Court. In any event, WLM's claims are meritless. The district court properly exercised its discretion to consider the documents now challenged by WLM. (1) The district court properly considered WLM's FinCen registration. The document was self-authenticating and did not violate Rule 407's bar against the introduction of subsequent remedial measures. (2) Similarly, the court properly relied on the Declaration of Special Agent Debra Lee because that declaration was based on her personal knowledge of the investi-

gation. (3) The court properly considered certified copies of documents received from a state agency; these documents were relevant to show that WLM was acting as an unlicensed money remitting business. (4) Finally, the court properly considered the wire transfer documents and WLM's tax returns. These documents were authenticated by their production from WLM, and were relevant to show that WLM accepted and transferred millions of dollars to unknown bank accounts.

II. WLM lacked standing to contest the civil forfeiture of the Defendant Funds because WLM was merely a nominal owner of the Citibank account from which the funds were seized. WLM lacked dominion and control of the funds in Citibank account number 202252771 because Ariston DeOliveira, the sole owner of WLM, did not have the power to make any unilateral decisions about where to transfer the funds. DeOliveira only transferred funds at the express direction of another individual, Carlos Ergas, who was unaffiliated with WLM. Because WLM was merely a nominal owner of the funds and could exercise no control over where the funds came from or where they went, WLM suffered no Article III injury from their seizure.

III. The Defendant Funds were forfeitable for their involvement in a violation of 18 U.S.C. § 1960 because WLM knowingly transmitted

funds using Citibank account number 202252771, without being licensed to do so under state or federal law. Further, WLM could not establish that it was an innocent owner of the Defendant Funds because it could not establish that it was an owner of the funds, and even if it could show ownership, in this Court, WLM makes no argument that its ownership was innocent as required by 18 U.S.C. § 983(d).

Argument

I. The district court did not abuse its discretion when it made certain evidentiary rulings.

A. Relevant facts

In support of its motion to dismiss and motion for summary judgment, the government attached several exhibits to its Rule 56(a)(1) motion. These exhibits included the following:

- 1) documents produced by WLM, such as: exhibit 3, WLM's FinCen registration receipt, dated June 9, 2008; exhibit 9, sample wire instructions; exhibit 10, excerpts of wire transactions; and exhibit 12, WLM's 2008 California tax returns, A273, A348, A528, A565;
- 2) an affidavit signed by Internal Revenue Service Special Agent Debra Lee, dated May 24, 2011 (the "Lee Declaration"), who was the federal agent assigned to investigate the underlying criminal case and the Defendant

Funds' involvement in the 18 U.S.C. §§ 1956 and 1960 violations, *see* exhibit 4, A276;

- 3) certified copies of letters between the Department of Financial Institutions (“DFI”), WLM and its counsel Richard O. Weed, such as: exhibit 6, a letter from DFI to Ariston DeOliveira, cc: Rick Weed, dated October 27, 2009; and exhibit 7, a letter from Richard O. Weed to DFI, signed by Ariston DeOliveira and Richard O. Weed, dated November 11, 2008, A323, A327; and
- 4) a certified copy of an internal DFI memorandum regarding WLM’s conduct, marked as exhibit 11, entitled “Memorandum from Wallace M. Wong to Pamela Hamanaka, Subject: Referral Under Financial Code Section 260,” dated November 23, 2009. A741-78.

In its memorandum of law in support of its opposition to the government’s motion for summary judgment, WLM objected to some of the government’s exhibits, but the district court overruled all of the objections, finding them unfounded. A840-42. Specifically, WLM objected to the inclusion of the Lee Declaration (exhibit 4), claiming Special Agent Lee lacked personal knowledge of the facts of the case, and was not competent to testify on those facts. A702-703. The district court, however, found that the Lee Declaration was admissible because of her “personal involvement and familiarity with the investigations.” A841.

Next, WLM claimed facts not found in the verified complaint should be excluded because they were not known to the United States at the time the United States drafted the verified complaint. These documents included facts obtained from certified documents produced by DFI to the United States (*see* exhibits 6, 7, and 11), as well as facts obtained from documents WLM disclosed to the United States in response to discovery requests and/or were identified by WLM during the deposition of Ariston DeOliveira (*see* exhibits 3, 6, 7, 10, 12). The district court found these objections baseless. A841-42.

In connection with its Rule 56(a)(2) motion, WLM also cited to Federal Rules of Evidence 401, 407, 602, 611, 701, 702, and 901, and claimed that the admission of some exhibits violated these rules, but failed to provide any legal argument in support of its position in its memorandum of law. *See* A702. The district court did not rule on these objections.

B. Governing law and standard of review

1. Standard of review

a. Review of evidentiary rulings

In a summary judgment proceeding, the district court need only consider *admissible* evidence. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). The district court “has broad discre-

tion in choosing whether to admit evidence” on summary judgment. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009) (quoting *Raskin*, 125 F.3d at 65).

This Court reviews “the trial court’s evidentiary rulings, which define the summary judgment record” for abuse of discretion. *LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 211 (2d Cir. 2005) (internal quotations omitted). A district court abuses its discretion when it bases its ruling “on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions.” *Sims v. Blot (In re Sims)*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotations and citations omitted).

b. Waiver

“[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal. [An appellate court] may consider a forfeited argument [only] if there is a risk that ‘manifest injustice’ would otherwise result.” *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 130 (2d Cir. 2012) (internal quotations and citations omitted).

Furthermore, even if a party preserved an issue below by presenting the argument to the district court, the party may waive appellate consideration of that issue by failing to develop the

argument on appeal. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (“Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.”). In particular, a party waives an issue by “merely incorporating by reference an argument presented to the district court, stating an issue without advancing an argument, or raising an issue for the first time in a reply brief” *Id.*

2. Civil forfeiture

To obtain civil forfeiture, the government must establish by a preponderance of evidence “a substantial connection between the property and the offense.” 18 U.S.C. § 983(c)(1) and (3). In the civil forfeiture context, evidence acquired after the filing of the complaint can be used to support forfeiture of property. *See* 18 U.S.C. § 983(c)(2) (“[T]he Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture[.]”); *see also United States v. \$291,828.00 In U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008) (per curiam) (“The government ‘may use both circumstantial evidence and hearsay,’ . . . and evidence gathered after the filing of the complaint for forfeiture to meet its burden.” (internal citations omitted)).

3. Federal Rules of Evidence (“Fed. R. Evid.”)

a. Rule 401

Under the Federal Rules of Evidence, “relevant” evidence is generally admissible unless excludable under the Constitution, statutes, or rules. *See generally* Fed. R. Evid. 402. Rule 401 of the Federal Rules of Evidence provides that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence; and. . . the fact is of consequence in determining the action.” Under this Rule, evidence does not have to be conclusive to be admissible. *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 927 (2d Cir. 1977).

For instance, an investigator’s testimony of facts she learned during the course of her investigation can be relevant. *United States v. Augustin*, 661 F.3d 1105, 1124 (11th Cir. 2011) (holding that agent’s lay opinion testimony was relevant to explaining course of investigation), *cert. denied*, 132 S. Ct. 2118 (2012), 132 S. Ct. 2444 (2012) and 132 S. Ct. 2447 (2012). Evidence of state investigations into similar criminal conduct have been held to be relevant where they show, among other things, knowledge and absence of mistake. *See United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 486-87 (6th Cir. 1999). Finally, courts have held that evidence regarding the filing of tax returns can be rele-

vant where it tends to show the defendant was involved in illegal activity. *See United States v. Mangual-Santiago*, 562 F.3d 411, 429 (1st Cir. 2009) (tax return information relevant in money laundering case where it showed that defendant did not file income tax returns with the Department of Treasury, but his bank accounts reflected the movement of large amounts of money in short periods of time).

b. Rule 407

Rule 407 provides guidance on the admissibility of subsequent remedial measures. Pursuant to that rule:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design;
- or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

As the Advisory Committee Notes explain, this Rule “incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence . . . (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” Fed. R. Evid. 407, Advisory Committee Notes.

c. Rule 602

Federal Rule of Evidence 602 provides that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” “This rule makes personal knowledge a foundational requirement for fact witness testimony.” *United States v. Cuti*, 720 F.3d 453, 458 (2d Cir. 2013); *see also Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 847-48 (10th Cir. 1979) (“There is uniformity among the courts that the testimony of witnesses . . . is admissible if predicated upon concrete facts within their own observation and recollection that is facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts.”).

Firsthand observation, however, is not required to establish personal knowledge under Rule 602. *United States v. Christie*, 624 F.3d 558, 568 (3d Cir. 2010). Rule 602 allows a federal agent, assigned to an investigation, to testify about facts obtained during the course of the investigation. *United States v. Bansal*, 663 F.3d 634, 667 (3d Cir. 2011) (holding that IRS Special Agent was competent to testify about his personal examination of the bank and wire transfer records he reviewed), *cert. denied*, 132 S. Ct. 2700 (2012) and 133 S. Ct. 225 (2012); *United States v. Lemire*, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (holding that FBI agent was competent to testify, pursuant to Rule 602, about information he obtained from his personal knowledge of the transcripts and exhibits).

d. Rule 611

Federal Rule of Evidence 611(a) provides that “[t]he court should exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make those procedures effective for determining truth . . . and protect witnesses from harassment or undue embarrassment.” Subsections b and c of the Rule discuss the scope and limits of cross-examination and leading questions, respectively. Fed. R. Evid. 611(b) and (c).

e. Rules 701 and 702

Rule 701 of the Federal Rules of Evidence governs the admission of opinion testimony by lay witnesses, and provides in relevant part that “[lay witness] testimony in the form of an opinion is limited to one that is . . . rationally based on the witness’s perception[.]”

Like under Rule 602, testimony is admissible under Rule 701 if it was based on a federal agent’s perceptions. *See e.g., Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171, 181-183 (2d Cir. 2004). The mere fact that an agent “has specialized knowledge, or that [s]he carried out the investigation because of that knowledge, does not preclude [her] from testifying pursuant to Rule 701, so long as the testimony was based on the investigation and reflected [her] investigatory findings and conclusions, and was not rooted exclusively in [her] expertise” *Id.* at 182. This type of “opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of [her] position in the business.” *Id.* (citing Fed. R. Evid. 701 advisory committee’s note.) Accordingly, to the extent that an agent’s testimony is based upon the facts obtained during her investigation, it is admissible pursuant to Rule 701 of the Federal Rules of Evidence because it is based on her perceptions. *Id.*

Where an agent's testimony is not a "product of [her] investigation, but rather reflected specialized knowledge [s]he has because of [her] extensive experience" it may be admissible under Rule 702. *Id.* Rule 702 provides in relevant part:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

f. Rules 901 and 902

Rules 901 and 902 provide the guidelines for authentication of evidence. Under Rule 901 of the Federal Rules of Evidence, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." A proponent may satisfy this requirement in many ways, including by offering the "[t]estimony of a Witness with Knowledge. . . that an item is what it is claimed to be." Fed. R. Evid. 901(b)(1). For

public records, Rule 901 provides that evidence that “a document was recorded or filed in a public office as authorized by law; or . . . a purported public record or statement is from the office where items of this kind are kept” satisfies the authenticity requirement. Fed. R. Evid. 901(b)(7).

The act of production of a document may authenticate that document. *Andresen v. Maryland*, 427 U.S. 463, 474, (1976) (holding that the “very act of production may constitute a compulsory authentication of incriminating information”); *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982) (“Just as [the defendant] could have identified the records by oral testimony, his very act of production was implicit authentication.”); *see also Fisher v. United States*, 425 U.S. 391, 412-13 (1976) (a taxpayer’s production of papers demanded in a subpoena establishes “the tax payer’s belief that the papers are those described in the subpoena.”)

Additionally, certain types of evidence are “self-authenticating,” *i.e.*, “they require no extrinsic evidence of authenticity in order to be admitted.” Fed. R. Evid. 902. In particular, certified copies of public records and certified copies of business records are self-authenticating. *See* Fed. R. Evid. 902(4) and (11).

C. Discussion

In its brief on appeal, WLM argues that the district court improperly considered eight exhibits offered by the United States: exhibits 3-4, 6-7, and 9-12. WLM waived many of its objections to these exhibits by failing to raise those objections below, and further, by failing to develop its arguments on appeal. In any event, WLM's objections are meritless; the district court properly exercised its discretion to consider the challenged exhibits in its ruling on summary judgment.

1. WLM waived several evidentiary objections.

In its brief on appeal, WLM argues that certain exhibits were improperly admitted under Federal Rule of Civil Procedure 15 and Federal Rules of Evidence 401, 407, 602, 611, 701, 702, 901. These objections were not articulated in WLM's opposition memorandum before the district court, *see* A624, and were only mentioned—with no argument or analysis—as objections in a separate pleading, *see* A702. By failing to properly present these issues to the district court, WLM waived appellate review of these issues. *Schnabel*, 697 F.3d at 130 (“[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.”).

Furthermore, even on appeal, WLM provides only a cursory listing of its objections on these issues, with no substantive analysis of its evidentiary objections. By failing to develop arguments on these issues, WLM has waived appellate review of them. *Norton*, 145 F.3d at 117 (noting that a party may waive an issue by “stating an issue without advancing an argument”). These objections, which were not addressed by the district court, and barely briefed on appeal, have been waived and are not properly before this Court for appellate review.

Finally, there is no basis for this Court to consider WLM’s forfeited arguments because there is no “manifest injustice” that would result. *Schnabel*, 697 F.3d at 130. Because even if this Court were to overlook WLM’s waiver of these issues in the district court and in this Court, the district court’s judgment should still be affirmed; all of WLM’s evidentiary objections are meritless.

2. WLM’s evidentiary objections lack merit.

As a preliminary matter, before the district court and on appeal, WLM claims that the district court should not have considered facts not mentioned in the verified complaint. In support of this argument, WLM confusingly cites to Federal Rule of Civil Procedure 15, which details the rules for amended and supplemental pleadings.

WLM appears to argue that the government would have to supplement or amend its verified complaint before it could rely on evidence it acquired during discovery.

The district court properly rejected this argument. It is basic black-letter law that in the civil forfeiture context, evidence acquired after the filing of the verified complaint of forfeiture can be used to support forfeiture of property. 18 U.S.C. § 983(c)(2); *see United States v. \$291,828.00 In U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008). Accordingly, WLM's argument that the court should not have considered evidence acquired during discovery necessarily fails.

Next, WLM raises objections to specific exhibits (aside from its objections based on Federal Rule of Civil Procedure 15), some of which were raised before the district court, while others are raised for the first time on appeal:

- a) Exhibit 3 (WLM's FinCen registration), claiming its admission violates Fed. R. Evid. 401, 407, and 901.
- b) Exhibit 4 (Lee Declaration), claiming its admission violates Fed. R. Evid. 602, 611, 701, 702.
- c) Exhibits 6 and 7 (certified copies of letters between DFI, WLM and its counsel Richard O. Weed), claiming their admission violates Fed. R. Evid. 401. Exhibit 11 (certi-

fied copy of the Memorandum from DFI's Wallace Wong, the Senior Assistant to Attorney General Pamela Hamanaka), claiming its admission violates Fed. R. Evid. 401 and 901.

- d) Exhibits 9 and 10 (copy of WLM's wire transfer instructions and transactions), claiming their admission violates Fed. R. Evid. 401 and 901. Exhibit 12 (copy of WLM's 2008 federal and California tax returns), claiming their admission violates Fed. R. Evid. 401 and 901.

Below we set forth WLM's objections to specific exhibits, whether these objections were raised before the district court, and the reasons these objections fail on appeal.

a. WLM's FinCen registration (exhibit 3)

WLM claims that exhibit 3, its FinCen registration, is inadmissible under Fed. R. Evid. 901 because it was not authenticated, and under Fed. R. Evid. 407 because it is "a subsequent remedial measure." These arguments should be dismissed because they lack merit.

First, the district court properly concluded that WLM authenticated the FinCen registration when it produced it to the United States during discovery, and when DeOliveira identified it through his deposition testimony. A841-

42, A824; *Brown*, 688 F.2d at 1116. During his deposition, DeOliveira identified the FinCen registration and conceded WLM did not register with FinCen until after the seizure of the Defendant Funds. A677, A824. This fact and the authenticity of the FinCen registration are not in dispute. A338, A677.

For the first time on appeal, WLM objects to the admission of exhibit 3 under Fed. R. Evid. 407. WLM's objection under Fed. R. Evid. 407 is meritless for several reasons. First, Rule 407 was intended to bar evidence of subsequent remedial measures to establish negligence in civil litigation. The Advisory Committee Notes explain that the Rule "incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407, Advisory Committee Notes. Here, these policy reasons are inapplicable. WLM was not being accused of negligence, and there was no concern that introduction of this document would discourage WLM from undertaking any action "in furtherance of added

safety.” While the proceeding was civil in nature, the allegations involved criminal conduct. Moreover, WLM’s registration with FinCen was not a subsequent remedial measure; it was merely compliance with the law.

In other words, here, the court was not concerned with purported negligent conduct by WLM, but rather with the nexus between the Defendant Funds and a violation of 18 U.S.C. § 1960. WLM had a legal obligation to register with FinCen prior to transmitting the Defendant Funds. WLM’s failure to do so provided evidence that the Defendant Funds were involved in the violation of § 1960. Accordingly, Rule 407 does not apply.

But even if Rule 407 applied to preclude admission of exhibit 3, any error in the court’s consideration of this exhibit did not result in a manifest injustice. DeOliveira admitted that WLM was not registered with the State of California or FinCen at the times relevant to this case. A240, A338, A677, A824. Thus, the fact that WLM subsequently registered with FinCen was arguably cumulative evidence given WLM’s admission.

b. The Lee Declaration (exhibit 4)

WLM claims that the Declaration of Debra Lee, the IRS Special Agent who investigated the underlying criminal case giving rise to the present forfeiture action, was inadmissible because

she lacked personal knowledge of the facts in her declaration, and was accordingly not competent to testify pursuant to Fed. R. Evid. 602 (personal knowledge). On appeal, WLM expands its claim to argue that the admission of the Lee Declaration also violated Fed. R. Evid. 611, 701, and 702. These claims all lack merit.

First, the government offered the Lee Declaration under Rules 602 and 701, not as an expert witness under Rule 702. The Lee Declaration was admissible under Rules 602 and 701 because the declaration was based on information Special Agent Lee learned during the course of her investigation into RM Insurance, BrazUSA and WLM. A277-87; *see United States v. Lane*, 591 F.3d 921, 926 (7th Cir. 2010) (holding that a police officer could testify where the officer had firsthand knowledge about what he observed during his investigation); *United States v. Birchem*, 100 F.3d 607, 610 (8th Cir. 1996) (rejecting a challenge to the affidavit of an agency official that was “based on the information contained in the [agency’s] business records”). WLM is well aware of this, because DeOliveira and Attorney Richard O. Weed were questioned by Special Agent Lee during the underlying criminal investigation. A285. Furthermore, WLM deposed Special Agent Lee and questioned her extensively on the facts contained in the verified complaint, and she testified to her personal knowledge. A832, A835-36. Accordingly, exhibit

4, the Lee Declaration was admissible under Rules 602 and 701.

For the first time on appeal, WLM argues that the admission of the Lee Declaration also violated Fed. R. Evid. 611. WLM fails to explain how the admission of the Lee Declaration violated Rule 611—a rule that grants district judges the authority to control the mode and order of the examination of witnesses at trial. Indeed, this matter comes before this Court following the district court’s grant of summary judgment, not after a trial. WLM had the opportunity to examine Special Agent Lee during her deposition, and to the extent WLM desired to cross examine or impeach Special Agent Lee at trial, the district court found that WLM failed at the summary judgment phase to set forth a response to the Lee Declaration’s statement of facts showing that the Defendant Funds were substantially connected to criminal activity. In other words, WLM failed to establish at the summary judgment phase that there existed a genuine issue of fact, which would preclude summary judgment, and allow for a trial. Accordingly, exhibit 4, the Lee Declaration was admissible and properly considered by the district court.

c. Certified documents (exhibits 6, 7, and 11)

For the first time on appeal, WLM claims that exhibits 6, 7, and 11 were inadmissible pur-

suant to Fed. R. Evid. 401 and 901. These arguments should be rejected because they lack merit.

First, there can be no challenge to the authenticity of these documents. Under the Federal Rules of Evidence, certified documents are self-authenticating. *See, e.g.*, Fed. R. Evid. 902(4) and 902(11); *United States v. Doyle*, 130 F.3d 523, 545 (2d Cir. 1977) (holding that certified government documents are adequately authenticated). The government obtained these certified documents from DFI, *see* A730, and produced the DFI file to WLM in discovery, A816-22. The government also produced exhibit 11 at that time, which was in the DFI file. A816-22. Accordingly, the district court properly considered exhibits 6, 7, and 11 because they were authenticated under Rule 902. In short, WLM's challenge to the authenticity of certified business records must fail.

Second, these exhibits were relevant because they show WLM was "engaged in the business of receiving money for transmission to foreign countries without having obtained the license required by the California Financial Code," in violation of California law. A733. The documents also were relevant because they supported a finding that WLM was operating in violation of 18 U.S.C. § 1960, because WLM failed to register with the United States Treasury Department. A733-34.

Finally, and in any event, even if the district court erroneously relied on the documents, the points made by those documents—that WLM’s lawyer had contacted DFI and that DFI told WLM to stop operating without regulatory approval—were merely confirmatory of other evidence in the record, including DeOliveira’s deposition testimony. A730.

d. Wire transfer documents and tax returns (exhibits 9, 10, and 12)

On appeal and before the district court, WLM claims that documents it produced to the government—including wire transfer instructions and transactions (exhibits 9 and 10) as well as its 2008 tax returns (exhibit 12)—were inadmissible under Fed. R. Evid. 401 because they were not relevant, and under Fed. R. Evid. 901 because they were not authenticated. These arguments lack merit.

WLM’s objection to the exhibits under Fed. R. Evid. 901 fails because, as the district court held, by producing these exhibits to the government, WLM authenticated the documents. A841-42; *see Brown*, 688 F.2d at 1116. The documents were also all authenticated by DeOliveira during his deposition. *See* Fed. R. Evid. 901(b) (providing that “[t]estimony that an item is what it is claimed to be” is an example of identification which satisfies the authentication requirement of Rule 901(a)). A729, A841-42.

For the first time on appeal, WLM objects to the admission of exhibits 9, 10, and 12, claiming their admission violates Fed. R. Evid. 401. A “relevancy” objection to exhibits 9 and 10 fails because these exhibits were relevant to show that Citibank account number 202252771 was used to accept and transfer millions of dollars to unknown bank accounts inside and outside of the United States. This fact was a key fact supporting the government’s contention that the Defendant Funds were involved in a violation of § 1960. Exhibit 12 was relevant because it belied WLM’s claim that it was the owner of the Defendant Funds. Exhibit 12 shows that WLM never reported the majority of the money funneled through its accounts. A175-76, n.5; *see also Mangual-Santiago*, 562 F.3d at 429 (tax returns relevant where it shows defendant was involved in illegal activities). Therefore, these exhibits were admissible under Rules 401.

II. WLM did not have standing to challenge the civil forfeiture of the Defendant Funds.

A. Relevant facts

As described above, in 2006, federal law enforcement officers began an investigation into possible money laundering and unlicensed money remitting violations at BrazUSA in Bridgeport and RM Insurance, d/b/a Marrakesh, in Danbury.

1. Bridgeport investigation

In Bridgeport, law enforcement began an investigation of BrazUSA. A158. Records listed Adriana DeOliveira (“Adriana”) as an agent of BrazUSA and Andrea DeOliveira (“Andrea”) as the principal of the business. A158. BrazUSA was not registered with either FinCen or the State of Connecticut Department of Banking as a money service business (“MSB”). A158.

Almost all of the wire transactions that Andrea made from her account from July to August 2007 went to a Citibank account in the name of WLM. A159. Andrea’s wire transfers to the WLM account from July 31, 2007, to August 24, 2007, totaled \$254,819.00. A159. During this investigation, law enforcement learned that WLM was a California company and was not a registered MSB with FinCen. A159. Nor was WLM registered with the State of California as a MSB, which is a requirement of that state. A159.

In August of 2007, Andrea opened an account in the name of BrazUSA at Union Savings Bank which had branches located in the District of Connecticut. A160. From August 2007 to February 2008, Andrea wire transferred \$3,136,690 from the BrazUSA account at Union Savings Bank to the WLM account at Citibank. A160.

2. Danbury investigation

In Danbury, law enforcement began an investigation into the activities of RM Insurance, a Connecticut corporation located in Danbury, Connecticut. A160. Corporate records indicated that Renata Amaral (“Amaral”) was the president and Monica Texeira (“Texeira”) was the vice president of RM Insurance. A160. Amaral and Texeira were conducting wire transfers through an account opened in the name of Marrakesh. A160.

According to FinCen, none of the relevant people or entities in the Danbury investigation—Amaral, Texeira, RM Insurance and Marrakesh—were registered to transfer funds on others’ behalf. A160. Further, Amaral, Texeira, and Marrakesh were not registered with the Connecticut Department of Banking to engage in a MSB as required by state law. A160.

From August 2007 to February 2008, Amaral and Texeira wired \$343,530 from the Marrakesh account to a Citibank account in the name of WLM. A159, A162. At that time, law enforcement learned that WLM was a California company and was not a registered MSB with FinCen; nor was WLM registered with the State of California as a MSB, which is a requirement of that state. A159, A162.

3. Seizure and search warrants for the Defendant Funds

On March 17, 2008, law enforcement executed two search and seizure warrants on the contents of account number 202252771 at Citibank. The first warrant, which resulted from Marrakesh's wire transfers, authorized the seizure of funds, not to exceed \$343,530.00, held in the name of WLM. A162, A848. Ultimately, \$343,530.00 was seized from the account. A848, A162. The second warrant, which resulted from BrazUSA's wire transfers, authorized the seizure of funds, not to exceed \$3,136,690.00, held in the name of WLM. A848. Ultimately, \$485,892.42 was seized from the account. A162, A848.

After execution of the warrants, the United States confirmed that between July 2007 and March 2008, RM Insurance, d/b/a Marrakesh, and BrazUSA wired a total of \$4,144,520.00. A848-49. Approximately \$261,170.00 was wired from Andrea's account, \$491,860.00 wired from Marrakesh's account, and \$3,391,490.00 wired from BrazUSA's account. A162, A849.

In October of 2008, owners and employees of RM Insurance and Marrakesh (Teixeira and Amaral) as well as owners and employees of BrazUSA (Nilander DeOliviera and Andrea), pleaded guilty to violations of 18 U.S.C. § 1960, which prohibits the knowing operation of a money transmitting business affecting interstate and

foreign commerce, which was not licensed under state law when the law so required. A163, A849.

4. Investigation into WLM

Ariston DeOliveira, an experienced businessman, with years of experience in the banking industry, is the sole owner, and during the relevant period of June 2007-March 2008, the sole employee, of WLM, a company based in Orange County, California. A163, A849-50.

WLM was incorporated on or about June 21, 2007, under the laws of the State of California. A163. In his sworn deposition testimony, DeOliveira, as the sole owner of WLM, stated that when WLM began operations, its only business objective was to receive and obtain wires of funds from various sources in the United States for the purpose of transmitting funds via wire transfers to bank accounts of various entities. A163. DeOliveira further testified under oath that WLM contemplated registering, but ultimately decided not to register, as a MSB when it began operations in June of 2007. A163, A193

WLM opened several accounts in Orange County, California, including three operational accounts and one expense account. A163. One operational account was at Citibank, account number 202252771. A163, A850. The WLM accounts were opened for the sole purpose of obtaining and transmitting wires of funds. A163. WLM, however, never obtained a license from

the State of California to operate as an MSB in that State. A163. Furthermore, at the time WLM began accepting wire transfers from various entities in the United States, until June 8, 2008, it was not licensed with FinCen. A163-64, A849.

On April 29, 2008, law enforcement agents interviewed DeOliveira, owner of WLM, after seizing a total of \$829,422.42 from account number 202252771 at Citibank, pursuant to the search and seizure warrants. A164. During this interview, DeOliveira acknowledged that he operated a business where he accepted and disbursed funds by wire. A164, A849. He further stated that he had no idea who was depositing money into Citibank account number 202252771 and made no effort to determine the identity of those making deposits into that account. A164, A849.

DeOliveira finally registered WLM with FinCen sometime in June of 2008, after the government had seized the Defendant Funds from the WLM account. A164, A849. However, the entire time WLM was operating, from at least 2007 to 2009, WLM was in the business of receiving incoming wires of funds from various sources in the United States, including RM Insurance and BrazUSA, and transferring said proceeds to various bank accounts, even though it was never licensed with the State of California. A164, A850-51.

Although WLM claimed its operations were purely domestic, the documents produced by WLM showed that the majority of the outgoing wires were sent to bank accounts for entities with addresses outside of the United States. A164. The funds were wired into and out of account number 202252771, at the direction of an attorney in Brazil named Carlos Ergas. A164, A850. According to DeOliveira, WLM only dealt with clients that were Ergas' "international business clients." A164, A850.

Specifically, DeOliveira, in his sworn deposition testimony, stated that WLM did not directly contact any of the entities or sources of the wired funds, and acted only as a middleman. A165, A850. DeOliveira claimed that he would turn on his computer in the morning and see that WLM had "received X amount of dollars from a company." A165. DeOliveira would then contact Ergas or his employees to inform Ergas of the deposit and obtain directions on where to send the money, and how much to send. A165, A850. Other times, Ergas would contact DeOliveira and inform him that a deposit would be made into one of the operational accounts of WLM, and would provide DeOliveira with instructions on where to transfer the funds. A165.

DeOliveira claimed that within twenty-four hours, the funds wired into WLM's operational account would be wired out to various bank accounts, based on the instructions and designa-

tion provided by Ergas. A165. WLM claimed it had no knowledge, interaction, or relationship with any of the entities who wired in funds or to whom it was transmitting funds. A165.

In exchange for its services, WLM would receive a small commission from Ergas. A165. WLM could not keep any funds, unless explicitly authorized by Ergas, and WLM was required to send the money out as instructed by Ergas or his employees. A165.

B. Governing law and standard of review

1. Standard of review

This Court reviews a district court’s grant of summary judgment *de novo*. *LaSalle Bank*, 424 F.3d at 205, 211. A district court’s dismissal of a complaint for lack of standing similarly receives plenary review. *Federal Treasury Enterprise Sojuzplodoimport v. SPI Spirits, Ltd.*, 726 F.3d 62, 71 (2d Cir. 2013), *petn for cert.* filed, No. 13-685 (Dec. 4, 2013); *see also Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010).

A motion to dismiss pursuant to Rule 12(b)(1), calls into question either “the sufficiency of the allegation *or . . .* the accuracy of the jurisdictional facts alleged.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part

and concurring in the judgment) (citations omitted; emphasis in original).

“If the defendant challenges only the legal sufficiency of the plaintiff’s jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.” *Robinson v. Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001) (internal citations and quotation marks omitted). If the parties present factual evidence that is “relevant to the jurisdictional question,” the court may consider such evidence. *Id.* A court must consider facts outside the pleadings, such as affidavits, “if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction.” *Id.* at 140 n. 6.

The party asserting subject-matter jurisdiction bears the burden of proving by a preponderance of the evidence that jurisdiction exists. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Courts “are constrained not only to accept the truth of the plaintiffs’ jurisdictional allegations, but also to construe all reasonable inferences to be drawn from those allegations in plaintiffs’ favor.” *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 226 (2d Cir. 2006); see also *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 114 (2d Cir. 2002).

2. Standing in civil forfeiture cases

Before a court can reach the merits of a case, it first must determine that a party has Article III standing to assert a claim. *Mercardo v. U.S. Customs Service*, 873 F.2d 641, 644 (2d Cir. 1989); *United States v. \$38,000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1543 (11th Cir. 1987). The burden is on the claimant to establish standing. *Mercado*, 873 F.2d at 644.

At the initial pleading stage, “to establish standing the claimant need not prove the full merits of [his] underlying claim.” *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 (2d Cir. 2002) (internal quotations omitted). At the summary judgment stage, the government is entitled to challenge the claimant’s legitimacy based on information obtained during the discovery process. See 18 U.S.C. § 983(c)(2).

Standing in the civil forfeiture context exists in two forms: Article III standing and statutory standing. *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 526 (2d Cir. 1999). As relevant here, to establish Article III standing in a civil forfeiture proceeding, the claimant must demonstrate some “distinct and palpable injury to himself, that is the direct result of the putatively illegal conduct of the [adverse party], and likely to be redressed by the requested relief.” *Id.* In essence, a claimant must allege: (1) personal injury (2) fairly traceable to the challenged action,

and (3) likely to be redressed by the requested relief. *Clapper v. Amnesty Intern.* 133 S. Ct. 1138, 1147 (2013); see also *Natural Resources Defense Council v. U.S. Food & Drug Admin.*, 710 F.3d 71, 79 (2d Cir. 2013).

“A plaintiff must always have suffered a distinct and palpable injury to himself . . .” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (internal quotations omitted). The injury must be “concrete in nature and particularized to [the plaintiff],” *Abortion Rights Mobilization Inc. v. Baker (In re United States Catholic Conference (“USCC”))*, 885 F.2d 1020, 1023-24 (2d Cir. 1989), and not “[a]bstract,” “conjectural,” or “hypothetical.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983).

In the civil forfeiture context, a “naked claim of possession” of the forfeited property is not sufficient to confer standing. *Mercado v. U.S. Customs Service*, 873 F.2d 641, 645 (2d Cir. 1989). “[W]here a mere custodian has possession, it is only a naked claim of possession and does not thereby impart Article III standing because such custodian has not demonstrated injury sufficient to satisfy the Article III standing test.” \$557,933.89, *More or Less, in U.S. Funds*, 287 F.3d at 79 n.10 (internal quotations omitted).

Although this Court has acknowledged that ownership or possession may provide evidence of standing, the core question is whether the claimant has suffered an injury from the forfei-

ture. *Cambio Exacto, S.A.*, 166 F.3d at 527. Indeed, this Court has “denied standing to ‘straw’ owners who do indeed ‘own’ the property, but hold title to it for somebody else” because such straw owners “do not themselves suffer an injury when the property is taken.” *Id.*

Similarly, the word “possession” means something more than a “mere custodian” because a mere custodian has only a “naked claim of possession” and lacks Article III standing. *Id.* Thus, for example, this Court has explained as follows:

An airline passenger . . . who does not know that a bag seized from him contains money does not have standing to challenge a forfeiture of the funds because he has suffered no injury. . . . The owner of a safety deposit box who does not also own its contents is not necessarily injured and therefore lacks standing when funds found in the box are seized. . . . And the driver of a camper truck who denies that he owns a hoard of money he is transporting does not necessarily suffer injury when the money is seized and so also lacks Article III standing.

Id. at 528 (internal citations omitted.)

C. Discussion

On appeal, WLM maintains that it had Article III standing to challenge the instant forfei-

ture because it claimed that it was the owner of Defendant Funds, that it had possession at the time of the seizure, and that it was directly injured by the forfeiture of the Defendant Funds. WLM's claim lacks merit.

WLM did not have standing to contest the civil forfeiture because WLM could not show that it was anything more than a straw owner of the Defendant Funds. WLM was only a nominal owner of Citibank account number 202252771. See A855-57. Indeed, the district court, relying on this Court's holdings in *Cambio Exacto*, 166 F.3d. at 527 and *Mercado*, 873 F.2d at 645, held that WLM was a "nominal' owner, without any controlling interest in the Defendant Funds" because "WLM could not even transfer additional funds to cover any expenses until Mr. Ergas so approved." A857.

Like the driver of the camper truck, the airline passenger, and the safety deposit box owner described in *Cambio Exacto*, 166 F.3d at 528, WLM was a nominal owner of the funds in Citibank account number 202252771. WLM transferred funds on behalf of Ergas. DeOliveira did not know when or how much money would be wired into the account, and he could only transfer the funds in that account at the direction of Ergas. A228-30, A232-34 A245-46, A248-49, A259-62. Although WLM maintained an expense account, the Citibank account was an operational, not an expense, account. A163. On this rec-

ord, then, WLM could not demonstrate that it was injured by the forfeiture, and failed to offer any evidence to show that it had a financial stake in the forfeited funds.

As this Court has explained, “[p]ossession’ denotes custody plus a right or interest of proprietorship, *i.e.*, a domination or supremacy of authority over the property in question.” *Mercado*, 873 F.2d at 644. The facts in the record, however, established that WLM did not exert dominion or control over the funds in the Citibank account. A855-57. For instance, DeOliveira conceded that “[he] did not have the power to make unilateral decisions about the Defendant [Funds].” A856-57; *see* A135-38, A223-35 (Deposition of DeOliveira). Rather, as the district court found, DeOliveira, “the sole owner of WLM, [testified that] all decisions about the funds in WLM’s Citibank Account Number 202252771 were made by, or on behalf of, Mr. Ergas, not WLM. Pursuant to an agreement between Mr. [DeOliveira] and Mr. Ergas, WLM would be advised by someone ‘working for [Mr. Ergas] or working for his clients’ that a deposit was going to be made into WLM Citibank Account 202252771.” A856-57. The agreement also required WLM to “wire out [money] to wherever it had been told to send the money.” A857. “The practice of WLM was to turn around and pay the money out on the ‘same business day’ on which

that money had been deposited in WLM Citibank Account 202252771.” A857.

In short, WLM acted as a mere custodian for Ergas, holding the money Ergas directed into the Citibank account, and transferring the money to various entities at the direction of Ergas. A856-57. Thus, while WLM’s name was on the Citibank account, WLM did not know the entities who wired it money, how much money would be wired into the account, or for whom the money was intended. As the district court concluded, “[t]hese facts demonstrate that [WLM] did not exert dominion or control over the funds in Citibank Account Number 202252771, and thus it lacks Article III standing to challenge the forfeiture.” A857. In other words, because the money wired into the Citibank account was never WLM’s money to begin with, WLM suffered no injury when that money was forfeited.

While WLM disagrees with the district court’s decision, it fails to cite to any law or facts in the record to support its assertion that it has standing under Article III. Indeed, WLM acknowledges that the district court’s decision was based, in part, on DeOliveira’s own admissions during his deposition that he had no authority to spend, transfer, or move any of the funds in the Citibank account without the permission of Ergas. A19-20; A223-31, A233-34; Appellant’s Brief at 20.

Accordingly, WLM’s nominal claim of possession was insufficient to impart Article III standing and the district court’s grant of the government’s motion to dismiss WLM’s claim should be affirmed.

III. The Defendant Funds were forfeitable for their involvement in a violation of 18 U.S.C. § 1960.

A. Relevant facts

On March 17, 2008, the United States seized the Defendant Funds, A848, and initiated forfeiture proceedings two months later, A3. On November 11, 2008, WLM wrote to the Department of Financial Services in California² “to request a ruling that [WLM] is not a money service business that requires registration under the definition found at 31 C.F.R. §103.11(uu).” A755.

DFI responded to WLM’s correspondence with a letter dated October 27, 2009, in which it ordered WLM to cease and desist all operations because it found that WLM was engaged in the business of receiving money for transmission to

² The DFI oversees the secure operation of California’s state-chartered financial institutions. DFI is responsible for administering state laws regulating: banks, credit unions, industrial banks, trust companies, offices of foreign banks, money transmitters, issuers of travelers checks and payment instruments/money orders, and premium finance companies. A165-66 n.3.

foreign countries without having obtained a license by the California Financial Code. A785. WLM was informed that its activities constituted a violation of “California Financial Code Section 1800.3, . . . Section 1960 of Title 18 of the U.S. Code, Section 1960 of Title 18 of the U.S. Code, . . . [and] Section 5330 of Title 31 of the U.S. Code.” A785-86.

On November 23, 2009, DFI referred the WLM file to the California Attorney General’s Office for a criminal investigation under California Financial Code Section 260. A742. The letter noted that based on the investigation of DFI into the operations of WLM, it appeared that WLM “is a participant in the Brazilian doleiro currency market, a parallel or black market for the exchange of Brazilian Real into other currencies.” A743.

B. Governing law and standard of review

1. Standard of review

This Court reviews *de novo* an order granting summary judgment and affirms the district court where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Doe ex rel. Doe v. Whelan*, 732 F.3d 151, 155 (2d Cir. 2013) (internal quotations omitted).

The legal standard for summary judgment is well established. Summary judgment should be granted where, when viewed in the light most favorable to the non-moving party, the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see* Fed. R. Civ. P. 56(a). The court should not “weigh the evidence and determine the truth of the matter,” but rather “determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Summary judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party, there exists a dispute about a material fact “such that a reasonable jury could return a verdict for the non-moving party.” *Id.* at 248. However, evidence presented by the non-moving party that is “blatantly contradicted by the record” should not be accepted by the court for purposes of defeating a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

In opposing a motion for summary judgment, Fed. R. Civ. P. 56(c) requires that affidavits be based on personal knowledge and admissible evidence. Fed. R. Civ. P. 56(c)(4). Mere “conclusory allegations, conjecture, or speculation,” however, will not defeat a motion for summary judgment.

Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996).

2. 18 U.S.C § 981

The government must show by a preponderance of the evidence that the Defendant Funds were subject to forfeiture. 18 U.S.C. § 983(c)(1). After making such a showing, the burden shifts to the claimant to establish by a preponderance of the evidence that it is an “innocent owner” of the seized property. 18 U.S.C. § 983(d); *United States v. Davis*, 648 F.3d 84, 94, fn. 5 (2d Cir. 2011) (citing 18 U.S.C. § 983(d)).

Pursuant to 18 U.S.C. § 981(a)(1)(A), property is forfeitable to the United States if it was involved in a transaction or attempted transaction in violation of section 1956, 1957, or 1960 of Title 18.

3. 18 U.S.C § 1960

Section 1960, provides that:

(a) Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1960(a). “[T]he term ‘money transmitting’ includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to

locations abroad by wire, check, draft, facsimile, or courier.” 18 U.S.C. § 1960(b)(2). An “unlicensed money transmitting business” includes “a money transmitting business which affects interstate or foreign commerce in any manner or degree and . . . is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law” 18 U.S.C. § 1960(b)(1)(A) (failure to register with State). An “unlicensed money transmitting business” can also include a money transmitting business that “fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code” 18 U.S.C. § 1960(b)(1)(B) (failure to register with FinCen).

As explained by the Seventh Circuit, § 1960 is a general intent crime:

The 2001 Amendments . . . removed the scienter requirement . . . making § 1960 a general intent crime for which a defendant is liable if he knowingly operates a money transmitting business. Under the amended § 1960, the government no longer need prove that a defendant was aware of state licensing requirements or that he knew about the federal registration requirements found at 31 U.S.C. § 5330

United States v. Dimitrov, 546 F.3d 409, 414 (7th Cir. 2008).

Section 1960 criminalizes primarily the transfer of funds by unlicensed entities. See *United States v. Bah*, 574 F.3d 106, 112 (2d Cir. 2009). But, proof that money was delivered for transmission overseas, and that the money was in fact transmitted overseas, is evidence of a § 1960 violation. *Id.* at 114-15 & n.7. Accordingly, the Second Circuit has affirmed convictions under § 1960 where the defendants knew or should have known they needed to obtain a license to transmit money, but never obtained it. See *United States v. Mazza-Alaluf*, 621 F.3d 205, 211-13 (2d Cir. 2010); see also *United States v. Elfgeeh*, 515 F.3d 100, 110, 131-36 (2d Cir. 2008).

4. Innocent owner defense

To establish an innocent owner defense, a claimant must prove by a preponderance of the evidence that it was an owner and that it was an “innocent” owner, as defined by § 983(d).

a. Ownership

A claimant must first establish it is an “owner.” *\$557,933.89, More or less, in U.S. Funds*, 287 F.3d at 77. Even though a claimant may establish standing to contest a forfeiture of property, its claim will fail if it is unable to establish it was an owner under federal law. *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1014 (8th Cir. 2003). In other words, a claimant

must make a preliminary showing of its ownership interest, as defined by statute, before going forward. *Id.*; *United States v. Hooper*, 229 F.3d 818, 820 n.4 (9th Cir. 2000) (explaining that when claimants have Article III standing but fail to prove an ownership interest that meets the statutory criteria, the “statement that Claimants lacked standing is another way of saying that Claimants had failed to establish on the merits a property interest entitling them to relief”).

The definition of owner, for the purpose of the innocent owner defense, is found under § 983(d)(6)(A) which provides that an owner is “a person with an ownership interest in the specific property sought to be forfeited.” Pursuant to § 983(d)(6)(B), the following are never owners:

- (i) a person with only a general unsecured interest in, or claim against, the property . . . ;
- (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
- (iii) a nominee who exercises no dominion or control over the property.

To have an ownership interest, a claimant must establish that it had an independent power to control the relevant property. *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974, 985 (3d Cir. 1992)

("[C]ourts have uniformly rejected standing claims put forward by nominal or straw owners.") (internal quotations omitted); *United States v. Real Property & Improvements Located at 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991) (noting that "possession of bare legal title by one who does not exercise dominion and control over the property is insufficient to establish standing to challenge a forfeiture"); *One Lincoln Navigator*, 328 F.3d at 1014 (explaining that even if claimants survive a challenge to standing, the innocent owner claims fails without evidence of dominion and control).

Dominion and control may be shown by evidence that the claimant had the power to make unilateral decisions to move, withdraw, transfer, and/or spend the relevant funds. *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28, 39 (1st Cir. 1999) (holding that claimant had standing to challenge forfeiture of joint account held in conjunction with brother, convicted gangster Whitey Bulger, because "[h]e acted as a joint owner would, writing checks and withdrawing money, and exercised dominion and control over the account"); *Accounts Numbers 3034504504 and 144-07143*, 971 F.2d at 986 (finding that claimant lacked dominion and control or standing, where it failed to act independently, and operated only as a strawman for fugitive president of company).

**b. Innocent owner, as defined in 18
U.S.C. § 983(d)**

Ownership interests, in the civil forfeiture context, fall under two categories: (1) 18 U.S.C. § 983(d)(2) claims, if the claimant had an ownership interest in the property at the time the underlying crime took place; and (2) 18 U.S.C. § 983(d)(3) claims, if the claimant alleged it acquired the interest in question after the underlying crime took place.

Under § 983(d)(2), a claimant-owner can satisfy the innocent owner defense if it can show that it did not know of the conduct giving rise to the forfeiture, or if upon learning of that conduct, the owner “did all that reasonably could be expected under the circumstances to terminate such use of the property.” 18 U.S.C. § 983(d)(2)(A).

To satisfy the requirements of § 983(d)(3), the claimant must prove that (1) it is a “bona fide purchaser . . . for value” and (2) that it “did not know and was reasonably without cause to believe that the property was subject to forfeiture.” 18 U.S.C. § 983(d)(3)(A). *See United States v. Reckmeyer*, 836 F.2d 200, 208 (4th Cir. 1987) (interpreting “bona fide purchaser for value” in 21 U.S.C. § 853(n)(6)(B) to include “all persons who give value . . . in an arm’s length transaction with the expectation that they would receive equivalent value in return”).

Under § 983(d)(3), a party must also establish that it “did not know and was reasonably without cause to believe that the property was subject to forfeiture.” In other words, an owner cannot ignore illegal activities of which it should have known. *See United States v. One Parcel of Property, Located at 755 Forest Road, Northford, Conn.*, 985 F.2d 70, 72 (2d Cir. 1993) (“[W]here an owner has engaged in ‘willful blindness’ as to activities occurring on her property, her ignorance will not entitle her to avoid forfeiture.”).

C. Discussion

1. The Defendant Funds were forfeitable because they were involved in a violation of 18 U.S.C. § 1960.

On appeal, WLM first claims that the district court erred when it found that the Defendant Funds were involved in a violation of § 1960. WLM’s claim lacks merit.³

³ WLM challenges the district court’s decision for two additional reasons. First, WLM claims that the defendant in rem cannot be forfeited as involved in a violation of § 1960 because the verified complaint only sought seizure under 18 U.S.C. § 1956. Second, WLM claims that the government failed to allege any facts connecting WLM to the violation of § 1960 in the verified complaint. WLM is incorrect.

Paragraph 1 of the verified complaint states that the “civil action in rem [was] brought to enforce the

Section 1960 was designed to criminalize the exact behavior in this case: WLM's knowing operation of an unlicensed money service business that transmitted funds, and affected interstate commerce. WLM neither attempted to discern nor cared who wired money into its accounts, nor did it know or attempt to inquire about the businesses of the entities into which accounts it was transferring funds. A860.

WLM accepted millions of dollars from of unknown entities. A528-61. These funds were accumulated in WLM's operational accounts, one being Citibank account number 202252771. A528-61. Within twenty-four hours, funds wired into WLM's Citibank operational account number 202252771 were wired out to various bank accounts based on the instructions and designation provided by Ergas. A350-527, A528-61. At the same time, from Citibank account number 202252771, WLM made thousands of wire transfers, sending millions of United States dollars to bank accounts of unknown entities all over the world. A350-527, A528-61.

provision of 18 U.S.C. § 981(a)(1)(A) for the forfeiture of property involved in violation of 18 U.S.C. § 1956, money laundering, 18 U.S.C. § 1960, operating as an unlicensed money remitter and/or pursuant to 18 U.S.C. § 984." A17. Moreover, paragraphs 18, and 29-32 of the verified complaint detail WLM's offense conduct. A21, A24-25. *See also* A134.

During the relevant period of time, June 2007 to June 2008, WLM knowingly accepted and transmitted funds via wire transfers, despite the fact it was not licensed to do so. A860, A348-561. Further, the wire transfers were received from entities all over the United States, including but not limited to RM Insurance, d/b/a Marrakesh, and BrazUSA, both of whose owners pleaded guilty and were sentenced for violating 18 U.S.C. § 1960, because they were also operating as unlicensed money remitters. A844-51, A108-132, A276-87, A288-322.

Moreover, WLM conducted all of these transactions without a license from the state or federal governments. Indeed, WLM admitted that it made a conscious decision not to obtain a license from the State of California or the Department of Treasury. A134. WLM claims that it was unaware that it needed to register as a MSB. A134. But WLM's ignorance of the law requiring it to register is immaterial to whether it violated § 1960. Under the current version of that statute, the government does not have to prove that the defendant knew that a license was required. *See Elfgeeh*, 515 F.3d at 132-33 (“In amending § 1960(a) in this way in October 2001, Congress made § 1960(a) stricter by eliminating the requirement of proof that the defendant knew that a license was required.”).

Furthermore, the fact that WLM registered with FinCen after the Defendant Funds were

seized in March of 2008 is immaterial, because during the relevant period of time, June of 2007 to May of 2008, WLM accepted over \$4 million dollars from two unlicensed money remitters in Connecticut, and transmitted those funds to other entities, even though it was unlicensed to conduct these transactions. A63-66, A81-83, A277-84.

WLM's attempt to register with the State of California after the Defendant Funds were seized provides further support for the government's position that the Defendant Funds were forfeitable. As discussed above, WLM was unable to register with the State of California because when it attempted to obtain information regarding its duty to license its company under California law, DFI responded with a cease and desist letter. DFI informed WLM that its activities constituted a violation of California "Financial Code Section 1800.3[,] . . . Section 1960 of Title 18 of the U.S. Code, . . . [and] Section 5330 of Title 31 of the U.S. Code, and regulations thereunder[.]" A324-25.

In short, WLM knowingly accepted and transmitted funds via wire transfers from and into accounts in the United States and in foreign countries. In other words, WLM knowingly operated as a money transmitting business, and did so knowing that it did not have a license. This is precisely the conduct targeted by § 1960, and thus the district court properly found that the

Defendant Funds were forfeitable on that basis. In addition, WLM received funds into its account from Marrakesh and BrazUSA, two entities that were involved in admitted violations of § 1960. Accordingly, the government's proof established that the Defendant Funds were involved in a violation of § 1960.

Apart from a confusing reference to 31 C.F.R. § 103.11(uu)(5)(ii), WLM fails to point to any legal authority or fact that would support its position that the Defendant Funds were not involved in a violation of § 1960. Accordingly, the Defendant Funds were forfeitable as being involved in a violation of 18 U.S.C. § 1960.

2. WLM failed to establish that it was an innocent owner.

On appeal WLM partially challenges the district court's determination that WLM was not an innocent owner of the Defendant Funds. WLM's claim lacks merit. WLM cannot establish that it was an innocent owner because (a) WLM cannot prove that it exerted dominion or control over the funds in Citibank account number 202252771, *i.e.*, that it was an owner of those funds, and (b) WLM waived any argument that its purported ownership was innocent as defined by 18 U.S.C. § 983(d).

a. WLM was not an owner of the Defendant Funds.

WLM asserts that its naked claim of possession of the Defendant Funds was sufficient to establish ownership. WLM is mistaken.

WLM conceded that it had no power to act independently with respect to the funds in the Citibank account. A856-57. All decisions regarding the funds in that account were made by Ergas, not WLM. Indeed, WLM had no idea when funds would be wired into Citibank account number 202252771. A228-30, A245-46, A248-49, A259-62. WLM also received specific instructions from Ergas on where to send the funds in the account (*e.g.*, how much to send, where to send the funds, and when to transfer the funds). A228-30, A245-46, A248-49, A259-62. In fact, WLM could not transfer any additional funds out of the account to cover its expenses until Ergas approved the transfer. A857. Therefore, WLM never exerted either dominion or control over the funds in Citibank account number 202252771. A856-57. Consequently, WLM lacked an ownership interest in the Defendant Funds, and could be an innocent owner. A861.

b. WLM has waived any claim that its purported ownership was “innocent” as defined under 18 U.S.C. § 983(d).

Assuming, WLM could establish it exerted dominion or control over the Defendant Funds, its innocent owner claim would still fail because it waived any argument that it satisfied the requirements of § 983(d). WLM made only a skeletal argument that it was innocent under § 983(d) before the district court, but makes no effort to even repeat that argument here. To be sure, WLM argues that it exercised dominion and control over the Defendant Funds, but it makes no attempt to argue that its ownership was innocent as defined by § 983(d). By failing to fully preserve this issue in the district court, and by failing to brief this issue on appeal, WLM has waived the argument. *See Schnabel*, 697 F.3d at 130; *Norton*, 145 F.3d at 117.

In any event, the district court properly found that any argument on this point would fail on the merits. A861-62. In particular, the district court concluded that WLM “ignored illegal activities of which it reasonably should have known.” A862. This conclusion was well supported by the record. WLM was asked by Ergas to accumulate funds into Citibank account number 202252771 from sources WLM did not know. A218, A223-30, A245-46, A248-49, A259-62. WLM blindly followed the directions of Ergas. A223-30, A245-46,

A248-49, A259-62. DeOliveira, with his self-professed years of experience in the banking industry, knew or should have known that the transactions he was engaged in were designed to obscure the true source of funds. This is especially the case because WLM admitted that it made a conscious decision not to license with FinCen or the State of California when it incorporated in 2007. A134. No reasonable jury would believe that DeOliveira, a businessman, with years of experience in the banking industry, was unaware that the financial transactions WLM conducted facilitated the unlicensed transfer of money, obscured the true source of the funds, and impacted domestic and foreign commerce.

Moreover, WLM continued to operate WLM after the Defendant Funds were seized. A528-61. WLM made a decision to continue to accept money from sources it did not know, and transfer funds to bank accounts for entities it did not know. This provides additional support for the conclusion that WLM was not an innocent owner. WLM itself was involved in the commission of the criminal activity, a violation of § 1960, and knew or should have known that its operations constituted a criminal offense. Accordingly, WLM was not an innocent owner, and the district court's ruling granting the government's request to forfeit the Defendant Funds for its involvement in a § 1960 violation should be affirmed.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 8, 2014

Respectfully submitted,

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,731 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "David X. Sullivan". The signature is written in a cursive style with a large initial "D".

DAVID X. SULLIVAN
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 981. Civil forfeiture

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

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

* * *

18 U.S.C. § 983. General rules for civil forfeiture proceedings

* * *

(c) Burden of proof.--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent owner defense.--

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture

statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term “innocent owner” means an owner who--

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

* * *

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term “innocent owner” means a person who, at the time that person acquired the interest in the property--

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

* * *

(6) In this subsection, the term “owner”--

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include--

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.