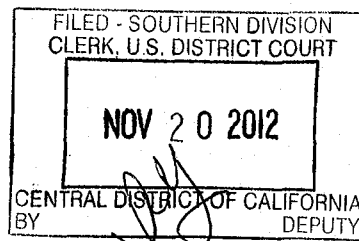


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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
 Plaintiff,
 v.
 \$1,026,781.61 IN FUNDS FROM
 FLORIDA CAPITAL BANK,
 Defendant.

Case No. SACV 09-04381-MLG
 and related case,
 Case No. SACV 09-00716-MLG
 MEMORANDUM OPINION AND ORDER
 GRANTING CLAIMANTS'
 MOTION FOR SUMMARY JUDGMENT

I. Background

A. Procedural History

On November 6, 2008, the United States of America ("Plaintiff" or the "Government") seized \$1,026,781.61 in funds from a Florida Capital Bank Account belonging to Lonnie Kocontes ("Kocontes"). The Government instituted these civil forfeiture proceedings on June 18, 2009, pursuant to 18 U.S.C. § 981(a)(1)(A),(c). Claimants Kocontes and Katherine Kern (collectively "Claimants") seek return of the funds and real property¹ that were seized.

¹ The real property was seized in related case *United States v. Real Property in Safety Harbor, Florida*, Case No. SACV 09-0716-MLG (C.D. Cal. 2009), filed on June 17, 2009. These cases have been consolidated.

1 Claimants first filed a motion for summary judgment on August 8,
2 2011, based solely on the argument that the Government did not have
3 probable cause to institute civil forfeiture proceedings at the time
4 the action was initiated. On October 25, 2011, District Judge James V.
5 Selna denied the motion. The parties subsequently consented to the
6 exercise of jurisdiction by this United States Magistrate Judge. 28
7 U.S.C. § 636(c).

8 Currently before the Court is Claimants' second motion for summary
9 judgment, which was filed on June 24, 2012, with supporting
10 declarations and exhibits. On September 25, 2012, the Government filed
11 an opposition to the motion with supporting documents, as well as a
12 statement of uncontroverted facts. Claimants filed a reply on October
13 4, 2012. Both parties also filed various motions addressing evidentiary
14 objections. The Court heard oral argument on October 18, 2012, and took
15 the matter under submission.² The matter is now ready for decision.

16 **B. Factual Background³**

17 These proceedings relate to the Government's claim that Lonnie
18 Kocontes murdered Micki Kanesaki during a Mediterranean cruise the
19 couple took in May 2006. Kocontes, an attorney, and Kanesaki, a legal
20 assistant, met while working at the same law firm in the early 1990s.
21 They married in 1995. In 2000, the couple filed for divorce, apparently
22 to protect assets from the reach of a potential judgment in a civil
23 lawsuit filed against Kocontes. The two continued to live together as
24 a couple. At the same time, Kocontes and Kanesaki's relationship began

25
26 ² Claimants have also moved for sanctions based on the Government's
27 alleged discovery abuses. The Court heard oral argument on this issue
28 on October 30, 2012. The question of sanctions is not addressed in the
present Memorandum Opinion and Order.

³ Unless otherwise noted, the facts are undisputed.

1 to deteriorate. On several occasions, local law enforcement was called
2 to the residence after altercations in which Kanesaki became physically
3 abusive towards Kocontes. Following one of these incidents, Kanesaki
4 was arrested and charged with battery. She eventually attended a court-
5 ordered domestic violence program, and the charges were dropped.

6 Kocontes and Kanesaki separated in 2005. Shortly thereafter,
7 Kocontes married another woman, but filed for divorce after only two
8 months. In the fall of 2005, Kocontes and Kanesaki reconciled and began
9 to attend counseling together. In November 2005, Kanesaki and Kocontes
10 each executed a will naming the other as the sole beneficiary. Kanesaki
11 was again arrested for battery upon Kocontes in January 2006. After
12 this incident, she enrolled herself in anger management classes and
13 attended Alcoholics Anonymous sessions.

14 In early May 2006, Kocontes booked a Mediterranean cruise for the
15 couple. On May 23, 2006, they boarded the cruise ship in Spain. On the
16 evening of May 25, 2006, as the ship traveled towards Naples, Kocontes
17 and Kanesaki went to dinner and ordered a bottle of wine. They each
18 drank one glass of wine with dinner, and took the rest of the bottle
19 with them when they finished dinner. They stopped at the ship's casino
20 and then went to a theater show. They returned to their cabin shortly
21 before midnight, where they finished the bottle of wine, each having
22 about one glass each. Kocontes took Ambien, a sleeping pill.

23 In a declaration submitted with Claimants' motion for summary
24 judgment ("Kocontes Decl."), Kocontes states that he recalls Kanesaki
25 saying that she was stepping out to get a cup of tea sometime between
26 midnight and 1:00 a.m. He claims this was the last time he saw her
27 alive, and that at about 4:30 a.m. on May 26, 2006, he awoke to
28 discover that Kanesaki's bed had not been slept in and she was not in

1 the cabin. Kocontes then notified ship officials that she was missing.
2 Kanesaki could not be found on the ship.

3 Kocontes was interviewed by ship personnel, and then in Naples by
4 Italian law enforcement officials. Kocontes left the ship the same day
5 and went to stay at a local hotel to wait for developments in the
6 search for Kanesaki. That evening, he received a telephone call from
7 an American consulate official, who advised him that the search for
8 Kanesaki had ended for the day and would resume the following day, but
9 that there was no chance she would be found alive after being in the
10 water for more than 24 hours. Kocontes took a flight back to California
11 on the morning of May 27, 2006. Kanesaki's body was found by the
12 Italian Coast Guard on May 28, 2006.

13 An autopsy was performed in Italy on June 7, 2006, by Dr.
14 Pietrantonio Ricci. (Report of Dean A. Hawley, M.D. ("Hawley Decl.")
15 at 1-3; Declaration of Terri L. Haddix ("Haddix Decl.") at 2.) Dr.
16 Ricci came to the conclusion that Kanesaki died by strangulation in a
17 homicidal assault. (Hawley Decl. at 3-4; Haddix Decl. at 2-3.)

18 The FBI began an investigation into Kanesaki's death, and among
19 other things, conducted two interviews of Kocontes. A federal grand
20 jury investigation was convened in this district court in December 2006
21 for the purpose of investigating Kanesaki's death. No indictment was
22 issued.

23 As a direct result of Kanesaki's death, Kocontes received a total
24 of between \$450,000 and \$500,000 from the following sources: (1)
25 \$318,707.93 from Kanesaki's half interest in their home, which was sold
26 in January of 2007, and was the only asset to pass through probate; (2)
27 approximately \$60,000 from Kanesaki's Vanguard retirement account on
28 which Kocontes was named the beneficiary in the 1990s; (3)

1 approximately \$40,000 from an account of Kanesaki's on which Kocontes
2 was listed as the "payable on death" recipient; (4) between \$50,000 and
3 \$100,000 in assets owned by Kanesaki from joint brokerage accounts; and
4 (5) \$10,000 in savings bonds purchased by Kanesaki on which Kocontes
5 was the beneficiary. In 2008, Kocontes filed amended federal tax
6 returns and paid additional taxes for the years 2002-2005 to correct
7 several errors. The IRS eventually refunded \$14,091.54 as an
8 overpayment in the form of a check dated May 30, 2008, made out to both
9 Kanesaki and Kocontes. Kocontes endorsed the check for both of them in
10 order to deposit the refund.

11 By January 2008, Kocontes had remarried and had created a foreign
12 trust for his new wife, Claimant Katherine Kern. Kocontes consolidated
13 most of his liquid assets and wire-transferred them to Belize into the
14 foreign trust. Later that year Kocontes closed the foreign trust
15 account and deposited these funds into his Florida Capital Bank
16 account. On November 6, 2008, the Government seized all of the funds
17 (\$1,276,781.61) in the Florida Capital Bank Account. The Government
18 subsequently returned \$250,000.

19 20 **II. Standard of Review**

21 Summary judgment is appropriate when, after reviewing the record
22 in the light most favorable to the nonmoving party, the Court
23 determines that "there is no genuine issue as to any material fact, and
24 that the movant is entitled to judgment as a matter of law." Fed. R.
25 Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
26 247-48 (1986); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th
27 Cir. 2004). Material facts are those necessary to the proof or defense
28 of a claim, and are determined by reference to substantive law.

1 Anderson, 477 U.S. at 248. A fact issue is genuine "if the evidence is
2 such that a reasonable jury could return a verdict for the nonmoving
3 party." *Id.* To demonstrate a genuine issue, the opposing party "must
4 do more than simply show that there is some metaphysical doubt as to
5 the material facts. . . . [T]he nonmoving party must come forward with
6 specific facts showing that there is a genuine issue for trial."
7 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,
8 586-87 (1986) (internal quotation marks and citations omitted). In
9 deciding a motion for summary judgment, "[t]he evidence of the
10 nonmovant is to be believed, and all justifiable inferences are to be
11 drawn in his favor." *Anderson*, 477 U.S. at 255.

12 The moving party bears the initial burden of demonstrating the
13 absence of a genuine issue of material fact by citing particular parts
14 of materials in the records or showing that an adverse party cannot
15 produce admissible evidence to support the fact. *See Celotex Corp. v.*
16 *Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c)(1)(B). If the
17 moving party meets its burden, then the nonmoving party must produce
18 enough evidence to rebut the moving party's claim and create a genuine
19 issue of material fact. *See Celotex Corp.*, 477 U.S. at 322-23. If the
20 nonmoving party produces such evidence, then the motion will be denied.
21 *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1103 (9th
22 Cir. 2000).

23 However, in order to demonstrate the existence of a material issue
24 of fact and defeat a motion for summary judgment, the non-moving party
25 must do more than simply present bald assertions or a "scintilla of
26 evidence." *Int'l Church of Foursquare Gospel v. City of San Leandro*,
27 673 F.3d 1059, 1068 (9th Cir. 2011) (citing *Anderson*, 477 U.S. at 252);
28 *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[M]ere

1 allegation and speculation do not create a factual dispute for purposes
2 of summary judgment." *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82
3 (9th Cir. 1996); *see also Angle v. Miller*, 673 F.3d 1122, 1134 n.6 (9th
4 Cir. 2012); *Endsley v. Luna*, 750 F.Supp.2d 1074, 1101 (C.D. Cal. 2010).

5 6 **III. Discussion**

7 **A. The Civil Asset Forfeiture Reform Act**

8 This case is governed by the Civil Asset Forfeiture Reform Act of
9 2000 ("CAFRA"), Pub.L. No. 106-185, 114 Stat. 202 (2000). Congress
10 passed CAFRA to transfer the burden of proof to the government in civil
11 forfeiture actions and to require the government to establish the
12 grounds for forfeiture by a preponderance of the evidence, rather than
13 by the lower probable cause standard that was in place prior to the
14 enactment of the statute. *United States v. \$80,180.00 in U.S. Currency*,
15 303 F.3d 1182, 1184 (9th Cir. 2002); 18 U.S.C. § 983(c)(1) ("[T]he
16 burden of proof is on the Government to establish, by a preponderance
17 of the evidence, that the property is subject to forfeiture").

18 The Government argues that the property seized from Claimants is
19 subject to forfeiture under 18 U.S.C. § 981(a)(1)(c) because it was
20 derived from proceeds traceable to the murder of Kanesaki by Kocontes.
21 (Complaint at 6-7). In light of CAFRA, it would be the Government's
22 burden at trial to demonstrate by a preponderance of the evidence that
23 Kocontes murdered Kanesaki and that the property seized was
24 substantially connected to the murder.

25 **B. A Genuine Issue of Material Fact Exists as to Whether Kanesaki** 26 **Was the Victim of a Homicide**

27 In their Motion for Summary Judgment, Claimants contend that the
28 Government has not offered admissible evidence that Kanesaki was the

1 victim of a homicide. (Am. Mem. in Supp. of Summ. J. at 13.) Claimants
2 argue that the findings from the autopsy performed by Italian
3 authorities after Kanesaki's death are inadmissible because the
4 Government produced only English summaries of the findings to
5 Claimants, rather than detailed translations. (*Id.*) Additionally,
6 Claimants argue that the autopsy findings cannot be considered because
7 they have not been properly authenticated. (*Id.* at 14.) Claimants
8 further claim that even if the autopsy findings were admissible, the
9 findings are flawed and should not be relied upon to determine
10 Kanesaki's cause of death. (*Id.* at 14-15.) In support of this
11 contention, Claimants rely on the opinions of three experts who
12 reviewed the autopsy findings after Claimants obtained a copy of the
13 autopsy findings from Italy and had them translated. (*Id.*)

14 At the summary judgment phase, a court may consider evidence that
15 is inadmissible in form, so long as its contents can be presented in
16 admissible form at trial. See *Fraser v. Goodale*, 342 F.3d 1032, 1036
17 (9th Cir. 2003); Fed. R. Civ. P. 56(c). While the autopsy findings in
18 their current form contain inadmissible hearsay, their contents could
19 be admissible at trial if properly authenticated, for example through
20 the testimony of the Italian physician who performed the autopsy, and
21 the Government has indicated that it intends to properly authenticate
22 them at trial. Additionally, the failure of the Government to provide
23 detailed translations of the autopsy findings to Claimants does not
24 render them inadmissible at trial, as the Government was under no
25 obligation to produce such translations. See, e.g., *E&J Gallo Winery v.*
26 *Cantine Rallo, S.p.A.*, No. 1:04cv5153, 2006 WL 3251830, at *5 (E.D. Cal
27 Nov. 8, 2006) ("Normally, in responding to a request for production of
28 documents, the requesting party would bear the cost of translating

1 documents written in a foreign language."). Accordingly, the Court will
2 consider the autopsy findings for purposes of this summary judgment
3 motion.

4 As to the cause of Kanesaki's death, the Government has produced
5 a declaration from expert witness Dr. Dean Hawley, who reviewed both
6 the Italian autopsy findings and the reports of Claimants' experts.
7 (Opp. at 19; Hawley Decl.). In his declaration, Dr. Hawley states that
8 the likely cause of Kanesaki's death was strangulation, and that the
9 findings of Claimants' experts to the contrary were incorrect. (Hawley
10 Decl. at 16.) The autopsy report and the declaration of Dr. Hawley
11 create a genuine issue of material fact as to whether Kanesaki was the
12 victim of a homicide.

13 **C. There is No Genuine Issue of Material Fact as to Whether**
14 **Kocontes Murdered Kanesaki**

15 Through Kocontes's declaration, Claimants offer direct evidence
16 that Kocontes did not murder Kanesaki. Kocontes states in his
17 declaration that the last time he saw Kanesaki alive was sometime
18 between midnight and 1:00 a.m the morning of May 26, 2006, and that he
19 subsequently fell asleep and awoke around 4:30 a.m. to discover that
20 she was missing. (Kocontes Decl. at 8.)

21 There is no direct evidence that Kocontes murdered Kanesaki.
22 However, in its opposition, the Government relies on the following
23 circumstantial evidence to support its allegation that Kocontes
24 murdered Kanesaki: 1) Kocontes and Kanesaki's history of marital
25 discord; 2) statistical evidence that the most prevalent form of female
26 homicide is homicide committed by an intimate partner; 3) Kocontes's
27 presence "at the scene of the crime"; 4) statements made by Kocontes
28 to investigators that were inconsistent with the autopsy findings; and

1 5) Kocontes's financial motive for murder. (Opp. at 16-17.) Each
2 factual allegation will be addressed in turn to determine whether it
3 creates a genuine issue of material fact on the relevant issue.

4 **1. Kocontes and Kanesaki's History of Marital Discord**

5 As noted above, the following is undisputed: Kocontes and Kanesaki
6 were married in 1995 and then divorced in 2001. The divorce was
7 allegedly obtained in order to protect certain assets from potential
8 civil litigation against Kocontes, and Kocontes and Kanesaki continued
9 to live together as a couple. (Pl.'s Statement of Genuine Issues, No.
10 17.) Nevertheless, their relationship deteriorated and on several
11 occasions, local law enforcement officers were called to the couple's
12 residence due to altercations in which Kanesaki became physically
13 abusive towards Kocontes. (*Id.*, No. 18.) One of the incidents resulted
14 in Kanesaki being arrested and charged with corporal injury and battery
15 upon Kocontes. (*Id.*) Kanesaki eventually attended a court-ordered
16 domestic violence program, in which Kocontes participated. (*Id.*, No.
17 20.) The couple then separated in 2005, and Kocontes married another
18 woman, but then filed for divorce two months later. (*Id.*, No 22.) In
19 the fall of 2005, Kocontes and Kanesaki reconciled and renewed their
20 relationship. (*Id.*, No. 23.) In January 2006, Kanesaki was again
21 arrested for battery upon Kocontes. (*Id.*, No 25.)

22 In their Motion for Summary Judgment, Claimants argue that the
23 couple's marital discord does not in any way suggest that Kocontes
24 murdered Kanesaki. (Am. Mem. in Supp. of Summ. J. at 22.) Indeed,
25 Claimants' contend, and the record shows, that there is no evidence
26 that Kocontes was ever physically abusive towards Kanesaki. Nor is
27 there evidence that he ever threatened to harm her. Rather, as the
28 Government acknowledges, it is undisputed that it was Kanesaki who

1 became physically violent towards Koontes during the couple's
2 infrequent altercations. Absent any evidence suggesting that Koontes
3 had used or threatened to use violence against Kanesaki, the mere fact
4 that the couple had a troubled relationship does not provide
5 circumstantial evidence giving rise to an inference that Koontes
6 murdered Kanesaki.

7 2. Statistical Evidence

8 The Government offers statistical evidence regarding intimate
9 partner homicides as circumstantial evidence supporting its allegation
10 that Koontes murdered Kanesaki. (Opp. at 15-16, Exs. H, I; Report of
11 Donald G. Dutton ("Dutton Decl").) Specifically, the evidence includes:
12 1) remarks made by Attorney General Eric Holder at a domestic violence
13 awareness event; 2) homicide data collected by the FBI for the year
14 2009; and 3) the declaration of Donald G. Dutton, Ph.D., a psychologist
15 with a specialty in the psychological and social causes of violence and
16 domestic abuse. Dr. Dutton was asked to provide an opinion on the death
17 of Kanesaki, and reviewed various documents relevant to this case. From
18 his review of the case material and general research on domestic
19 violence, he reached the following conclusions: 1) intimate partner
20 homicides are the most common type of murders of women; 2) typically,
21 a history of domestic violence precedes the intimate partner homicide;
22 3) intimate partner homicide is sometimes committed for financial gain;
23 and 4) men who murder intimate partners for financial gain tend to have
24 antisocial personalities. (Dutton Decl. at 6.) The Government has
25 stated that Dr. Dutton would be available to testify concerning these
26 conclusions at trial in the present case.⁴

27
28 ⁴ The Government has not explained how Attorney General Holder's
remarks or the FBI homicide data would be admissible at trial.

1 Even assuming that this statistical information would be
2 admissible at trial,⁵ it does not constitute circumstantial evidence
3 supporting the Government's allegations that Kocontes murdered
4 Kanesaki. Much of the statistical information is focused on
5 circumstances where an intimate partner homicide is preceded by a
6 history of domestic violence perpetrated by the killer against the
7 victim. For example, Dr. Dutton states that he has experience as a
8 therapist of "wife assaulters," and discusses domestic abuse
9 perpetrated by the partner who commits the homicide. (Dutton Decl. at
10 1-4.) Here, in contrast, it is undisputed that the domestic
11 altercations requiring the presence of local law enforcement were the
12 result of Kanesaki assaulting Kocontes. (Pl.'s Statement of Genuine
13 Issues, Nos. 18, 25.) As discussed previously, there is no evidence
14 that Kocontes ever threatened or physically assaulted Kanesaki. Thus,
15 the statistical information about the relevance of past domestic abuse
16 in cases of intimate partner homicide has no bearing on the factual
17 circumstances present here, where it was the victim of the homicide who
18 had committed past acts of physical abuse.

19 Moreover, some of the statistical information contained in Dr.
20 Dutton's report appears to undermine the Government's argument in
21 opposition to summary judgment. Dr. Dutton identifies studies showing
22 that strangulation is not the most common method of intimate partner
23 killing. (Dutton Decl. at 19.) He also implies that financial gain is
24 not a frequent motive behind intimate partner killings, compared to
25

26
27 ⁵ While unnecessary to decide here, it is questionable whether such
28 statistical evidence would be deemed admissible in light of Fed. R.
Evid. 702 and Fed. R. Evid. 403. Suffice it to say that all of the
cases the Government cites in support of its assertion that such
statistical evidence is admissible in this context are inapposite.

1 other motives such as estrangement or fear the partner is being
2 unfaithful. (Dutton Decl. at 19, 21.) This information is inconsistent
3 with the Government's allegations that Kocontes strangled Kanesaki in
4 order to obtain her assets.

5 Finally, several of Dr. Dutton's conclusions appear wholly
6 speculative. He opines that the likelihood of stranger homicide on the
7 cruise ship is particularly rare because "the cruise ship clientele
8 would be middle class." (Dutton Decl. at 5.) However, there is no
9 evidence in the record regarding the socioeconomic status of the
10 passengers aboard the ship. Even if it can be assumed that the
11 passengers were primarily middle class, there were also 543 crew
12 members on board, whose socio-economic class is not apparent from the
13 record. (Mot. For Summ. J., Ex. S.) Dr. Dutton also opines that if
14 Kanesaki were sexually assaulted and killed by a crew member, then "it
15 would mostly like be a serial rapist/killer and evidence of other
16 deaths (either on other cruises or ashore) should be forthcoming."
17 (Dutton Decl. at 5.) Yet he does not explain his basis for concluding
18 that this hypothetical murderer would be a serial killer. Furthermore,
19 his implication that there should be obvious evidence of the work of
20 a serial killer defies common sense in this context, where there were
21 over 2000 people on the ship and no information is available regarding
22 their histories or whereabouts. Such unsupported speculation and
23 conclusions simply do not provide relevant circumstantial evidence
24 supporting the claim that Kocontes murdered Kanesaki.

25 3. Presence "At the Scene of the Crime"

26 The Government asserts that Kocontes was at the scene of the
27 crime—"the cruise ship where Kanesaki met her death." (Opp. at 16.)
28 While it is undisputed that Kocontes was on the cruise ship, Claimants

1 offer evidence in the form of a declaration by Kocontes stating that
2 he was asleep in his cabin during the time that Kanesaki disappeared,
3 and awoke to find her missing. (Kocontes Decl. at 8.) There is no
4 direct evidence in the record supporting a finding that Kanesaki was
5 murdered in the cabin she was sharing with Kocontes. Indeed, the record
6 includes statements from persons in neighboring cabins who confirm they
7 did not hear or see anything unusual coming from the couple's cabin.
8 (Mot. for Summ. J., Ex. T.) The record is devoid of any other evidence
9 regarding where on the ship Kanesaki was murdered or that she was
10 thrown overboard in one particular area of the ship as opposed to any
11 other, and the Government acknowledges as much. (Opp. at 18 ("It is
12 entirely possible that the crime occurred anywhere else [besides the
13 couple's cabin] on the ship").) Thus, while Kocontes was at the scene
14 of the crime, defining the scene as the entire cruise ship, so were the
15 more than 2,000 passengers and crew who were also onboard. (Mot. for
16 Summ. J., Ex. S.) Thus, there is no physical, visual, or aural
17 evidence linking Kocontes to the murder.

18 **4. Inconsistent Statements**

19 The Government maintains that Kocontes's statements to authorities
20 that Kanesaki had ingested both alcohol and Ambien just before her
21 disappearance were inconsistent with the autopsy findings, suggesting
22 that Kocontes attempted to mislead law enforcement. (Opp. at 16-17.)
23 Claimants offer compelling evidence that there was nothing inconsistent
24 between Kocontes's statements and the autopsy findings. (Mem. in Supp.
25 of Summ. J. at 15-18.)

26 The Italian police reports document that Kocontes made the
27 following statement to authorities about Kanesaki's activities the
28 night of her disappearance:

1 "Yesterday evening, while still on board, and having
2 prepared ourselves for the evening, we went to dinner and
3 purchased a bottle of wine of which we only drank one glass
4 each. We went back to our cabin where we left the bottle that
5 we had purchased. We first went to the casino of the ship and
6 later to the theater onboard to watch a comedic show. At
7 around midnight we returned to our cabin. Once in the cabin we
8 drank the wine we had purchased earlier, again a glass each.
9 Since we had planned an excursion here in Naples for this
10 morning we decided to take a pill that would help us to fall
11 asleep since we were both suffering from jet lag. We were both
12 having trouble falling asleep. I took my pill and went to bed
13 while my wife went to the bathroom in our cabin to wash off
14 the glasses.

15 - NOTE - *I am unable to say whether or not my wife took her*
16 *pill to fall asleep* because as mentioned, she went into the
17 bathroom, therefore I could not see her. When she came out of
18 the bathroom she told me she was going to the café to get an
19 herbal tea that would help her to rest. I then fell asleep."

20 (Mot. for Summ. J., Ex. R at 4 (emphasis added).)

21 A toxicology report prepared as part of the autopsy revealed that
22 Kanesaki had not ingested the sleeping pills found in the cabin. Report
23 of Dean A. Hawley, M.D. ("Hawley Decl.") at 3.) However, as noted by
24 Claimants, this was not inconsistent with Kocontes's statements that
25 he did not know whether Kanesaki had taken the pills before her
26 disappearance.

27 Regarding the issue of whether Kanesaki had consumed wine, the
28 autopsy does not indicate whether a test for the presence of alcohol

1 in Kanesaki's blood was performed. (Hawley Decl. at 3.) Accordingly,
2 there is also no inconsistency between Kocontes's statement that
3 Kanesaki drank wine prior to her disappearance and the autopsy report.
4 Furthermore, the Italian police reports contain a statement from a
5 waiter who served Kocontes and Kanesaki a bottle of wine at dinner on
6 the evening of Kanesaki's disappearance. The waiter stated that
7 Kocontes and Kanesaki each had a glass of wine at dinner, and took the
8 unfinished bottle with them when they left the dining room. (Mot. for
9 Summ. J., Ex. R at 8.)

10 The Government has not offered any evidence to rebut Claimants'
11 evidence demonstrating that there were no inconsistencies between
12 Kocontes's statements and the autopsy findings. *See Celotex Corp.*, 477
13 U.S. at 322-23. Accordingly, there is no genuine issue of material fact
14 as to whether Kocontes made inconsistent statements to investigators.

15 **5. Financial Motive**

16 The Government argues that Kocontes wanted to obtain Kanesaki's
17 assets, and that this provided the motive for him to commit murder. The
18 Government maintains that Kanesaki was independently wealthy, but that
19 the exact amount of her wealth is ultimately irrelevant, as it is
20 undisputed that Kocontes acquired at least \$450,000 as the result of
21 her death. (Opp. at 20-24.) Claimants maintain that Kanesaki was not
22 independently wealthy, and that the fact that Kocontes inherited money
23 upon Kanesaki's death does not create a triable issue of fact as to
24 whether Kocontes murdered Kanesaki. (Am. Mem. in Supp. of Summ. J. at
25 18-23.)

26 **a. Relevant Evidence**

27 **(1) Claimants' Financial Evidence**

28 As evidence demonstrating the absence of a triable issue of fact

1 as to whether Kanesaki was independently wealthy, Claimants offer the
2 declaration of Kocontes, which details his knowledge of Kanesaki's
3 assets and the basis for that knowledge. Kocontes states that up until
4 1997, when Kanesaki stopped working at the law firm where they met,
5 Kanesaki was making approximately \$40,000 per year. (Kocontes Decl. at
6 2.) Kocontes had reviewed and signed Kanesaki's tax returns for 1996
7 and 1997, which confirmed she was making that amount for those years.
8 Kanesaki stopped working at the law firm in 1997, and from 1998 until
9 her death, her primary source of regular income was disability
10 insurance, from which she received approximately \$2,745.42 per month.

11 (*Id.*)

12 Kocontes explains that at the time of his marriage to Kanesaki,
13 she had partial ownership in one parcel of real property, and that this
14 was the only substantial asset, real or personal, owned by Kanesaki.

15 (*Id.*) Kanesaki had purchased the property jointly with her brother and
16 his wife, and contributed approximately \$11,000 to the down payment
17 amount, making her equity interest approximately \$10,000 at the time
18 of purchase in 1994. (*Id.* at 3.) After their marriage, Kocontes was
19 added to the grant deed upon a payment of \$12,500, at the same time the
20 home was refinanced. After refinancing, Kanesaki and Kocontes each had
21 a \$12,500 interest out of the \$50,000 total equity in the home. (*Id.*)

22 Claimants have included the relevant deeds confirming this information.
23 (2011 Supp. Decl. of Kocontes, Ex. O.) Once married, the couple
24 acquired additional property, but most of the funds came from
25 Kocontes's separate property and earnings. (Kocontes Decl. at 3-5.)

26 Kocontes states that at the time of his marriage to Kanesaki, his
27 separate net worth was approximately \$250,000. (*Id.* at 3.) Kocontes
28 earned more than \$100,000 per year as an attorney between 1995 and

1 2006. During this same time period, Kanesaki contributed at most 20
2 percent of the funds deposited in their joint accounts and used to
3 acquire jointly held assets. In 2006, the couple's jointly held assets
4 had grown to over a million dollars total. (*Id.* at 5.)

5 Kocontes also stated that from the time of the couple's divorce
6 to the time of Kanesaki's death, the couple maintained joint financial
7 accounts with a right of survivorship. The bulk of the money that
8 funded these accounts was Kocontes's separate property funds. Kocontes
9 had full access to withdraw funds from these accounts at any time, and
10 his access did not depend on Kanesaki's death. (Supp. Decl. of Kocontes
11 at 2.) Kocontes also stated that he was not aware of any trust fund
12 that ever existed for Kanesaki's benefit, and did not take control of
13 any trust fund belonging to Kanesaki following her death. (Kocontes
14 Decl. at 12.)

15 (2) The Government's Financial Evidence

16 To rebut Claimants' evidence and demonstrate that Kanesaki was,
17 in fact, independently wealthy, the Government provides the declaration
18 of Frank Bernal, an FBI agent, along with exhibits ("Bernal Decl.>").
19 Bernal states that his declaration is based on personal knowledge, as
20 well as based on a review of FBI records, translated Italian government
21 records, and bank records. (Bernal Decl. at 1.) According to Bernal,
22 Kanesaki was a millionaire at the time she married Kocontes based on
23 financial investments and her ownership of several pieces of real
24 property. (*Id.* at 2.) Following Kanesaki's death, Kocontes obtained
25 full control over: (1) Kanesaki's trust fund; (2) a Citibank account
26 held jointly by Kanesaki and Kocontes ; (3) other bank accounts held
27 jointly by Kanesaki and Kocontes; and (4) other assets owned by
28 Kanesaki. (*Id.* at 2-3.)

1 Attached to the Bernal Declaration is five exhibits. The first is
2 an email dated March 2, 2005, from Kanesaki to Sue White, Kanesaki's
3 former co-worker at the law firm where she was working when she met
4 Kocontes. In the email, Kanesaki stated she was unhappy with Kocontes,
5 and then on the subject of finances, she wrote:

6 After the past few weeks of arguing with LK [Kocontes],
7 I have decided to cut-off his access to my parents' money. He
8 even tries to control their money. You know they asked me to
9 hold on to it and I can use it for safer investments. They
10 know that the amount of money they have may not last for the
11 rest of their lives, so they moved into that retirement place
12 because they don't want to burden me-and asked me to
13 hold/utilized the money for their and my benefit. I'll be
14 dammed if I'm going to let LK tell me how I should
15 invest/spend my parents' money. He tells me, we should invest
16 it so we can have more money when we retire. Yeah right, you
17 mean so he can have more money and access to my parents'
18 money????!!!

19 I really understand why you and many others keep their
20 money separate from their spouses. Money and infidelity = No.1
21 reasons for marriage dissolution.

22 You know, I can't even buy any big ticket items because
23 LK doesn't want to spend the money-and we can afford it and we
24 would be paying cash. Spending the money doesn't affect our
25 financial ability to save for our future, or meet our expenses
26 in life. He just cant part with the \$\$ because it would
27 decrease the balance. I have to put up a big fights/arguments
28 before I can buy anything for my house. The fighting takes all

1 the fun out of my home projects. . . ."

2 (Bernal Decl, Ex. C at 3-4.)

3 The other four exhibits are FBI Form 302s, which contain interview
4 notes from FBI interviews conducted with four individuals. All four of
5 the interviews took place in May or June of 2006, shortly after
6 Kanesaki's death. The first was with Sue White. (Bernal Decl., Ex. D.)
7 The Form 302 indicates that White characterized Kanesaki as being
8 wealthy and that she stated that Kanesaki had done very well as a day
9 trader. White stated that she was aware that Kanesaki had separated her
10 assets from Kocontes and established a trust fund for her parents, and
11 that White had provided Kanesaki with a name of an attorney that might
12 be able to help her separate her assets. Interestingly, White believed
13 that Kanesaki and Kocontes were still married. (*Id.*)

14 The second Form 302 contains interview notes with Amporn
15 Amatayakul, who appears to be the current wife of Kanesaki's former
16 brother-in-law. According to the notes:

17 "Amatayakul was aware that Kanesaki had a lot of money.
18 Amatayakul believes that Kanesaki did well investing in oil
19 and stocks on the internet. Amatayakul also believed that
20 Kanesaki owned three homes. Amatayakul stated that Kocontes
21 was always after Kanesaki's money, and that Kocontes wanted
22 Kanesaki to live more frugally. . . . Amatayakul said that
23 during their last separation, Kanesaki had hired an
24 attorney for approximately \$16,000 to help her separate her
25 assets from Kocontes."

26 (Bernal decl, Ex. E.)

27 The third Form 302 contains notes from an interview with Apiruks
28 Amatayakul, Kanesaki's former brother-in-law. Kanesaki lived with

1 Apiruks and his wife Amporn while she was separated from Kocontes in
2 2005. Apiruks was aware that Kanesaki had hired an attorney to separate
3 her financial accounts from Kocontes. According to the interview notes:

4 "Amatayakul stated that the home that Kocontes and Kanesaki
5 had lived in in Ladera Ranch, California was completely in
6 Kanesaki's name, and that Kocontes wanted half of the money
7 for the home. Kanesaki told Amatayakul that well [sic] they
8 were separated she paid Kocontes a couple of million
9 dollars. Amatayakul was also aware that Kanesaki had two or
10 three rental properties that she derived income from."

11 (Bernal Decl, Ex. F.) Apiruks also stated that during one of the days
12 that Kanesaki was visiting their home in early May 2006, she checked
13 her investment accounts on his computer and Apiruks observed that she
14 had \$2 to \$3 million dollars in one of these accounts. (*Id.*)

15 The final Form 302 contains notes from an interview with Julie
16 Saranita, Kanesaki's niece and the daughter of Apirkus Amatayakul and
17 Kanesaki's sister. Saranita stated she believed Kanesaki's disability
18 insurance monthly payments were significant, and possibly as much as
19 \$4,000 or \$5,000. Additionally, Kanesaki "went to classes on the stock
20 market and was successful in compiling liquid assets of at least 2
21 million." In 2005, Kanesaki retained an attorney to ensure her assets
22 were separated from Kocontes's assets. Saranita stated their Ladera
23 Ranch home was listed in the names of both Kocontes and Kanesaki.
24 (Bernal Decl., Ex. G.)

25 **b. Admissibility of the Government's Financial Status**

26 **Evidence**

27 While Bernal's statements as to Kanesaki's wealth are not based
28 on personal knowledge, the Government contends that the Bernal

1 Declaration references exhibits that contain admissible evidence of
2 Kanesaki's wealth, and that therefore this evidence should be
3 considered in opposition to the motion for summary judgment.
4 (Government's Response to Claimant's Evidentiary Objections
5 ("Response") at 3 (citing *Fraser*, 342 F.3d at 1036).) It argues that
6 the email from Kanesaki can be introduced under a hearsay exception,
7 and that the contents of the Form 302s will be admissible either
8 through a hearsay exception or through witnesses who can testify at
9 trial. (Response at 3, 11.) The government's admissibility arguments
10 are without merit.

11 **(1) Kanesaki's Email**

12 The Government argues that Kanesaki's email can be introduced
13 under either: (1) the "forfeiture by wrongdoing" exception to the
14 hearsay rule, or (2) the "state of mind" exception. (Response at 4.)
15 Federal Rule of Evidence 804(b)(6) provides a hearsay exception for
16 "[a] statement offered against a party that wrongfully caused--or
17 acquiesced in wrongfully causing--the declarant's unavailability as a
18 witness, and did so intending that result." In determining whether Rule
19 804(b)(6)'s exception is applicable, courts have generally used the
20 preponderance of the evidence standard, though some have indicated that
21 the higher clear and convincing evidence standard may apply instead.
22 See, e.g., *Hodges v. Attorney General, Florida*, 506 F.3d 1337, 1345 n.1
23 (11th Cir. 2007) (recognizing that preponderance of the evidence is the
24 appropriate standard); Advisory Committee Notes to Fed. R. Evid.
25 804(b)(6), 1997 Amendments ("The usual Rule 104(a) preponderance of the
26 evidence standard has been adopted in light of the behavior the new
27 Rule 804(b)(6) seeks to discourage."); but see *United States v.*
28 *Baskerville*, 448 Fed. Appx. 243, 250 n. 4, 2011 WL 4850257, at *6 n.4

1 (3d Cir. 2011) (declining to decide the appropriate evidentiary
2 standard for admitting statements pursuant to Rule 804(b)(6) and noting
3 that "[u]nder either a clear and convincing evidence standard or a
4 preponderance of the evidence standard, the Government's showing
5 sufficed."). Accordingly, the question of whether Kanesaki's email can
6 be admitted is the same as the ultimate issue of this forfeiture
7 action-whether the Government can establish, by a preponderance of the
8 evidence, that Kocontes murdered Kanesaki. The Government may not use
9 the circular argument that Kanesaki's email is evidence that Kocontes
10 murdered Kanesaki, and that the email is admissible because of the
11 same.

12 Under Fed. R. Evid. 803(3), a statement of an out-of-court
13 declarant's then-existing state of mind, including intent, is not
14 excluded by the hearsay rules. Here, the Government argues that the
15 email, which expresses Kanesaki's intent to cut off Kocontes's access
16 to her parent's trust fund, is admissible under the state of mind
17 exception to show that Kanesaki did, in fact, cut him off from the
18 money. (Response at 4.) However, the question of whether Kanesaki did
19 cut him off from her parents' trust fund is not relevant here. The
20 Government's argument that "such a deprivation of access would have
21 given Kocontes a financial motive for murder" is wholly speculative.
22 There is no evidence that Kocontes either obtained or tried to obtain
23 access to this trust fund following Kanesaki's death. Furthermore,
24 statements by Kanesaki about the reasons for her decision to cut off
25 Kocontes are not admissible under the state of mind hearsay exception.
26 *See Wagner v. Conty. of Maricopa*, 673 F.3d 977, 987 (9th Cir. 2012)
27 (finding that "statements ... offered to show not only that
28 [individual] was agitated ... but also why he was agitated" were

1 hearsay not permitted by Rule 803(3)); *United States v. Emmert*, 829
2 F.2d 805, 810 (9th Cir. 1987) (state of mind exception does not permit
3 witness to relate statements as to why he had particular state of
4 mind). Thus, even if the single line in the email that Kanesaki had
5 "decided to cut-off his access to my parents' money" was admissible
6 under this exception, the remainder of the email is not.

7
8 **(2) Form 302s**

9 The Government argues that the contents of the Form 302s are
10 admissible because either: (1) the statements have sufficient
11 "circumstantial guarantees of trustworthiness" to fall under the
12 residual hearsay exception of Fed. R. Evid. 807, or (2) the witnesses
13 identified in the Form 302s will be available to testify at trial.
14 (Response at 6, 11.)

15 The Government has failed to show that Rule 807's residual hearsay
16 exception is applicable here. This exception is only applicable if the
17 statement sought to be admitted "is more probative on the point for
18 which it is offered than any other evidence that the proponent can
19 obtain through reasonable efforts." Fed. R. Evid. 807(a)(3). Here, the
20 Government has not argued, much less demonstrated, that more probative
21 evidence as to Kanesaki's financial status is not available through
22 reasonable efforts. It has not explained why six-year-old speculative
23 hearsay statements from several of Kanesaki's acquaintances and family
24 members should be relied upon instead of documents such as financial
25 records, property deeds, or tax returns that could reliably demonstrate
26 Kanesaki's assets. Furthermore, it has not convincingly shown that the
27 consistency between the statements of four individuals (three of whom
28 belong to the same family) constitutes an "equivalent circumstantial
guarantee[] of trustworthiness" to other specifically covered hearsay

1 exceptions.⁶ See Fed. R. Evid. 807(a).

2 Moreover, the Government's contention that the individuals
3 identified in the Form 302s will be available to testify at trial is
4 not sufficient to render the relevant contents of the Form 302s
5 admissible evidence. Fed. R. Civ. P. Rule 56, which governs motions for
6 summary judgment, requires that a "declaration used to support or
7 oppose a motion must be made on personal knowledge, set out facts that
8 would be admissible in evidence, and show that the affiant or declarant
9 is competent to testify on the matters stated." Fed. R. Civ. P.
10 56(c)(4). For the statements to be admissible on summary judgment, the
11 declaration itself must make clear how the declarants know the facts
12 they assert and are competent to testify about them. See *Shakur v.*
13 *Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) ("[C]onclusory affidavits
14 that do not affirmatively show personal knowledge of specific facts are
15 insufficient.") (quoting *Casey v. Lewis*, 4 F.3d 1516, 1527 (9th Cir.
16 1993)).

17 The Form 302s, for the most part, contain statements of opinion
18 regarding Kanesaki's wealth and her relationship with Kocontes.
19 Neither the forms themselves, nor any other evidence provided by the
20 Government, identifies admissible evidence supporting these opinions
21 that would render the opinions themselves admissible. Rather, the
22 opinions are either conclusory or appear to be generally based on
23 inadmissible hearsay statements from Kanesaki herself.

24
25 ⁶ This is particularly true in light of inconsistencies and
26 undisputed errors within the Form 302s. For example, Sue White states
27 that she believed that Kanesaki and Kocontes were still married, when
28 it is undisputed that Kocontes and Kanesaki's divorce was finalized.
(Bernal Decl., Ex. C). Apiruks Amatayakul stated that the couple's
Ladera Ranch property was completely in Kanesaki's name, while Julie
Saranita stated that the Ladera Ranch home was listed under the names
of both Kocontes and Kanesaki. (Exs. F, G.)

1 Here, Claimants have offered a detailed declaration from Kocontes
2 regarding Kanesaki's assets. The declaration is based on Kocontes's
3 personal knowledge as Kanesaki's spouse and partner, as well as
4 reliable documents such as tax returns and property deeds. Having met
5 their initial burden of demonstrating the absence of a genuine issue
6 of material fact on this issue, it was the Government's burden to
7 produce enough evidence to show that a triable issue of fact remains.
8 See *Celotex Corp*, 477 U.S. at 322-23. Yet despite its reliance on
9 Kocontes's alleged financial motive for murder as one of the key
10 elements of its case, the Government offers only six-year-old interview
11 notes on Form 302s to rebut Claimants' testimonial and documentary
12 evidence as to Kanesaki's assets. The Government has not explained its
13 failure to submit declarations from the individuals identified in the
14 Form 302s, nor indicated that they have even been contacted since the
15 original interviews took place more than six years ago. More
16 importantly, the Government has produced no documentary evidence, such
17 as deeds, tax returns, or financial records, to demonstrate that
18 Kanesaki was independently wealthy. Accordingly, the Government has not
19 produced sufficient evidence to create a triable issue of fact as to
20 whether Kanesaki was independently wealthy and whether Kocontes
21 obtained, or even stood to obtain, more than \$500,000 as the result of
22 her death.

23 **6. Analysis of the Government's Circumstantial Evidence**

24 The admissible evidence supporting the Government's argument that
25 a genuine issue of material fact exists as to whether Kocontes murdered
26 Kanesaki consists of: 1) the undisputed fact that Kocontes was present
27 on the cruise ship, along with the more than 2,000 passengers and crew
28 members also on board, and 2) the fact that Kocontes acquired between

1 \$450,000 and \$500,000 as the result of Kanesaki's death, and 3) the
2 fact that Kocontes and Kanesaki had a troubled relationship. The Court
3 must determine if, based on these facts, a genuine issue of material
4 fact exists as to whether Kocontes murdered Kanesaki.

5 Kocontes's presence on the ship, his acquisition of Kanesaki's
6 share of their jointly held property, and the up-and-down nature of the
7 couple's relationship are simply insufficient to meet the Government's
8 burden. Kocontes's presence on the ship at the time of Kanesaki's
9 disappearance made him as likely as any one of more than 2,000 other
10 individuals to have committed the murder. His presence does not provide
11 strong circumstantial evidence that he was the perpetrator.

12 While the acquisition of nearly \$500,000 in assets may be
13 evidence of a motive to kill under some circumstances, here Kocontes'
14 accumulation of the assets occurred in the context of a 10-year
15 relationship and marriage to Kanesaki.⁷ Additionally, Kocontes had
16 access to a substantial portion of these assets while Kanesaki was
17 alive. (*Supp. Decl of Kocontes*, at 2.) In short, the fact that Kocontes
18 received assets, most of which were joint property, as the result of
19 the death of his partner and former spouse is not compelling
20 circumstantial evidence that he committed murder.

21 Finally, while the relationship was troubled, with apparent
22 disputes over finances and an intervening divorce, there is nothing
23 arising from the relationship which would give rise to an inference
24 that Kocontes murdered Kanesaki. The violence in the relationship
25

26 ⁷ While the Bernal Declaration states that Kocontes "obtained
27 control over [] Kanesaki's trust fund," (Bernal Decl. at 2-3), the
28 Government has provided no admissible evidence to rebut Kocontes's
statement that either no such fund existed, or if it did, Kocontes was
not aware of it and never took control of it. (Kocontes Decl. at 12.)

1 appears to be minimal and all of it was attributable to Kanesaki.

2 While suspicion naturally would focus on the domestic partner in
3 a case such as this, suspicion is not enough to survive summary
4 judgment. When all is said and done, the government has presented
5 nothing more than allegations and speculation to support its claim that
6 Kocontes murdered Kanesaki, which is insufficient to create a genuine
7 issue of material fact. *Nelson*, 83 F.3d 1081-82. Under these
8 circumstances, Claimants' motion for summary judgment must be granted.

9

10 **IV. Conclusion**

11 For the foregoing reasons, Claimants' motion for summary judgment
12 is GRANTED. IT IS ORDERED that judgment be entered dismissing the
13 action with prejudice.

14

15 Dated: November 20, 2012

16

17

MARC L. GOLDMAN

18

Marc L. Goldman
United States Magistrate Judge

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