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HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement

Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitorin Connection with Five-year Agreement

WASHINGTON – HSBC Holdings plc (HSBC Group) – a United Kingdom corporation headquartered in London – and HSBC Bank USA N.A. (HSBC Bank USA) (together, HSBC) – a federally chartered banking corporation headquartered in McLean, Va. – have agreed to forfeit $1.256 billion and enter into a deferred prosecution agreement with the Justice Department for HSBC's violations of the Bank Secrecy Act (BSA), the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA). According to court documents, HSBC Bank USA violated the BSA by failing to maintain an effective anti-money laundering program and to conduct appropriate due diligence on its foreign correspondent account holders. The HSBC Group violated IEEPA and TWEA by illegally conducting transactions on behalf of customers in Cuba, Iran, Libya, Sudan and Burma – all countries that were subject to sanctions enforced by the Office of Foreign Assets Control (OFAC) at the time of the transactions.

The announcement was made by Lanny A. Breuer, Assistant Attorney General of the Justice Department's Criminal Division; Loretta Lynch, U.S. Attorney for the Eastern District of New York; and John Morton, Director of U.S. Immigration and Customs Enforcement (ICE); along with numerous law enforcement and regulatory partners. The New York County District Attorney's Office worked with the Justice Department on the sanctions portion of the investigation. Treasury Under Secretary David S. Cohen and Comptroller of the Currency Thomas J. Curry also joined in today's announcement.

A four-count felony criminal information was filed today in federal court in the Eastern District of New York charging HSBC with willfully failing to maintain an effective anti-money laundering (AML) program, willfully failing to conduct due diligence on its foreign correspondent affiliates, violating IEEPA and violating TWEA. HSBC has waived federal indictment, agreed to the filing of the information, and has accepted responsibility for its criminal conduct and that of its employees.

"HSBC is being held accountable for stunning failures of oversight – and worse – that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries," said Assistant Attorney General Breuer. "The record of dysfunction that prevailed at HSBC for many years was astonishing. Today, HSBC is paying a heavy price for its conduct, and, under the terms of today's agreement, if the bank fails to comply with the agreement in any way, we reserve the right to fully prosecute it."

"Today we announce the filing of criminal charges against HSBC, one of the largest financial institutions in the world," said U.S. Attorney Lynch. "HSBC's blatant failure to implement proper anti-money laundering controls facilitated the laundering of at least $881 million in drug proceeds through the U.S. financial system. HSBC's willful flouting of U.S. sanctions laws and regulations resulted in the processing of hundreds of millions of dollars in OFAC-prohibited

transactions. Today's historic agreement, which imposes the largest penalty in any BSA prosecution to date, makes it clear that all corporate citizens, no matter how large, must be held accountable for their actions."

"Cartels and criminal organization are fueled by money and profits," said ICE Director Morton. "Without their illicit proceeds used to fund criminal activities, the lifeblood of their operations is disrupted. Thanks to the work of Homeland Security Investigations and our El Dorado Task Force, this financial institution is being held accountable for turning a blind eye to money laundering that was occurring right before their very eyes. HSI will continue to aggressively target financial institutions whose inactions are contributing in no small way to the devastation wrought by the international drug trade. There will be also a high price to pay for enabling dangerous criminal enterprises."

In addition to forfeiting $1.256 billion as part of its deferred prosecution agreement (DPA) with the Department of Justice, HSBC has also agreed to pay $665 million in civil penalties – $500 million to the Office of the Comptroller of the Currency (OCC) and $165 million to the Federal Reserve – for its AML program violations. The OCC penalty also satisfies a $500 million civil penalty of the Financial Crimes Enforcement Network (FinCEN). The bank's $375 million settlement agreement with OFAC is satisfied by the forfeiture to the Department of Justice. The United Kingdom's Financial Services Authority (FSA) is pursuing a separate action.

As required by the DPA, HSBC also has committed to undertake enhanced AML and other compliance obligations and structural changes within its entire global operations to prevent a repeat of the conduct that led to this prosecution. HSBC has replaced almost all of its senior management, "clawed back" deferred compensation bonuses given to its most senior AML and compliance officers, and has agreed to partially defer bonus compensation for its most senior executives – its group general managers and group managing directors – during the period of the five-year DPA. In addition to these measures, HSBC has made significant changes in its management structure and AML compliance functions that increase the accountability of its most senior executives for AML compliance failures.

The AML Investigation

According to court documents, from 2006 to 2010, HSBC Bank USA severely understaffed its AML compliance function and failed to implement an anti-money laundering program capable of adequately monitoring suspicious transactions and activities from HSBC Group Affilliates, particularly HSBC Mexico, one of HSBC Bank USA's largest Mexican customers. This included a failure to monitor billions of dollars in purchases of physical U.S. dollars, or "banknotes," from these affiliates. Despite evidence of serious money laundering risks associated with doing business in Mexico, from at least 2006 to 2009, HSBC Bank USA rated Mexico as "standard" risk, its lowest AML risk category. As a result, HSBC Bank USA failed to monitor over $670 billion in wire transfers and over $9.4 billion in purchases of physical U.S. dollars from HSBC Mexico during this period, when HSBC Mexico's own lax AML controls caused it to be the preferred financial institution for drug cartels and money launderers.

A significant portion of the laundered drug trafficking proceeds were involved in the Black Market Peso Exchange (BMPE), a complex money laundering system that is designed to move the proceeds from the sale of illegal drugs in the United States to drug cartels outside of the United States, often in Colombia. According to court documents, beginning in 2008, an investigation conducted by ICE Homeland Security Investigation's (HSI's) El Dorado Task Force, in conjunction with the U.S. Attorney's Office for the Eastern District of New York, identified multiple HSBC Mexico accounts associated with BMPE activity and revealed that drug traffickers were depositing hundreds of thousands of dollars in bulk U.S. currency each day into HSBC Mexico accounts. Since 2009, the investigation has resulted in the arrest, extradition, and conviction of numerous individuals illegally using HSBC Mexico accounts in furtherance of BMPE activity.

As a result of HSBC Bank USA's AML failures, at least $881 million in drug trafficking proceeds – including proceeds of drug trafficking by the Sinaloa Cartel in Mexico and the Norte del Valle Cartel in Colombia – were laundered through HSBC Bank USA. HSBC Group admitted it did not inform HSBC Bank USA of significant AML deficiencies at HSBC Mexico, despite knowing of these problems and their effect on the potential flow of illicit funds through HSBC Bank USA.

The Sanctions Investigation

According to court documents, from the mid-1990s through September 2006, HSBC Group allowed approximately $660 million in OFAC-prohibited transactions to be processed through U.S. financial institutions, including HSBC Bank USA. HSBC Group followed instructions from sanctioned entities such as Iran, Cuba, Sudan, Libya and Burma, to omit their names from U.S. dollar payment messages sent to HSBC Bank USA and other financial institutions located in the United States. The bank also removed information identifying the countries from U.S. dollar payment messages; deliberately used less-transparent payment messages, known as cover payments; and worked with at least one sanctioned entity to format payment messages, which prevented the bank's filters from blocking prohibited payments.

Specifically, beginning in the 1990s, HSBC Group affiliates worked with sanctioned entities to insert cautionary notes in payment messages including "care sanctioned country," "do not mention our name in NY," or "do not mention Iran." HSBC Group became aware of this improper practice in 2000. In 2003, HSBC Group's head of compliance acknowledged that amending payment messages "could provide the basis for an action against [HSBC] Group for breach of sanctions." Notwithstanding instructions from HSBC Group Compliance to terminate this practice, HSBC Group affiliates were permitted to engage in the practice for an additional three years through the granting of dispensations to HSBC Group policy.

Court documents show that as early as July 2001, HSBC Bank USA's chief compliance officer confronted HSBC Group's Head of Compliance on the issue of amending payments and was assured that "Group Compliance would not support blatant attempts to avoid sanctions, or actions which would place [HSBC Bank USA] in a potentially compromising position." As early as July 2001, HSBC Bank USA told HSBC Group's head of compliance that it was concerned that the use of cover payments prevented HSBC Bank USA from confirming whether the underlying transactions met OFAC requirements. From 2001 through 2006, HSBC Bank USA repeatedly told senior compliance officers at HSBC Group that it would not be able to properly screen sanctioned entity payments if payments were being sent using the cover method. These protests were ignored.

"Today HSBC is being held accountable for illegal transactions made through the U.S. financial system on behalf of entities subject to U.S. economic sanctions," said Debra Smith, Acting Assistant Director in Charge of the FBI's Washington Field Office. "The FBI works closely with partner law enforcement agencies and federal regulators to ensure compliance with federal banking laws to promote integrity across financial institutions worldwide."

"Banks are the first layer of defense against money launderers and other criminal enterprises who choose to utilize our nation's financial institutions to further their criminal activity," said Richard Weber, Chief, Internal Revenue Service-Criminal Investigation (IRS-CI). "When a bank disregards the Bank Secrecy Act's reporting requirements, it compromises that layer of defense, making it more difficult to identify, detect and deter criminal activity. In this case, HSBC became a conduit to money laundering. The IRS is proud to partner with the other law enforcement agencies and share its world-renowned financial investigative expertise in this and other complex financial investigations."

Manhattan District Attorney Cyrus R. Vance Jr., said, "New York is a center of international finance, and those who use our banks as a vehicle for international crime will not be tolerated. My office has entered into Deferred Prosecution Agreements with two different banks in just the past two days, and with six banks over the past four years. Sanctions enforcement is of vital importance to our national security and the integrity of our financial system. The fight against money laundering and terror financing requires global cooperation, and our joint investigations in this and other related cases highlight the importance of coordination in the enforcement of U.S. sanctions. I thank our federal counterparts for their ongoing partnership."

Queens County District Attorney Richard A. Brown said, "No corporate entity should ever think itself too large to escape the consequences of assisting international drug cartels. In particular, banks have a special responsibility to use appropriate due diligence in monitoring the cash transactions flowing through their financial system and identifying the sources of that money in order not to assist in criminal activity. By allowing such illicit transactions to occur, HSBC failed in its global responsibility to us all. Hopefully, as a result of this historical settlement, we have gained the attention of not only HSBC but that of every other major financial institution so that they cannot turn a blind eye to the crime of money laundering."

* * *

This case was prosecuted by Money Laundering and Bank Integrity Unit Trial Attorneys Joseph Markel and Craig Timm

of the Criminal Division's Asset Forfeiture and Money Laundering Section, and Assistant U.S. Attorneys Alex Solomon and Daniel Silver of the U.S. Attorney's Office for the Eastern District of New York.

The AML investigation was conducted by HSI's El Dorado Task Force, a joint task force composed of members from more than 55 law enforcement agencies in New York and New Jersey, including special agents and investigators from IRS-CI and the Queens County District Attorney's Office, other federal agents, state and local police investigators and intelligence analysts, with the assistance of DEA's New York Division. The sanctions investigation was conducted by the FBI's Washington Field Office.

The Money Laundering and Bank Integrity Unit is a corps of prosecutors with a boutique practice aimed at hardening the financial system against criminal money laundering vulnerabilities by investigating and prosecuting financial institutions and professional money launderers for violations of the anti-money laundering statutes, the Bank Secrecy Act and other related statutes.

The Department of Justice expressed gratitude to William Ihlenfeld II, U.S. Attorney for the Northern District of West Virginia; Assistant District Attorney Garrett Lynch of the New York County District Attorney's Office, Major Economic Crimes Bureau; the Treasury Department's Office of Foreign Assets Control; the Board of Governors of the Federal Reserve System; and the Office of the Comptroller of the Currency for their significant and valuable assistance.

Component(s):
Criminal Division

Press Release Number:
12-1478

Updated May 22, 2015

CLOSED

U.S. District Court
Eastern District of New York (Brooklyn)
CRIMINAL DOCKET FOR CASE #: 1:12-cr-00763-AMD All Defendants

Case title: USA v. HSBC Bank USA, N.A. et al

Date Filed: 12/11/2012
Date Terminated: 12/12/2017

Assigned to: Judge Ann M Donnelly

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TERMINATED: 12/12/2017

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Pending Counts | **Disposition**

None

Highest Offense Level (Opening)

None

Terminated Counts | **Disposition**

RECORDS AND REPORTS ON MONETARY TRANSACTIONS-REPORTING OF SUSPICIOUS TRANSACTION
(1-2) — Dismissed on government motion

Highest Offense Level (Terminated)

Felony

Complaints | **Disposition**

None

Assigned to: Judge Ann M Donnelly

Defendant (2)

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TERMINATED: 12/12/2017

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Pending Counts | **Disposition**

None

Highest Offense Level (Opening)

None

Terminated Counts	**Disposition**
PRESIDENTIAL AUTHORITIES (3)	Dismissed on government motion
TRADING WITH THE ENEMY ACT (4)	Dismissed on government motion

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
None	

Interested Party

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TERMINATED: 12/12/2017

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Date Filed	#	Docket Text
12/11/2012	1	NOTICE of Intent to proceed under FRCrP 7(b) as to HSBC Bank USA, N.A., HSBC Holdings PLC (Attachments: # 1 Criminal Information Sheet) (Marziliano, August) (Entered: 12/11/2012)
12/11/2012	2	Letter dated 12/11/2012 from Alexander A. Solomon and AUSA Daniel Silver to Judges Glasser and Gleeson pursuant to Local Rule 50.3.2 notifying the Court that the above-captioned case ("HSBC") is presumptively related to United States v. Julio Eduardo Chaparro Escobar. et al., No. 10 CR 54 (JG) ("Chaparro"). (Marziliano, August) (Entered: 12/11/2012)
12/11/2012	3	Letter *Requesting Filing of Deferred Prosecution Agreement and Order of Excludable Delay* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Attachments: # 1 Information, # 2 Deferred Prosecution Agreement, # 3 Exhibit Statement of Facts, # 4 Exhibit Corporate Monitor) (Silver, Daniel) (Entered: 12/11/2012)
12/11/2012	4	NOTICE OF ATTORNEY APPEARANCE: Samuel Whitney Seymour appearing for HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 12/11/2012)
12/11/2012	5	NOTICE OF ATTORNEY APPEARANCE: Alexander John Willscher appearing for HSBC Bank USA, N.A., HSBC Holdings PLC (Willscher, Alexander) (Entered: 12/11/2012)
12/11/2012	6	NOTICE OF ATTORNEY APPEARANCE: Anirudh Bansal appearing for HSBC Bank USA, N.A., HSBC Holdings PLC (Bansal, Anirudh) (Entered: 12/11/2012)
12/11/2012	7	NOTICE OF ATTORNEY APPEARANCE: David Noel Kelley appearing for HSBC Bank

		USA, N.A., HSBC Holdings PLC (Kelley, David) (Entered: 12/11/2012)
12/13/2012		ORDER REASSIGNING JUDGE as to HSBC Bank USA, N.A. reassigned to Judge John Gleeson as related to 10cr54. Judge I. Leo Glasser no longer assigned to the case. Ordered by Chief Judge Carol Bagley Amon on 12/13/2012. (Bowens, Priscilla) (Entered: 12/13/2012)
12/13/2012		SCHEDULING ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC. The parties are to appear for a Status Conference set for Thursday, December 20, 2012 at 11:30 AM in Courtroom 6C South before Judge John Gleeson. Ordered by Judge John Gleeson on 12/13/2012. (Lee, Ilene) (Entered: 12/13/2012)
12/13/2012		ORDER REASSIGNING JUDGE as to HSBC Holdings PLC Reassigned toJudge John Gleeson. Judge I. Leo Glasser no longer assigned to the case.. Ordered by Chief Judge Carol Bagley Amon on 12/13/2012. (Davis, Kimberly) (Entered: 12/21/2012)
12/16/2012	8	NOTICE *of Appearance of Joseph K. Markel* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 12/16/2012)
12/16/2012	9	NOTICE *of Appearance of Craig M. Timm* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 12/16/2012)
12/20/2012	11	INFORMATION as to HSBC Bank USA, N.A. (1) count(s) 1-2, HSBC Holdings PLC (2) count(s) 3, 4. (Piper, Francine) (Entered: 12/26/2012)
12/20/2012	12	WAIVER OF INDICTMENT by HSBC Bank USA, N.A., HSBC Holdings PLC before Judge Gleeson on 12/20/12. (Piper, Francine) (Entered: 12/26/2012)
12/20/2012	13	Minute Entry for proceedings held before Judge John Gleeson:Arraignment as to HSBC Bank USA, N.A. (1) Count 1-2 and HSBC Holdings PLC (2) Count 3,4 held on 12/20/2012, Status Conference as to HSBC Bank USA, N.A., HSBC Holdings PLC held on 12/20/2012, Initial Appearance as to HSBC Bank USA, N.A., HSBC Holdings PLC held on 12/20/2012, Plea entered by HSBC Bank USA, N.A. (1) Count 1-2 and HSBC Holdings PLC (2) Count 3,4. by HSBC Bank USA, N.A., HSBC Holdings PLC Not Guilty to all counts. Order of Speedy Trial, Code XT, Start 12/20/12 - Stop 12/28/12. The court has given the parties until 12/28/12 to submit a joint submission regarding the status and proposed dates of the deferred prosecution agreement. Upon the receival of this submission, a new conference date will be given by the court. AUSA Alexander Solomon, Daniel Silver, Joseph Markel and Craig Timm. Defense Counsel, David Kelley and Samuel Seymour for Defendants. (Court Reporter Marie Foley.) (Piper, Francine) (Entered: 12/26/2012)
12/21/2012	10	Letter *Regarding Proposed Briefing Schedule* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 12/21/2012)
01/03/2013		ORDER granting 10 proposed briefing schedule. The government and defendants shall file separate submissions on January 30, 2013. The next conference date is set for February 15, 2013 at 11:30 AM. Ordered by Judge John Gleeson on 1/3/2013. (Kim, Scarlet) (Entered: 01/03/2013)
01/30/2013	14	PRETRIAL MEMORANDUM *in Support of Deferred Prosecution Agreement* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 01/30/2013)
01/30/2013	15	PRETRIAL MEMORANDUM as to HSBC Bank USA, N.A., HSBC Holdings PLC (Kelley, David) (Entered: 01/30/2013)
02/14/2013	16	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC to Judge Gleeson, adding insight into the dealings at hsbc. (Piper, Francine) (Entered: 02/19/2013)

02/15/2013		Minute Entry for proceedings held before Judge John Gleeson: Case called. Defendants HSBC Bank USA, NA and HSBC Holdings PLC are represented by David N. Kelley, Esq. and Samuel W. Seymour, Esq. AUSA Daniel S. Silver; AUSA Alexander Solomon; Joseph Markel, Esq.; and Craig M. Timm, Esq. appear of behalf of the government. Status Conference as to HSBC Bank USA, N.A. and HSBC Holdings PLC held on 2/15/2013. The Court has agreed to the joint proposed motion for a deferred prosecution in this case. The speedy trial time is excluded until further notice of this Court in light of the proposed deferred prosecution and due to the complexity of this case. (Court Reporter Charleane Heading.) (Lee, Ilene) (Entered: 02/15/2013)
02/15/2013		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: I erred in the docket entry posted a few minutes ago. The parties' application to exclude time under the speedy trial act was granted at today's conference, but the Court has not yet approved or disapproved the proposed agreement disposing of the case. The application for approval of that agreement has been taken under advisement. Ordered by Judge John Gleeson on 2/15/2013. (Gleeson, John) (Entered: 02/15/2013)
03/20/2013	17	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC from Berenice Mosca to Judge Gleeson, requesting that the court not approve the inadequate settlement offer. (Piper, Francine) (Entered: 03/25/2013)
03/25/2013	18	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated 3/18/13 from Robert Warner to Judge Gleeson, requesting that the court reject the settlement agreement between the DOJ and HSBC. (Piper, Francine) (Entered: 03/28/2013)
05/02/2013	20	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated 5/2/13 from Liviu Vogel to Judge Gleeson, requesting that the court consider whether the approval of the proposed non-prosecution agreement should be conditioned upon HSBC's payment of some portion of the criminal forfeiture to the thousands of victims of Iranian terrorism. (Piper, Francine) (Entered: 05/08/2013)
05/07/2013	19	Letter *to Judge John Gleeson* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 05/07/2013)
05/28/2013	21	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC from Marie Kerr to Judge Gleeson, regarding overturning the DPA with HSBC. (Piper, Francine) (Entered: 05/30/2013)
06/05/2013	22	Letter *Advising Court of Monitor Selection* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 06/05/2013)
07/01/2013	23	ORDER approving the DPA pursuant to the Court's supervisory power and granting the parties' 3 application to place the case in abeyance for five years pursuant to the Speedy Trial Act for the reasons stated in the attached Memorandum and Order. The Court will maintain supervisory power over the implementation of the DPA and directs the government to file quarterly reports with the Court while the case is pending. Ordered by Judge John Gleeson on 7/1/2013. (Kim, Scarlet) (Entered: 07/01/2013)
07/17/2013	24	Letter *Regarding Reporting Schedule* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 07/17/2013)
07/18/2013		ORDER approving the reporting schedule proposed by the Government as set forth in their 24 letter to the Court. Ordered by Judge John Gleeson on 7/18/2013. (Kim, Scarlet) (Entered: 07/18/2013)
07/22/2013	25	Letter *Regarding Reporting Schedule* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 07/22/2013)
09/30/2013	26	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver,

		Daniel) (Entered: 09/30/2013)
12/31/2013	27	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 12/31/2013)
03/11/2014	28	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to HSBC Bank USA, N.A., HSBC Holdings PLC held on February 15, 2013, before Judge Gleeson. Court Reporter/Transcriber Charleane M. Heading, Telephone number 718-613-2643. Email address: cheading@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/1/2014. Redacted Transcript Deadline set for 4/11/2014. Release of Transcript Restriction set for 6/9/2014. (Heading, Charleane) (Entered: 03/11/2014)
04/01/2014	29	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 04/01/2014)
07/01/2014	30	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 07/01/2014)
10/01/2014	31	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 10/01/2014)
01/02/2015	32	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 01/02/2015)
04/01/2015	33	STATUS REPORT *(Quarterly Report)* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Solomon, Alexander) (Entered: 04/01/2015)
04/28/2015		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC. The government is directed to file with the Court the "First Annual Follow-Up Review Report" referred to in the government's April 1, 2015 report 33 . Ordered by Judge John Gleeson on 4/28/2015. (Garcia, Lynda) (Entered: 04/28/2015)
05/01/2015	34	Letter *Requesting 30 Days to Respond to Court's April 28th Order* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 05/01/2015)
05/04/2015		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC. The government's request 34 for an extension of time of 30 days to respond to the Court's April 28, 2015 order is granted. Ordered by Judge John Gleeson on 5/4/2015. (Garcia, Lynda) (Entered: 05/04/2015)
06/01/2015	35	MOTION for Leave to File *Monitor's Report Under Seal* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit) (Silver, Daniel) (Entered: 06/01/2015)
06/01/2015	36	STATUS REPORT *Monitor's First Annual Follow-up Report Part I* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 06/01/2015)
06/01/2015	37	STATUS REPORT *Monitor's First Annual Follow-up Report (Part II)* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 06/01/2015)
06/01/2015	38	Letter *in Support of the United States' Motion for Leave to File Monitor's Report Under Seal* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 06/01/2015)
06/05/2015	39	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated May 25, 2015 from Colvin Brown to Judge Gleeson, advising the court of the circumstances of the situation with HSBC in Hong Kong. (Piper, Francine) (Entered: 06/05/2015)

07/01/2015	40	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 07/01/2015)
10/01/2015	41	NOTICE *Providing Quarterly Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC re 23 Order, (Solomon, Alexander) (Entered: 10/01/2015)
11/05/2015	42	Letter dated 11/3/15 from Hubert Dean Moore, Jr. to Judge Gleeson, writing advising of his current issues with HSBC and the potential impact of Michel Cherkasky's report from earlier this year. (Greene, Donna) (Entered: 11/05/2015)
11/06/2015		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: I construe the 42 letter dated 11/3/15 from Hubert Dean Moore, Jr. to be a motion to unseal the Monitor's Report filed under seal on June 1, 2015. His application, along with the application of any other person or entity that seeks access to the report, will be heard on the following schedule: any other application to unseal the Monitor's Report must be filed on or before November 25, 2015; any opposition to the application(s) must be filed on or before December 11, 2015; oral argument is scheduled for January 15, 2016 at 10:00 AM. Ordered by Judge John Gleeson on 11/6/2015. (Bensing, Kayla) (Entered: 11/06/2015)
11/30/2015	43	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated November 24, 2015 from Hubert Dean Moore, Jr. to Judge Gleeson, updating the court of several items that have transpired within the last several days. (Piper, Francine) (Entered: 11/30/2015)
12/09/2015	44	NOTICE OF ATTORNEY APPEARANCE Laura Billings appearing for USA. (Billings, Laura) (Entered: 12/09/2015)
12/11/2015	45	Letter *in Response to Application to Unseal Monitor Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 12/11/2015)
12/11/2015	46	Letter *in Response to Application to Unseal Monitor's Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 12/11/2015)
12/15/2015		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: I respectfully direct the government and HSBC to send copies of the 45 and 46 letters in response to the application to unseal the monitor's report to Mr. Hubert Dean Moore, Jr. Ordered by Judge John Gleeson on 12/15/2015. (Bensing, Kayla) (Entered: 12/15/2015)
12/28/2015	47	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated December 23, 2015 from Hubert Dean Moore, Jr. to Judge Gleeson, reviewing the request to keep the Monitor's Report under seal. (Piper, Francine) (Entered: 12/28/2015)
01/04/2016	48	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 01/04/2016)
01/05/2016	49	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated December 31, 2015 from Hubert Moore to Judge Gleeson, in response to HSBC and DOJ opposition to unseal the monitor's report. (Piper, Francine) (Entered: 01/05/2016)
01/13/2016		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: I received, through my law clerk, a telephone call from HSBC shareholder Michael Mason-Mahmon, who wishes to file a letter in connection with the 42 application to unseal the Monitor's Report. I have given him permission to send us a letter, and I will upload the letter to the electronic docket when I receive it. Ordered by Judge John Gleeson on 1/13/2016. (Bensing, Kayla) (Entered: 01/13/2016)
01/15/2016	50	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated January 14, 2016 from Michael Mason-Mahon to Judge Gleeson, regarding the request to keep the Monitor's Report under seal. (Bensing, Kayla) (Entered: 01/15/2016)

01/15/2016		Minute Entry for proceedings held before Judge John Gleeson: Case called. Defendants represented by Samuel W. Seymour, Esq. and Alexander J. Willscher, Esq.. AUSA Daniel S. Silver, AUSA Laura Billings and AUSA Alexander Solomon appear for the government. Pro Se Movant Hubert Dean Moore, Jr. and his wife present. Oral Argument as to HSBC Bank USA, N.A. and HSBC Holdings PLC held on 1/15/2016 regarding the movant's motion to unseal the monitoring reports 42 . The Court's decision is reserved and will be filed via ECF separately. (Court Reporter Charleane Heading.) (Lee, Ilene) (Entered: 01/15/2016)
01/20/2016	51	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated January 15, 2016 from Colvin Brown to Judge Gleeson, advising the court of false and misleading statements to the Hong Kong High Court. (Piper, Francine) (Entered: 01/20/2016)
01/28/2016	52	ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: the motion to unseal the Monitor's Report is granted to the extent set forth in the attached Memorandum and Order. Ordered by Judge John Gleeson on 1/28/2016. (Bensing, Kayla) (Entered: 01/28/2016)
02/01/2016	53	Letter *Requesting Extension of Time to Submit Redactions* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 02/01/2016)
02/01/2016	54	Letter *Requesting Stay Pending Appeal, or in the Alternative Extension of Time to Submit Redactions* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Seymour, Samuel) (Entered: 02/01/2016)
02/01/2016	55	NOTICE OF APPEAL (Interlocutory) by HSBC Bank USA, N.A., HSBC Holdings PLC re 52 Order. Filing fee $ 505, receipt number 0207-8344737. Appeal Record due by 2/15/2016. (Seymour, Samuel) (Entered: 02/01/2016)
02/02/2016		Electronic Index to Record on Appeal as to HSBC Bank USA, N.A., HSBC Holdings PLC sent to US Court of Appeals 55 Notice of Appeal - Interlocutory Documents are available via Pacer. For docket entries without a hyperlink or for documents under seal, contact the court and we'll arrange for the document(s) to be made available to you. (McGee, Mary Ann) (Entered: 02/02/2016)
02/03/2016	56	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to HSBC Bank USA, N.A., HSBC Holdings PLC held on January 15, 2016, before Judge Gleeson. Court Reporter/Transcriber Charleane M. Heading, Telephone number 718-613-2643. Email address: cheading@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 2/24/2016. Redacted Transcript Deadline set for 3/7/2016. Release of Transcript Restriction set for 5/3/2016. (Heading, Charleane) (Entered: 02/03/2016)
02/03/2016		SCHEDULING ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC : The parties are to appear for a Status Conference scheduled for this Friday, February 5, 2016 at 11:30 AM in Courtroom 6C South before Judge John Gleeson. The Court has notified Mr. Hubert Moore via telephone and he will be present in-person for this conference. Ordered by Judge John Gleeson on 2/3/2016. (Lee, Ilene) (Entered: 02/03/2016)
02/03/2016		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: the Clerk is respectfully directed to add Hubert Dean Moore, Jr. to the docket as an interested party. His contact information is as follows: (484) 678-7026 (cell); dean.moore999@gmail.com (email address); 618 Meadow Drive, West Chester, PA 19380 (mailing address). Ordered by Judge John Gleeson on 2/3/2016. (Bensing, Kayla) (Entered: 02/03/2016)
02/04/2016	57	NOTICE OF APPEAL (Interlocutory) by USA as to HSBC Bank USA, N.A., HSBC

		Holdings PLC (Silver, Daniel) (Entered: 02/04/2016)
02/04/2016	58	Letter *Requesting Stay of Unsealing Order Pending Appeal* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Silver, Daniel) (Entered: 02/04/2016)
02/05/2016		NOTICE of ADJOURNMENT of the Status Conference as to HSBC Bank USA, N.A., HSBC Holdings PLC scheduled for this morning (2/5/2016) due to inclement weather. The new Status Conference date is now rescheduled to Friday, February 12, 2016 at 11:30 AM in courtroom 6C South before Judge John Gleeson. The Court has already notified Mr. Hubert Moore via telephone of the change in date. (Lee, Ilene) (Entered: 02/05/2016)
02/05/2016		SECOND NOTICE OF CHANGE in Status Conference date and time as to HSBC Bank USA, N.A., HSBC Holdings PLC due to scheduling conflicts. The Status Conference is now adjourned to Tuesday, February 9, 2016 at 3:00 PM in courtroom 6C South before Judge John Gleeson. The Court will email Mr. Hubert Moore a copy of this notice. (Lee, Ilene) (Entered: 02/05/2016)
02/05/2016		First Supplemental Electronic Index to Record on Appeal as to HSBC Bank USA, N.A., HSBC Holdings PLC sent to US Court of Appeals 57 Notice of Appeal - Interlocutory (McGee, Mary Ann) (Entered: 02/05/2016)
02/05/2016	59	Letter *from Gary M. Osen to the Hon. John Gleeson regarding the Government's Motion for a Stay of the Court's January 28, 2016 Order Pending Appeal* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Osen, Gary) (Entered: 02/05/2016)
02/08/2016	60	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to HSBC Bank USA, N.A., HSBC Holdings PLC held on 12/20/12, before Judge Gleeson. Court Reporter/Transcriber Marie Foley, Telephone number 718-613-2596. Email address: Marie_Foley@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 2/29/2016. Redacted Transcript Deadline set for 3/10/2016. Release of Transcript Restriction set for 5/9/2016. (Foley, Marie) (Entered: 02/08/2016)
02/08/2016	61	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated February 4, 2016 from Hubert Moore to Judge Gleeson, requesting that the court reject the motion for a stay and maintain the redaction deadline of February 12. (Piper, Francine) (Entered: 02/08/2016)
02/08/2016	62	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated February 7, 2016 from Colvin Brown to Judge Gleeson, regarding releasing the Monitor's Report. Ordered by Judge John Gleeson on 2/8/2016. (Bensing, Kayla) (Entered: 02/08/2016)
02/08/2016	63	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated February 8, 2016 from Michael Mason-Mahon to Judge Gleeson, regarding releasing the Monitor's Report. Ordered by Judge John Gleeson on 2/8/2016. (Bensing, Kayla) (Entered: 02/08/2016)
02/08/2016	64	Letter as to HSBC Bank USA, N.A., HSBC Holdings PLC dated February 8, 2016 from Hubert Dean Moore, Jr. to Judge Gleeson, regarding releasing the Monitor's Report. Ordered by Judge John Gleeson on 2/8/2016. (Bensing, Kayla) (Piper, Francine). (Entered: 02/08/2016)
02/09/2016		Minute Entry for proceedings held before Judge John Gleeson: Case called. Defendants represented by Alexander J. Willscher, Esq. and Samuel W. Seymour, Esq.. Interested party Hubert Dean Moore, Jr. present with his attorney David Schulz who was present via telephone. AUSA Daniel S. Silver, AUSA Alexander Solomon and Laura Billings, Esq. appear for the government. Status Conference as to HSBC Bank USA, N.A. and HSBC

		Holdings PLC held on 2/9/2016 regarding the defendants' and the government's request for an extension of time to file the proposed redactions of the monitor reports and to stay this case pending appeal 54 , 58 . The Court has granted the extension of time to file the proposed redactions, the new date is now set for 2/26/2016. The Court has given the parties further opportunity to file submissions as to why the Court should or should not stay this case pending appeal. (Court Reporter Lisa Schwam.) (Lee, Ilene) (Entered: 02/09/2016)
02/26/2016	65	NOTICE OF ATTORNEY APPEARANCE James Donald Gatta appearing for USA. (Gatta, James) (Entered: 02/26/2016)
02/26/2016		Attorney updated in case as to HSBC Bank USA, N.A., HSBC Holdings PLC. Attorney David A Schulz for Hubert Dean Moore, Jr added. (Lee, Ilene) (Entered: 02/26/2016)
02/26/2016	66	Letter *submitting proposed redactions to Monitor's Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Gatta, James) (Entered: 02/26/2016)
02/26/2016	67	Letter *regarding potential redaction of Monitor's Report filed on behalf of Hubert Dean Moore, Jr.* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Schulz, David) (Entered: 02/26/2016)
03/07/2016		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: when the parties filed their copies of proposed redactions to the Monitor's Report on February 26, 2016, there may have been a brief period of time in which counsel for the interested party, David Schulz, may have had access to those copies. I have been informed by Mr. Schulz that he did not access or view the Monitor's Report within that time period. Further, Mr. Schulz's permissions and access have now been changed on the electronic docketing system such that he can no longer review those copies, or any other documents filed under seal. Additionally, the government informed me through my law clerk that it initially had been unable to file its proposed redactions on the electronic docketing system. I am grateful that the government timely filed its redactions with chambers, but respectfully direct it to file its sealed submissions on the electronic docketing system. Ordered by Judge John Gleeson on 3/7/2016. (Bensing, Kayla) (Entered: 03/07/2016)
03/07/2016	69	REDACTION by HSBC Bank USA, N.A., HSBC Holdings PLC (Attachments: # 1 Color - Part 1, # 2 Color - Part 2, # 3 Color - Part 3, # 4 Color - Part 4, # 5 Color - Part 5, # 6 Color - Part 6, # 7 Color - Part 7, # 8 Color - Part 8, # 9 Color - Part 9, # 10 Color - Part 10, # 11 Color - Part 11, # 12 Color - Part 12, # 13 Color - Part 13, # 14 Color - Part 14, # 15 Color - Part 15, # 16 Color - Part 16, # 17 Color - Part 17, # 18 Color - Part 18, # 19 Color - Part 19, # 20 Color - Part 20, # 21 Opaque - Full) (Seymour, Samuel) (Entered: 03/07/2016)
03/09/2016	70	ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: as set forth in the attached Order, the Monitor's Report and appended United States Country Report shall remain under seal, and the matter is stayed, pending appellate review. I have sent redacted copies of these documents to the Clerk's Office, and I respectfully direct it to file these copies under seal. Ordered by Judge John Gleeson on 3/9/2016. (Bensing, Kayla) (Entered: 03/09/2016)
03/09/2016		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: I have been informed by the Clerk's Office that the parties cannot view sealed documents. Accordingly, the Monitor's Report and United States Country Report shall be filed in such a manner that the government and counsel for HSBC may view them, but counsel for the interested party and the public may not. Ordered by Judge John Gleeson on 3/9/2016. (Bensing, Kayla) (Entered: 03/09/2016)
03/09/2016	73	MOTION for Leave to Appeal *Pursuant to 28 U.S.C. § 1292(b) and to Seal March 9*

		Order by HSBC Bank USA, N.A., HSBC Holdings PLC. (Seymour, Samuel) (Entered: 03/09/2016)
03/11/2016	74	RESPONSE in Opposition re 73 MOTION for Leave to Appeal *Pursuant to 28 U.S.C. § 1292(b) and to Seal March 9 Order filed by Interested Party Hubert Dean Moore, Jr.* (Schulz, David) (Entered: 03/11/2016)
03/11/2016		Case as to HSBC Bank USA, N.A., HSBC Holdings PLC Reassigned to Judge Kiyo A. Matsumoto. Judge John Gleeson no longer assigned to the case. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Mahoney, Brenna) (Entered: 03/11/2016)
03/14/2016		ORDER REASSIGNING CASE as to HSBC Bank USA, N.A., HSBC Holdings PLC. Reassigned to Judge Ann M Donnelly. Judge Kiyo A. Matsumoto no longer assigned to the case. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such.. Ordered by Chief Judge Carol Bagley Amon on 3/14/2016. (Davis, Kimberly) (Entered: 03/14/2016)
03/25/2016	75	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to HSBC Bank USA, N.A., HSBC Holdings PLC held on 2-9-2016, before Judge Gleeson. Court Reporter/Transcriber Lisa Schwam, Telephone number 718-613-2268. Email address: LisaSchwam@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 4/15/2016. Redacted Transcript Deadline set for 4/25/2016. Release of Transcript Restriction set for 6/23/2016. (Schwam, Lisa) (Entered: 03/25/2016)
03/31/2016		SCHEDULING ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC. As this case has been reassigned to the undersigned, a telephone status conference is scheduled for April 19, 2016 at 1:00 p.m. Defendants' counsel is to organize a conference call, and then phone my chambers with all counsel on the line. Ordered by Judge Ann M Donnelly on 3/31/2016. (Zainulbhai, Yasmin) (Entered: 03/31/2016)
03/31/2016	76	NOTICE OF ATTORNEY APPEARANCE Julia Nestor appearing for USA. (Nestor, Julia) (Entered: 03/31/2016)
04/01/2016	77	STATUS REPORT *Quarterly Status Report* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Solomon, Alexander) (Entered: 04/01/2016)
04/07/2016	78	NOTICE OF APPEAL by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC re 70 Order, (James, David) (Entered: 04/07/2016)
04/08/2016		Second Supplemental Electronic Index to Record on Appeal as to HSBC Bank USA, N.A., HSBC Holdings PLC sent to US Court of Appeals 78 Notice of Appeal - Final Judgment. (McGee, Mary Ann) (Entered: 04/08/2016)
04/08/2016	79	NOTICE OF APPEAL (Interlocutory) by HSBC Bank USA, N.A., HSBC Holdings PLC re 70 Order,. Filing fee $ 505, receipt number 0207-8520495. Appeal Record due by 4/22/2016. (Seymour, Samuel) (Entered: 04/08/2016)
04/11/2016		Third Supplemental Electronic Index to Record on Appeal as to HSBC Bank USA, N.A., HSBC Holdings PLC sent to US Court of Appeals 79 Notice of Appeal - Interlocutory. (McGee, Mary Ann) (Entered: 04/11/2016)
04/12/2016	80	NOTICE *of Supplemental Authority* as to HSBC Bank USA, N.A., HSBC Holdings PLC

		re 73 MOTION for Leave to Appeal *Pursuant to 28 U.S.C. § 1292(b) and to Seal March 9 Order* (Attachments: # 1 Exhibit A - United States v. Fokker Servs. B.V., No. 15-3016 (D.C. Cir. Apr. 5, 2016)) (Seymour, Samuel) (Entered: 04/12/2016)
04/15/2016		SCHEDULING ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC. Due to a change in the court's calendar, the telephone status conference scheduled to begin at 1:00 p.m. on April 19, 2016 will instead begin at 3:00 p.m. Ordered by Judge Ann M Donnelly on 4/15/2016. (Zainulbhai, Yasmin) (Entered: 04/15/2016)
04/19/2016		Minute Entry for proceedings held before Judge Ann M Donnelly: Telephone Status Conference as to HSBC Bank USA, N.A., HSBC Holdings PLC held on 4/19/2016. Julia Nestor and Laura Billings for the government; Samuel Seymour, Alexander Willscher, and Judson Littleton for defendants; David Schulz and Max Mishkin for interested party Hubert Dean Moore. Case called. Discussions held. (Court Reporter Charleane Heading.) (Zainulbhai, Yasmin) (Entered: 04/19/2016)
05/04/2016	81	MEMORANDUM DECISION AND ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: HSBC's motion for certification of the January 28, 2016 and March 9, 2016 orders for interlocutory appeal and to seal a portion of the March 9, 2016 order (ECF 73) is **DENIED** . Ordered by Judge Ann M Donnelly on 5/4/2016. (Greene, Donna) (Entered: 05/04/2016)
07/01/2016	82	STATUS REPORT *Quarterly Report* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Solomon, Alexander) (Entered: 07/01/2016)
09/30/2016	83	Letter *Regarding Quarterly Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Nestor, Julia) (Entered: 09/30/2016)
12/30/2016	84	STATUS REPORT by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Solomon, Alexander) (Entered: 12/30/2016)
03/21/2017		ORDER as to HSBC Bank USA, N.A., HSBC Holdings PLC: Dean Moore, an Interested Party, contacted the Court re filing a motion pro se. Mr. Moore was instructed to contact the Pro Se office and file any motions directly with the Clerk of the Court. Ordered by Judge Ann M Donnelly on 3/21/2017. (Winik, Sara) (Entered: 03/21/2017)
03/31/2017	85	STATUS REPORT *(Quarterly Report)* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Solomon, Alexander) (Entered: 03/31/2017)
04/10/2017	86	Letter dated 4/4/17 from Hubert Dean Moore, Jr. to Judge Donnelly Re: HSBC Bank USA, N.A., HSBC Holdings PLC. (Greene, Donna) (Entered: 04/10/2017)
04/10/2017		ORDER: Judge Gleeson determined that Mr. Moore was an interested party in this criminal action for a limited purpose, which was the unsealing of the Monitor's report, and assigned him counsel for that limited purpose. The court is in receipt of an April 4, 2017 letter, filed pro se, in which Mr. Moore lays out various personal grievances against HSBC and its attorneys. Mr. Moore does not have standing in this criminal action to make what appear to be civil complaints against HSBC. Accordingly, the Court will not consider those claims. It also does not appear that Mr. Moore served his letter on opposing counsel. If he did not, he is reminded that he must serve all communications on opposing counsel. Ordered by Judge Ann M. Donnelly on 4/10/2017. (Greene, Donna) (Entered: 04/10/2017)
06/13/2017	87	NOTICE OF ATTORNEY APPEARANCE David K. Kessler appearing for USA. (Kessler, David) (Entered: 06/13/2017)
06/30/2017	88	STATUS REPORT *(Quarterly Report)* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC (Kessler, David) (Entered: 06/30/2017)
07/12/2017	89	ORDER of USCA (certified copy) as to HSBC Bank USA, N.A., HSBC Holdings PLC re

		79 Notice of Appeal - Interlocutory, 55 Notice of Appeal - Interlocutory, 78 Notice of Appeal - Final Judgment, 57 Notice of Appeal - Interlocutory. It is Ordered that the Orders of the District Court are Reversed. Certified Copy Issued 7/12/17 (Endorsed on USCA Opinion) PLEASE NOTE: THE MANDATE HAS NOT YET BEEN ISSUED. USCA #16-308(L), #16-353, #16-1068 and #16-1094.(Attachments: # 1 USCA Concurring Opinion) (McGee, Mary Ann) Mo (Entered: 07/12/2017)
08/03/2017	90	MANDATE of USCA (certified copy) as to HSBC Bank USA, N.A., HSBC Holdings PLC. It is Ordered that the Orders of the District Court are REVERSED. Issued as Mandate: 8/2/17. USCA #16-308(L), 16-353, 16-1068, 16-1094(CON). (McGee, Mary Ann) (Entered: 08/03/2017)
08/18/2017	91	USCA MANDATE - as to HSBC Bank USA, N.A., HSBC Holdings PLC. Pursuant to this Court's Opinion issued in docket #s 16-308(L), 16-353, 16-1086, 16-1094 denying the Mandamus Petition in docket #16-2545 on page 19, foot note 2 of the Opinion. Issued: 8/14/17. Please Note: This Mandate was endorsed on USCA Opinion (August Term, 2016) (McGee, Mary Ann) (Entered: 08/18/2017)
09/29/2017	92	Letter *Regarding Quarterly Report* as to HSBC Bank USA, N.A., HSBC Holdings PLC (Nestor, Julia) (Entered: 09/29/2017)
12/07/2017	93	Consent MOTION to Withdraw as Attorney by David A. Schulz.by Hubert Dean Moore, Jr as to HSBC Bank USA, N.A., HSBC Holdings PLC. (Attachments: # 1 Proposed Order) (Schulz, David) (Entered: 12/07/2017)
12/07/2017		ORDER: The granting David A. Schulz of Ballard Spahr LLP's 93 motion to withdraw as attorney for Hubert Dean Moore, Jr. in this action. Ordered by Judge Ann M Donnelly on 12/7/2017. (Winik, Sara) (Entered: 12/07/2017)
12/12/2017	94	NOTICE OF ATTORNEY APPEARANCE Julia Nestor appearing for USA. (Nestor, Julia) (Entered: 12/12/2017)
12/12/2017	95	First MOTION to Dismiss by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC. (Nestor, Julia) (Entered: 12/12/2017)
12/12/2017	96	First MOTION to Dismiss *as Corrected* by USA as to HSBC Bank USA, N.A., HSBC Holdings PLC. (Nestor, Julia) (Entered: 12/12/2017)
12/12/2017	97	ORDER Dismissing Information.Ordered by Judge Ann M. Donnelly on 12/12/2017. (Greene, Donna) (Entered: 12/12/2017)
01/18/2018	98	Letter dated 1/10/18 from Hubert Dean Moore, Jr., interested party to Judge Donnelly re: reopening of this case. (Greene, Donna) (Entered: 01/18/2018)
01/19/2018		ORDER: The Court is in receipt of Mr. Moore's letter dated January 10, 2018, arguing that he should have been consulted before the Court dismissed the case against HSBC. As I explained in my April 10, 2017 Order, Mr. Moore has no standing in the disposition of the criminal case. The case has been dismissed and will not be reinstated. Ordered by Judge Ann M Donnelly on 1/19/2018. (Winik, Sara) (Entered: 01/19/2018)
08/27/2020	99	NOTICE of Change of Firm Address by HSBC Bank USA, N.A., HSBC Holdings PLC (Bansal, Anirudh) (Entered: 08/27/2020)

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CR 12-0763

DSS/AAS
F.#2009R02380

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA

NOTICE OF MOTION

- against -

HSBC BANK USA, N.A. and
HSBC HOLDINGS PLC,

GLASSER, J.
AZRACK, M.J.

Defendants.

- -X

PLEASE TAKE NOTICE that the undersigned will move this Court, before a United States District Judge to be assigned, for leave to file an information upon the defendants HSBC BANK USA, N.A. and HSBC HOLDINGS PLC's waiver of indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure.

Dated: Brooklyn, New York
December 11, 2012

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

By: _____
Daniel S. Silver
Assistant U.S. Attorney
(718) 254-6034

CR 12 - 0763

INFORMATION SHEET

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

1. Title of Case: **United States v. HSBC Bank USA, N.A., et al.**

2. Related Magistrate Docket Number(s): N/A

3. Arrest Date: N/A

4. Nature of offense(s): ☒ Felony
☐ Misdemeanor

GLASSER, J.

5. Related Cases - Title and Docket Nos. (Pursuant to Rule 50.3 of the Local E.D.N.Y. Division of Business Rules):

United States v. Chaparro 10 CR 54 (JG)

AZRACK, M.J.

6. Projected Length of Trial: Less than 6 weeks ( )
More than 6 weeks (X)

7. County in which crime was allegedly committed: Kings
(Pursuant to Rule 50.1(d) of the Local E.D.N.Y. Division of Business Rules)

8. Has this indictment been ordered sealed? ( ) Yes (X) No

9. Have arrest warrants been ordered? ( ) Yes (X) No

10. Capital count included? ( ) Yes (X) No

LORETTA E. LYNCH
UNITED STATES ATTORNEY

By: _____
Daniel S. Silver
Assistant U.S. Attorney
718 254-6034

Rev. 3/22/01

12-0763

U.S. Department of Justice

United States Attorney's Office
Eastern District of New York

CBD:DSS/AAS
F.#2009R02380

271 Cadman Plaza East
Brooklyn, New York 11201

December 11, 2012

BY HAND DELIVERY and ECF

Clerk of the Court
(for forwarding to randomly assigned U.S. District Judge)
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

GLASSER, J.

AZRACK, M.J.

The Honorable John Gleeson
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. HSBC Bank USA, N.A. and HSBC Holdings plc

Dear Clerk of the Court and Judge Gleeson:

Pursuant to Local Rule 50.3.2, the government hereby notifies the Court that the above-captioned case ("HSBC") is presumptively related to United States v. Julio Eduardo Chaparro Escobar, et al., No. 10 CR 54 (JG) ("Chaparro").

Local Rule 50.3.2(b)(1) provides for a "presumption that one case is 'related' to another when the facts of each arise out of the same charged criminal scheme(s), transaction(s), or event(s), even if different defendants are involved in each case." Local Rule 50.3.2(c)(1) directs the United States Attorney's Office to "give notice to all relevant judges whenever it appears that one case may be presumptively related to another pursuant to Section (b)(1)."

This letter constitutes the notice directed by Local Rule 50.3.2(c)(1). This case is presumptively related to Chaparro because the HSBC prosecution arose from the same criminal scheme charged in Chaparro. Specifically, the defendants in Chaparro were charged with laundering the proceeds of narcotics trafficking via the Black Market Peso Exchange, a method by which money launderers convert cash narcotics dollars into Colombian pesos by, among other methods, purchasing and

reselling wholesale consumer goods. The Chaparro defendants utilized various accounts they controlled at Grupo Financiero HSBC, S.A. de C.V. ("HSBC Mexico") to deposit drug dollars and then wire those funds to, among other places, businesses located in the United States and elsewhere. The funds were then used to purchase consumer goods, which were exported to South America and resold to generate "clean" cash.

In HSBC, an information will be filed alleging violations of, inter alia, the Bank Secrecy Act, 31 U.S.C. §§ 5311, et seq., arising from the failure to maintain an effective anti-money laundering program. The lack of an effective anti-money laundering program at HSBC Mexico and HSBC Bank USA, N.A. contributed to the conduct charged in Chaparro and was discovered as a result of the Chaparro investigation. As HSBC is thus presumptively related to Chaparro, the government respectfully submits that reassignment would be appropriate.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: _____
Alexander A. Solomon
Daniel S. Silver
Assistant U.S. Attorneys
(718) 254-6074/6034

cc: David N. Kelley, Esq.
Samuel W. Seymour, Esq.

U.S. Department of Justice

United States Attorney's Office
Eastern District of New York

CBD:DSS/AAS
F.#2009R02380

271 Cadman Plaza East
Brooklyn, New York 11201

December 11, 2012

BY HAND DELIVERY and ECF

The Honorable I. Leo Glasser
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

The Honorable John Gleeson
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. HSBC Bank USA, N.A. and
HSBC Holdings plc
Criminal Docket No. 12-763 (ILG)

Dear Judge Glasser and Judge Gleeson:

The government respectfully submits this letter to request that the Court file the above-captioned criminal Information, attached hereto as Exhibit A, with the Clerk of the Court, place this matter into abeyance for a period of sixty months and exclude that time from the period within which trial must commence pursuant to 18 U.S.C. § 3161(h)(2). The defendants join in these requests. As set forth in the document attached hereto as Exhibit B, the government and defendants HSBC Bank USA, N.A. and HSBC Holdings plc (collectively "HSBC") have entered into a deferred prosecution agreement. Should HSBC comply with the terms and provisions of the attached agreement, the

government has agreed to dismiss the Information after sixty months.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: /s/
Alexander A. Solomon
Daniel S. Silver
Assistant U.S. Attorneys
(718) 254-6074/6034

cc: David N. Kelley, Esq.
Samuel W. Seymour, Esq.

CBD:DSS/AAS
F.#2009R02380

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

- against -

HSBC BANK USA, N.A. and
HSBC HOLDINGS PLC,

Defendants.

- - - - - - - - - - - - - - - - - - -X

I N F O R M A T I O N

Cr. No. 12-763
(T. 18, U.S.C., §§ 2 and 3551 et seq.; T. 31, U.S.C., §§ 5318(h), 5318(i), 5322(b) and 5322(d); T. 50, U.S.C., §§ 1702 and 1705; T. 50, U.S.C. App., §§ 3, 5 and 16)

THE UNITED STATES CHARGES:

INTRODUCTION

At all times relevant to this Information, unless otherwise indicated:

1. Defendant HSBC Bank USA, N.A. was a federally chartered banking institution and subsidiary of HSBC North America Holdings, Inc. HSBC North America Holdings, Inc. was an indirect subsidiary of defendant HSBC Holdings plc.

2. Defendant HSBC Holdings plc was a financial institution holding company registered and organized under the laws of England and Wales.

3. Defendant HSBC Holdings plc, through its subsidiaries, conducted United States Dollar ("USD") clearing at

defendant HSBC Bank USA, N.A., as well as other financial institutions located in the United States.

4. Defendant HSBC Bank USA N.A. was subject to oversight and regulation by the Department of the Treasury, Office of the Comptroller of the Currency ("OCC").

THE BANK SECRECY ACT

5. The Bank Secrecy Act ("BSA"), Title 31 U.S.C. Sections 5311 et seq., and its implementing regulations, which Congress enacted to address an increase in criminal money laundering activities utilizing financial institutions, required domestic banks, insured banks and other financial institutions to maintain programs designed to detect and report suspicious activity that might be indicative of money laundering and other financial crimes, and to maintain certain records and file reports related thereto that are especially useful in criminal, tax or regulatory investigations or proceedings.

6. Pursuant to Title 31, United States Code, Section 5318(h)(1) and Title 12, Code of Federal Regulations, Section 21.21, defendant HSBC Bank USA, N.A. was required to establish and maintain an anti-money laundering ("AML") compliance program that, at a minimum:

(a) provided internal policies, procedures, and controls designed to guard against money laundering;

(b) provided for a compliance officer to coordinate and monitor day-to-day compliance with the BSA and AML requirements;

(c) provided for an ongoing employee training program; and

(d) provided for independent audit function programs.

7. Pursuant to Title 31, United States Code, Section 5318(i), defendant HSBC Bank USA, N.A. was required to establish due diligence, and in some cases enhanced due diligence, policies, procedures and controls that were reasonably designed to detect and report suspicious activity for correspondent accounts it maintained in the United States for non-U.S. persons.

THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

8. The International Emergency Economic Powers Act ("IEEPA"), Title 50, United States Code, Sections 1701 through 1706, authorized the President of the United States (the "President") to impose economic sanctions on a foreign country in response to an unusual or extraordinary threat to the national security, foreign policy or economy of the United States, when the President declared a national emergency with respect to that threat.

The Iranian Sanctions

9. On March 15, 1995, President William J. Clinton issued Executive Order No. 12957, finding that "the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" and declaring "a national emergency to deal with that threat."

10. On May 6, 1995, President Clinton issued Executive Order 12959 to take additional steps with respect to the national emergency declared in Executive Order 12957 and impose comprehensive trade and financial sanctions on Iran. These sanctions prohibited, among other things, the exportation, re-exportation, sale and transportation, directly or indirectly, to Iran or the Government of Iran of any goods, technology or services from the United States or United States persons, wherever located. This prohibition included any transactions or financing of transactions by United States persons relating to goods or services of Iranian origin, and further prohibited any "transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding" such sanctions. On August 19, 1997, President Clinton issued Executive Order 13059 consolidating and clarifying Executive Orders 12957 and 12959 (collectively, the "Iranian

Executive Orders"). The Iranian Executive Orders authorized the United States Secretary of the Treasury to promulgate rules and regulations necessary to carry out the Iranian Executive Orders. Pursuant to this authority, the Secretary of the Treasury promulgated the Iranian Transaction Regulations ("ITRs"), Title 31, Code of Federal Regulations, Part 560, implementing the sanctions imposed by the Iranian Executive Orders.

11. With the exception of certain exempt transactions, the ITRs prohibited, among other things, U.S. depository institutions from servicing Iranian accounts and directly crediting or debiting Iranian accounts. The ITRs also prohibited transactions by any U.S. person who evaded or avoided, had the purpose of evading or avoiding, or attempted to evade or avoid the restrictions imposed under the ITRs. The ITRs were in effect at all times relevant to the Information.

The Libyan Sanctions

12. On January 7, 1986, President Ronald W. Reagan issued Executive Order No. 12543, which imposed broad economic sanctions against Libya. One day later, President Reagan issued Executive Order No. 12544, which also ordered the blocking of all property and interests in property of the Government of Libya in the United States or under the possession or control of United States persons. President George H.W. Bush strengthened those

sanctions in 1992 pursuant to Executive Order No. 12801. These sanctions remained in effect until September 22, 2004, when President George W. Bush issued Executive Order 13357, which terminated the national emergency with regard to Libya and revoked the sanction measures imposed by the prior Executive Orders.

The Sudanese Sanctions

13. On November 3, 1997, President Clinton issued Executive Order No. 13067, which imposed a trade embargo against Sudan and blocked all property and interests in property of the Government of Sudan in the United States or under the possession or control of United States persons. President George W. Bush strengthened those sanctions in 2006 pursuant to Executive Order No. 13412 (collectively, the "Sudanese Executive Orders"). The Sudanese Executive Orders prohibited virtually all trade and investment activities between the United States and Sudan, including, but not limited to, broad prohibitions on: (a) the importation into the United States of goods or services of Sudanese origin; (b) the exportation or re-exportation of any goods, technology or services from the United States or by a United States person, wherever located, to Sudan; (c) trade and service related transactions with Sudan by United States persons, including financing or facilitating such transactions; and (d)

the grant or extension of credits or loans by any United States person to the Government of Sudan. The Sudanese Executive Orders further prohibited "[a]ny transaction by a United States person or within the United States that evades or avoids, has the purposes of evading or avoiding, or attempts to violate any of the prohibitions set forth in [these orders]." With the exception of certain exempt or authorized transactions, the United States Department of Treasury, Office of Foreign Assets Control ("OFAC") regulations implementing the Sudanese Sanctions generally prohibited the export of services to Sudan from the United States.

The Burmese Sanctions

14. On May 20, 1997, President Clinton issued Executive Order No. 13047, which prohibited both new investment in Burma by United States persons and the approval or other facilitation by a United States person, wherever located, of a transaction by a foreign person where the transaction would constitute new investment in Burma.

15. On July 28, 2003, President George W. Bush signed the Burmese Freedom and Democracy Act of 2003 ("BFDA") to restrict the financial resources of Burma's ruling military junta. To implement the BFDA and to take additional steps, President Bush issued Executive Order No. 13310 on July 28, 2003,

which blocked all property and interest in property of other individuals and entities meeting certain criteria. President Bush subsequently issued Executive Order Nos. 13448 and 13464, expanding the list of persons and entities whose property must be blocked. Executive Order No. 13310 also prohibited the exportation or re-exportation, directly or indirectly, to Burma of financial services from the United States, or by United States persons, wherever located, as well as the financing or facilitation, by a United States person, of any prohibited transaction with Burma by a foreign person.

THE TRADING WITH THE ENEMY ACT

16. Beginning with Executive Orders and regulations issued at the direction of President John F. Kennedy, the United States has maintained an economic embargo against Cuba through the enactment of various laws and regulations. These laws, which prohibited virtually all financial and commercial dealings with Cuba, Cuban businesses and Cuban assets, were promulgated under the Trading With the Enemy Act ("TWEA"), Title 50, United States Code Appendix, Sections 1-44, and were generally administered by OFAC.

17. Unless authorized by OFAC, the Cuban Assets Control Regulations ("CACRs") prohibited persons subject to the jurisdiction of the United States from engaging in financial

transactions involving or benefiting Cuba or Cuban nationals, including all "transfers of credit and all payments" and "transactions in foreign exchange." Title 31, Code of Federal Regulations, Sections 515.201(a)(1) and 515.201(a)(2). Furthermore, unless authorized by OFAC, persons subject to the jurisdiction of the United States were prohibited from engaging in transactions involving property in which Cuba or Cuban nationals have any direct or indirect interest, including "[a]ll dealings in . . . any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States" and "[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States." 31 C.F.R. §§ 515.201(b)(1), 515.201(b)(2). The CACRs also prohibited "[a]ny transaction for the purpose or which had the effect of evading or avoiding any of the prohibitions set forth in [the regulations]." 31 C.F.R. § 515.201(c).

COUNT ONE

(Failure to Maintain an Effective Anti-Money Laundering Program)

18. The allegations contained in paragraphs one through seven are realleged and incorporated as if fully set forth in this paragraph.

19. In or about and between January 2006 and December 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Bank USA, N.A., a domestic financial institution, wilfully violated the Bank Secrecy Act, Title 31, United States Code, Sections 5318(h) and 5322(b), by failing to develop, implement and maintain an effective anti-money laundering program.

20. Specifically, the defendant HSBC Bank USA, N.A. knowingly and wilfully failed to implement and maintain effective policies, procedures and internal controls to: (a) obtain and maintain due diligence or "know your customer" information on financial institutions owned by HSBC Holdings plc; (b) monitor wire transfers from customers located in countries which it classified as "standard" or "medium" risk; (c) monitor purchases of physical U.S. dollars ("banknotes") from financial institutions owned by HSBC Holdings plc; and (d) provide adequate staffing and other resources to maintain an effective anti-money laundering program.

(Title 31, United States Code, Sections 5318(h) and 5322(b); Title 18 United States Code, Sections 3551 et seq.)

COUNT TWO
(Failure to Conduct Due Diligence on Correspondent Bank Accounts Involving Foreign Persons)

21. The allegations contained in paragraphs one through seven are realleged and incorporated as if fully set forth in this paragraph.

22. In or about and between January 2006 and December 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Bank USA, N.A., a domestic financial institution, wilfully violated the Bank Secrecy Act, Title 31, United States Code, Sections 5318(i) and 5322(d), by failing to conduct due diligence on correspondent bank accounts for non-United States persons.

23. As part of this offense, the defendant HSBC Bank USA, N.A. knowingly and wilfully failed to obtain and maintain due diligence or "know your customer" information on foreign financial institutions owned by HSBC Holdings plc for which it maintained correspondent accounts, information that if collected and maintained would have reasonably allowed for the detection and reporting of instances of money laundering and other suspicious activity.

(Title 31, United States Code, Sections 5318(i) and 5322(d); Title 18 United States Code, Sections 3551 et seq.)

COUNT THREE
(International Emergency Economic Powers Act)

24. The allegations contained in paragraphs one through four and eight through fifteen are realleged and incorporated as if fully set forth in this paragraph.

25. In or about and between January 2001 and December 2006, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Holdings plc, together with others, knowingly, intentionally and wilfully facilitated prohibited transactions for sanctioned entities in Iran, Libya, Sudan and Burma.

(Title 50, United States Code, Sections 1702 and 1705; Title 18 United States Code, Sections 2 and 3551 et seq.)

COUNT FOUR
(Trading with the Enemy Act)

26. The allegations contained in paragraphs one through four and sixteen through seventeen are realleged and incorporated as if fully set forth in this paragraph.

27. In or about and between January 2001 and December 2006, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Holdings plc, together with others, knowingly, intentionally and

wilfully facilitated transactions for sanctioned entities in Cuba.

(Title 50, United States Code Appendix, Sections 3, 5 and 16; Title 18 United States Code, Sections 2 and 3551 et seq.)

12/11/2012
DATE

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

12/11/2012
DATE

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture and
Money Laundering Section
Criminal Division
Department of Justice

12/10/2012
DATE

WILLIAM J. IHLENFELD II
United States Attorney
Northern District of West Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

-against- Cr. No. 12-763

HSBC BANK USA, N.A. and
HSBC HOLDINGS PLC,

Defendants.
- - - - - - - - - - - - - - - - - -X

DEFERRED PROSECUTION AGREEMENT

Defendant HSBC Bank USA, N.A., a federally chartered banking institution and subsidiary of HSBC North America Holdings, Inc., and defendant HSBC Holdings plc, a financial institution holding company organized under the laws of England and Wales (collectively, "the HSBC Parties"), by their undersigned representatives, pursuant to authority granted by the HSBC Parties' Boards of Directors, and the United States Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, the United States Attorney's Office for the Eastern District of New York, and the United States Attorney's Office for the Northern District of West Virginia (collectively, the "Department"), enter into this deferred prosecution agreement (the "Agreement"). The terms and conditions of this Agreement are as follows:

Criminal Information and Acceptance of Responsibility

1. The HSBC Parties acknowledge and agree that the Department will file the attached four-count criminal Information in the United States District Court for the Eastern District of New York ("the Court") charging the HSBC Parties with (a) wilfully failing to maintain an effective anti-money laundering program, in violation of Title 31, United States Code, Section 5318(h) and regulations issued thereunder; (b) wilfully failing to conduct and maintain due diligence on correspondent bank accounts held on behalf of foreign persons, in violation of Title 31, United States Code, Section 5318(i) and regulations issued thereunder; (c) wilfully violating and attempting to violate the Trading with the Enemy Act, Title 50 United States Code Appendix Sections 3, 5, 16, and regulations issued thereunder; and (d) wilfully violating and attempting to violate the International Emergency Economic Powers Act, Title 50 United States Code Sections 1702 and 1705, and regulations issued thereunder. In so doing, the HSBC Parties: (a) knowingly waive their right to indictment on this charge, as well as all rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) knowingly waive for purposes of this Agreement any objection

with respect to venue and consent to the filing of the Information, as provided under the terms of this Agreement.

2. The HSBC Parties admit, accept and acknowledge that they are responsible for the acts of their officers, directors, employees, and agents as charged in the Information, and as set forth in the Statement of Facts attached hereto as Attachment A and incorporated by reference into this Agreement, and that the allegations described in the Information and the facts described in Attachment A are true and accurate. Should the Department pursue the prosecution that is deferred by this Agreement, the HSBC Parties agree that they will neither contest the admissibility of nor contradict the Statement of Facts in any such proceeding, including any guilty plea or sentencing proceeding. Neither this Agreement nor the criminal Information is a final adjudication of the matters addressed in such documents.

Term of the Agreement

3. This Agreement is effective for a period beginning on the date on which the Information is filed and ending five (5) years from that date (the "Term"). However, the HSBC Parties agree that, in the event the Department determines, in its sole discretion, that the HSBC Parties have knowingly violated any provision of this Agreement, an extension or extensions of the Term of the Agreement may be imposed by the Department, in its sole discretion, for up

to a total additional period of one year, without prejudice to the Department's right to proceed as provided in Paragraphs 16 through 19 below. Any extension of the Agreement extends all terms of this Agreement for an equivalent period. Conversely, in the event the Department finds, in its sole discretion, that the provisions of this Agreement have been satisfied, the Term of the Agreement may be terminated early.

Relevant Considerations

4. The Department enters into this Agreement based on the individual facts and circumstances presented by this case. Among the facts considered were the following: (a) the HSBC Parties' willingness to acknowledge and accept responsibility for the actions of their officers, directors, employees, and agents as charged in the Information and as set forth in the Statement of Facts; (b) the HSBC Parties' extensive remedial actions taken to date, which are described in the Statement of Facts and Paragraph 5 below; (c) the HSBC Parties' agreement to continue to enhance their anti-money laundering programs; (d) the HSBC Parties' agreement to continue to cooperate with the Department in any ongoing investigation of the conduct of the HSBC Parties and their current or former officers, directors, employees, agents and consultants, as provided in Paragraph 6 below; (e) the HSBC Parties' willingness to settle any and all civil and criminal

claims currently held by the Department for any act within the scope of the Statement of Facts; and (f) the HSBC Parties' cooperation with the Department, including conducting multiple extensive internal investigations, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for the Department.

5. The HSBC Parties have taken, will take, and/or shall continue to adhere to, the following remedial measures:

a. HSBC North America has a new leadership team, including a new Chief Executive Officer, General Counsel, Chief Compliance Officer, AML Director, Deputy Chief Compliance Officer and Deputy Director of its Global Sanctions program.

b. As a result of its AML violations and program deficiencies, HSBC North America and HSBC Bank USA "clawed back" deferred compensation (bonuses) for a number of their most senior AML and compliance officers, to include the Chief Compliance Officer, AML Director and Chief Executive Officer.

c. In 2011, HSBC Bank USA spent $244 million on AML, approximately nine times more than what it spent in 2009.

d. In particular, HSBC Bank USA has increased its AML staffing from 92 full time employees and 25 consultants as of January 2010 to approximately 880 full time employees and 267 consultants as of May 2012.

e. HSBC Bank USA has reorganized its AML department to strengthen its reporting lines and elevate its status

within the institution as a whole by (i) separating the Legal and Compliance departments; (ii) requiring that the AML Director report directly to the Chief Compliance Officer; and (iii) providing that the AML Director regularly report directly to the Board and senior management about HSBC Bank USA's Bank Secrecy Act ("BSA") and anti-money laundering ("AML") program.

f. HSBC Bank USA has revamped its KYC program and now treats HSBC Group Affiliates as third parties that are subject to the same due diligence as all other customers.

g. HSBC Bank USA has implemented a new customer risk-rating methodology based on a multifaceted approach that weighs the following factors: (1) the country where the customer is located, (2) the products and services utilized by the customer, (3) the customer's legal entity structure, and (4) the customer and business type.

h. HSBC Bank USA has exited 109 correspondent relationships for risk reasons.

i. HSBC Bank USA has a new automated monitoring system. The new system monitors every wire transaction that moves through HSBC Bank USA. The system also tracks the originator, sender and beneficiary of a wire transfer, allowing HSBC Bank USA to look at its customer's customer.

j. HSBC Bank USA has made significant progress in remediating all customer KYC files in order to ensure they adhere to the new AML policies discussed above and plans to have completed remediation of 155,554 customers by December 2012.

k. HSBC Bank USA has exited the Banknotes business.

l. HSBC Bank USA has spent over $290 million on remedial measures.

m. HSBC Holdings also has a new leadership team, including a new CEO, Chairman, Chief Legal Officer and Head of Global Standards Assurance.

n. HSBC Group has simplified its control structure so that the entire organization is aligned around 4 global businesses, 5 regional geographies, and 10 global functions. This allows HSBC Group to better manage its business and communication, and better understand and address risks worldwide.

o. Since January 2011, HSBC Group has begun to apply a more consistent global risk appetite and as a result has sold 42 businesses and withdrawn from 9 countries.

p. HSBC Group has undertaken to implement single global standards shaped by the highest or most effective anti-money laundering standards available in any location where the HSBC Group operates. This new policy will require that all HSBC Group Affiliates will, at a minimum, adhere to U.S. anti-money laundering standards.

q. HSBC Group has elevated the Head of HSBC Group Compliance position to a Group General Manager, which is one of the 50 most senior employees at HSBC globally. HSBC Group has also replaced the individual serving as Head of HSBC Group Compliance.

r. The Head of HSBC Group Compliance has been given direct oversight over every compliance officer globally, so that both accountability and escalation now flow directly to and from HSBC Group Compliance.

s. Eighteen of the top twenty-one most senior officers at HSBC Group are new in post since the beginning of 2011.

t. Material or systemic AML control weaknesses at any affiliate that are reported by the Regional and Global Business Compliance heads are now shared with all other

Regional and Global Business Compliance heads facilitating horizontal information sharing.

u. The senior leadership team that attends HSBC Group Management Board meetings is collectively and individually responsible for reviewing all of the information presented at the meeting, as well as all written documentation provided in advance of the meeting, and determining whether it affects their respective entity or region. In addition, if an executive believes that something occurring within his or her area of responsibility affects another business or affiliate within HSBC Group, it is that executive's responsibility to seek out the executives from that business or affiliate and work to address the issue.

v. HSBC Group has restructured its senior executive bonus system so that the extent to which the senior executive meets compliance standards and values has a significant impact on the amount of the senior executive's bonus, and failure to meet those compliance standards and values could result in the voiding of the senior executive's entire year-end bonus.

w. HSBC Group has commenced a review of all customer KYC files across the entire Group. The first phase of this remediation will cost an estimated $700 million to complete over five years.

x. HSBC Group will defer a portion of the bonus compensation for its most senior officers, namely its Group General Managers and Group Managing Directors, during the pendency of the deferred prosecution agreement, subject to EU and UK legal and regulatory requirements.

y. HSBC Group has adopted a set of guidelines to be taken into account when considering whether HSBC Group should do business in countries posing a particularly high corruption/rule of law risk as well as limiting

business in those countries that pose a high financial crime risk.

z. Under HSBC Group's new global sanctions policy, HSBC Group will be utilizing key Office of Foreign Assets Control ("OFAC") and other sanctions lists to conduct screening in all jurisdictions, in all currencies.

Upon the application of the HSBC Parties, the Corporate Compliance Monitor (discussed infra at paragraphs 9-13) may modify, adjust, or discontinue any remedial or compliance measure listed in this Agreement if the Monitor finds that continuation of the measure is impractical, inconsistent with any recommendation of the Monitor, or inadvisable for any other reason, subject to Department approval.

Cooperation

6. The HSBC Parties shall continue to cooperate fully with the Department in any and all investigations, subject to applicable laws and regulations and the attorney-client and attorney work product privileges. At the request of the Department, the HSBC Parties shall also cooperate fully with other domestic or foreign law enforcement authorities and agencies in any investigation of the HSBC Parties or any of their present and former officers, directors, employees, agents and consultants, or any other party. The HSBC Parties also agree that they shall:

a. Use their good faith efforts to make available, at their cost, the HSBC Parties' current and former officers, directors, employees, agents and consultants, when requested by the Department, to provide additional information and materials concerning any and all investigation; to testify, including providing sworn testimony before a grand jury or in a judicial proceeding; and to be interviewed by law enforcement authorities. Cooperation under this Paragraph shall include identification of witnesses who, to the knowledge of the HSBC Parties, may have material information regarding these matters;

b. Provide any information, materials, documents, databases, or transaction data in the HSBC Parties' possession, custody, or control, or in the possession custody or control of any affiliate, wherever located, requested by the Department in connection with the investigation or prosecution of any current or former officers, directors, employees, agents and consultants;

c. Continue to abide by the terms of the "Consent Cease and Desist Order" entered with the Board of Governors of the Federal Reserve System, dated October 4, 2010;

d. Continue to abide by the terms of the "Consent Cease and Desist Order" entered with the Office of the Comptroller of the Currency ("OCC"), dated October 6, 2010;

e. Abide by the terms of the "Consent Cease and Desist Order" entered with the Board of Governors of the Federal Reserve System, dated December 11, 2012;

f. Continue to apply the OFAC sanctions list to the same extent as any United Nations or European Union sanctions or freeze lists to United States Dollar ("USD") transactions, the acceptance of customers, and all USD cross-border Society for Worldwide Interbank

Financial Telecommunications ("SWIFT") incoming and outgoing messages involving payment instructions or electronic transfer of funds;

g. Except as otherwise permitted by United States law, not knowingly undertake any USD cross-border electronic funds transfer or any other USD transaction for, on behalf of, or in relation to any person or entity resident or operating in, or the governments of, Iran, North Korea, Sudan (except for those regions and activities exempted from the United States embargo by Executive Order No. 13412), Syria or Cuba;

h. Implement compliance procedures and training designed to ensure that the HSBC Parties' compliance officer in charge of sanctions is made aware in a timely manner of any known requests or attempts by any entity (including, but not limited to, the HSBC Parties' customers, financial institutions, companies, organizations, groups, or persons) to withhold or alter its name or other identifying information where the request or attempt appears to be related to circumventing or evading U.S. sanctions laws. The HSBC Parties' Head of Compliance, or his or her designee, shall report to the Department, in a timely manner, the name and contact information, if available to the HSBC Parties, of any entity that makes such a request;

i. Maintain the electronic database of SWIFT Message Transfer payment messages and all documents and materials produced by the HSBC Parties to the Department as part of this investigation relating to USD payments processed during the period from 2001 through 2007 in electronic format for a period of five years from the date of this Agreement;

j. Notify the Department of any criminal, civil, administrative or regulatory investigation or action of the Bank or its current directors, officers, employees, consultants, representatives, and agents

related to the HSBC Parties' compliance with U.S. sanctions laws, the HSBC Parties' involvement in money laundering, or the HSBC Parties' anti-money laundering program;

k. Provide information, materials, and testimony as necessary or requested to identify or to establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence in any criminal or judicial proceeding; and

l. Develop and implement policies and procedures for mergers and acquisitions requiring that the HSBC Parties conduct appropriate risk-based due diligence on potential new business entities, including appropriate BSA and anti-money laundering due diligence by legal, audit, and compliance personnel. If the HSBC Parties discover inadequate anti-money laundering controls as part of their due diligence of newly acquired entities or entities merged with the HSBC Parties, it shall report such conduct to the Department as required in Attachment B to this Agreement.

Forfeiture Amount

7. As a result of the HSBC Parties' conduct, including the conduct set forth in the Statement of Facts, the parties agree the Department could institute a civil and/or criminal forfeiture action against certain funds held by the HSBC Parties and that such funds would be forfeitable pursuant to Title 18, United States Code, Sections 981 and 982. The HSBC Parties hereby acknowledge that at least $881,000,000 was involved in transactions, in violation of Title 18, United States Code,

Sections 1956 and 1957; and that at least $375,000,000 was involved in transactions in violation of Title 50, United States Code, Appendix, Sections 3, 5 and 16 and the regulations issued thereunder, or Title 50, United States Code, Section 1705 and the regulations issued thereunder. In lieu of a criminal prosecution and related forfeiture, the HSBC Parties hereby agree to pay to the United States the sum of $1,256,000,000 (the "Forfeiture Amount"). The HSBC Parties hereby agree the Forfeiture Amount shall be considered substitute *res* for the purpose of forfeiture to the United States pursuant to Title 18, United States Code, Sections 981 and 982, and the HSBC Parties release any and all claims they may have to such funds. The HSBC Parties shall pay the Forfeiture Amount plus any associated transfer fees within five (5) business days of the date on which this Agreement is signed, pursuant to payment instructions as directed by the Department in its sole discretion.

Conditional Release from Liability

8. In return for the full and truthful cooperation of the HSBC Parties, and their compliance with the other terms and conditions of this Agreement, the Department agrees, subject to Paragraphs 16 through 19 below, not to use any information related to the conduct described in the attached Statement of Facts against the HSBC Parties or any of their corporate parents, subsidiaries,

affiliates, predecessors, successors or assigns, in any criminal or civil case, except: (a) in a prosecution for perjury or obstruction of justice; or (b) in a prosecution for making a false statement. In addition, the Department agrees, except as provided herein, that it will not bring any criminal case against the HSBC Parties or any of their corporate parents, subsidiaries, affiliates, predecessors, successors or assigns, related to the conduct described in the attached Statement of Facts and the Information.

a. This Paragraph does not provide protection against prosecution for conduct not disclosed by the HSBC Parties to the Department prior to the date on which this Agreement was signed, nor does it provide protection against prosecution for any future involvement by the HSBC Parties in criminal activity, including any future involvement in money laundering or any future failure to maintain an effective anti-money laundering program.

b. In addition, this Paragraph does not provide any protection against prosecution of any present or former officers, directors, employees, agents and consultants of the HSBC Parties for any violations committed by them, including any conduct described in the Statement of Facts or any conduct disclosed to the Department by the HSBC Parties.

c. Finally, other than transactions during the period set forth in the Statement of Facts that have already been disclosed and documented to the United States, this Paragraph does not provide any protection against prosecution of the HSBC Parties, or any of their affiliates, successors, related companies, employees,

officers or directors, who knowingly and wilfully transmitted or approved the transmission of funds that went to or came from persons or entities designated by OFAC at the time of the transaction as Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and proliferators of Weapons of Mass Destruction (the "Special SDN Transactions"), including transactions disclosed and documented to the United States that occurred after January 1, 2008. Any prosecution related to the Special SDN Transactions may be premised upon any information provided by or on behalf of the HSBC Parties to the Department or any investigative agencies, whether prior to or subsequent to this Agreement, or any leads derived from such information, including the attached Statement of Facts.

Corporate Compliance Monitor

9. Within sixty (60) calendar days of the filing of the Agreement and the accompanying Information, or promptly after the Department's selection pursuant to Paragraph 10 below, HSBC Holdings agrees to retain an independent compliance monitor (the "Monitor"). In particular, within thirty (30) calendar days after the execution of this Agreement, and after consultation with the Department, HSBC Holdings will propose to the Department a pool of three qualified candidates to serve as the Monitor. If the Department, in its sole discretion, is not satisfied with the candidates proposed, the Department reserves the right to seek additional nominations from HSBC Holdings. The Monitor candidates shall have, at a minimum, the following qualifications:

a. demonstrated expertise with respect to the BSA and other applicable U.S. and U.K. anti-money laundering laws;

b. experience designing and/or reviewing corporate compliance policies, procedures and internal controls, including BSA and anti-money laundering policies, procedures and internal controls;

c. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement; and

d. sufficient independence from HSBC Holdings to ensure effective and impartial performance of the Monitor's duties as described in the Agreement.

10. The Department retains the right, in its sole discretion, to accept or reject any Monitor candidate proposed by HSBC Holdings, though HSBC Holdings may express their preference(s) among the candidates. In the event the Department rejects all proposed Monitors, HSBC Holdings shall propose another candidate within ten (10) calendar days after receiving notice of the rejection. This process shall continue until a Monitor acceptable to both parties is chosen. The Department may also propose the names of qualified Monitor candidates for consideration. The term of the monitorship, as set forth in Attachment B, shall commence upon the Department's acceptance of a Monitor candidate proposed by HSBC Holdings. If the Monitor resigns or is otherwise unable to fulfill his or her obligations as set out herein and Attachment B, HSBC Holdings shall

within sixty (60) calendar days recommend a pool of three qualified Monitor candidates from which the Department will choose a replacement.

11. The Monitor will be retained by HSBC Holdings for a period of not less than sixty (60) months from the date the Monitor is selected. The term of the monitorship, including the circumstances that may support an extension of the term, as well as the Monitor's powers, duties, and responsibilities, will be as set forth in Attachment B.

12. HSBC Holdings agrees that it will not employ or be affiliated with the Monitor for a period of not less than one year from the date on which the Monitor's term expires.

13. The Monitor's term shall be five (5) years from the date on which the Monitor is retained by HSBC Holdings, subject to extension or early termination as described in Paragraph 3.

Deferred Prosecution

14. In consideration of: (a) the past and future cooperation of the HSBC Parties described in Paragraph 6 above; (b) the HSBC Parties' forfeiture, totaling $1,256,000,000; and (c) the HSBC Parties' implementation and maintenance of remedial measures described in the Statement of Facts and Paragraph 5 above, the Department agrees that any prosecution of the HSBC Parties for conduct set forth in the Information or the attached Statement of

Facts, and for the conduct that the HSBC Parties disclosed to the Department prior to the signing of this Agreement, be and hereby is deferred for the Term of this Agreement.

15. The Department further agrees that if the HSBC Parties fully comply with all of their obligations under this Agreement, the Department will not continue the criminal prosecution against the HSBC Parties described in Paragraph 1 and, at the conclusion of the Term, this Agreement shall expire. Within thirty (30) days of the Agreement's expiration, the Department shall seek dismissal with prejudice of the criminal Information filed against the HSBC Parties described in Paragraph 1.

Breach of the Agreement

16. If, during the Term of this Agreement, the Department determines, in its sole discretion, that the HSBC Parties have (a) committed any crime under U.S. federal law subsequent to the signing of this Agreement, (b) at any time provided in connection with this Agreement deliberately false, incomplete, or misleading information, or (c) otherwise breached the Agreement, the HSBC Parties shall thereafter be subject to prosecution for any federal criminal violation of which the Department has knowledge, including the charges in the Information described in Paragraph 1, which may be pursued by the Department in the United States District Court for the Eastern District of New York or any other appropriate venue.

Any such prosecution may be premised on information provided by the HSBC Parties. Any such prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the HSBC Parties notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the expiration of the Term plus one year. Thus, by signing this Agreement, the HSBC Parties agree the statute of limitations with respect to any such prosecution that is not time-barred on the date of the signing of this Agreement shall be tolled for the Term plus one year.

17. In the event the Department determines the HSBC Parties have breached this Agreement, the Department agrees to provide the HSBC Parties with written notice of such breach prior to instituting any prosecution resulting from such breach. The HSBC Parties shall, within thirty (30) days of receipt of such notice, have the opportunity to respond to the Department in writing to explain the nature and circumstances of such breach, as well as the actions the HSBC Parties have taken to address and remediate the situation, which explanation the Department shall consider in determining whether to institute a prosecution.

18. In the event the Department determines the HSBC Parties have breached this Agreement: (a) all statements made by or on behalf of the HSBC Parties to the Department or to the Court,

including the attached Statement of Facts, and any testimony given by the HSBC Parties before a grand jury, a court, or any tribunal, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Department against the HSBC Parties; and (b) the HSBC Parties shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that statements made by or on behalf of the HSBC Parties prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed. The decision whether conduct or statements of any current director or employee, or any person acting on behalf of, or at the direction of, the HSBC Parties will be imputed to the HSBC Parties for the purpose of determining whether the HSBC Parties have violated any provision of this Agreement shall be in the sole discretion of the Department.

19. The HSBC Parties acknowledge the Department has made no representations, assurances, or promises concerning what sentence may be imposed by the Court if the HSBC Parties breach this Agreement and this matter proceeds to judgment. The HSBC Parties further acknowledge that any such sentence is solely within the

discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

Sale or Merger of HSBC Parties

20. The HSBC Parties agree that in the event they sell, merge, or transfer all or substantially all of their business operations as they exist as of the date of this Agreement, whether such sale is structured as a sale, asset sale, merger, or transfer, it shall include in any contract for sale, merger, or transfer a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement.

Public Statements by HSBC Parties

21. The HSBC Parties expressly agree that they shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the HSBC Parties make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the HSBC Parties set forth above or the facts described in the attached Statement of Facts. Any such contradictory statement shall, subject to cure rights of the HSBC Parties described below, constitute a breach of this Agreement, and the HSBC Parties thereafter shall be subject to prosecution as set forth in Paragraphs 16-19 of this Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be

imputed to the HSBC Parties for the purpose of determining whether they have breached this Agreement shall be at the sole discretion of the Department. If the Department determines that a public statement by any such person contradicts in whole or in part a statement contained in the Statement of Facts, the Department shall so notify the HSBC Parties, and the HSBC Parties may avoid a breach of this Agreement by publicly repudiating such statement(s) within five (5) business days after notification. The HSBC Parties shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Statement of Facts. This Paragraph does not apply to any statement made by any present or former officer, director, employee, or agent of the HSBC Parties in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the HSBC Parties. Subject to this paragraph, the HSBC Parties retain the ability to provide information or take legal positions in litigation or other regulatory proceedings in which the Department or the New York County District Attorney's Office is not a party.

22. The HSBC Parties agree that if it or any of its direct or indirect subsidiaries or affiliates issues a press release or

holds any press conference in connection with this Agreement, the HSBC Parties shall first consult the Department to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Department and the HSBC Parties; and (b) whether the Department has no objection to the release.

23. The Department agrees, if requested to do so, to bring to the attention of governmental and other debarment authorities the facts and circumstances relating to the nature of the conduct underlying this Agreement, and the nature and quality of the HSBC Parties' cooperation and remediation. By agreeing to provide this information to debarment authorities, the Department is not agreeing to advocate on behalf of the HSBC Parties, but rather is agreeing to provide facts to be evaluated independently by the debarment authorities.

Limitations on Binding Effect of Agreement

24. This Agreement is binding on the HSBC Parties and the Department, but specifically does not bind any other federal agencies, or any state, local or foreign law enforcement or regulatory agencies, or any other authorities, although the Department will bring the cooperation of the HSBC Parties and their compliance with their other obligations under this Agreement to the attention of such agencies and authorities if requested to do so

by the HSBC Parties. Specifically, this Agreement does not bind the Tax Division or the Fraud Section of the Criminal Division of the United States Department of Justice. This Agreement does not bind any affiliates or subsidiaries of HSBC Holdings plc, other than those that are parties to this Agreement, but is binding on HSBC Holdings plc itself. To the extent HSBC Holdings plc's compliance with this Agreement requires it, HSBC Holdings plc agrees to ensure that its wholly-owned subsidiaries, and any successors and assigns, comply with the requirements and obligations set forth in this Agreement, to the full extent permissible under locally applicable laws and regulations, and the instructions of local regulatory agencies.

Complete Agreement

25. This Agreement sets forth all the terms of the agreement between the HSBC Parties and the Department. No amendments, modifications or additions to this Agreement shall be valid unless they are in writing and signed by the Department, the attorneys for the HSBC Parties and a duly authorized representative of the HSBC Parties.

FOR HSBC Bank USA, N.A. and HSBC Holdings plc:

Date: December 10, 2012 By: _____

Stuart A. Alderoty
Senior Executive Vice President
and General Counsel
HSBC Bank USA, N.A.

Date: _____ By: _____

Marc Moses
Group Chief Risk Officer
HSBC Holdings plc

Date: _____ By: _____

David N. Kelley
Anirudh Bansal
Cahill Gordon & Reindel LLP

Date: _____ By: _____

Samuel W. Seymour
Alexander J. Willscher
Sullivan & Cromwell LLP

FOR HSBC Bank USA, N.A. and HSBC Holdings plc:

Date:_____ By: _____

Stuart A. Alderoty
Senior Executive Vice President
and General Counsel
HSBC Bank USA, N.A.

Date: 10 December 2012 By: M. M. Moses

Marc Moses
Group Chief Risk Officer
HSBC Holdings plc

Date:_____ By: _____

David N. Kelley
Anirudh Bansal
Cahill Gordon & Reindel LLP

Date:_____ By: _____

Samuel W. Seymour
Alexander J. Willscher
Sullivan & Cromwell LLP

FOR HSBC Bank USA, N.A. and HSBC Holdings plc:

Date:_____ By: _____

Stuart A. Alderoty
Senior Executive Vice President
and General Counsel
HSBC Bank USA, N.A.

Date:_____ By: _____

Marc Moses
Group Chief Risk Officer
HSBC Holdings plc

Date: December 10, 2012 By: David N. Kelley

David N. Kelley
Anirudh Bansal
Cahill Gordon & Reindel LLP

Date: December 10, 2012 By: Samuel W. Seymour /AM

Samuel W. Seymour
Alexander J. Willscher
Sullivan & Cromwell LLP

FOR THE DEPARTMENT OF JUSTICE:

LANNY BREUER
ASSISTANT ATTORNEY GENERAL

LORETTA E. LYNCH
UNITED STATES ATTORNEY
Eastern District of New York

Date: 12/11/2012

BY: _____
Alexander A. Solomon
Daniel S. Silver
Assistant United States Attorneys

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture and Money
Laundering Section Criminal Division
United States Department of Justice

Date: 12/11/2012

BY: _____
Joseph K. Markel
Craig M. Timm
Trial Attorneys
Asset Forfeiture and Money
Laundering Section

WILLIAM J. IHLENFELD II
UNITED STATES ATTORNEY
Northern District of West Virginia

Date: 12/10/2012

BY: _____
Michael Stein
Assistant United States Attorney

BANK OFFICER'S CERTIFICATE

I have read this Agreement and carefully reviewed every part of it with outside counsel for HSBC Bank USA, N.A. (the "Bank"). I understand the terms of this Agreement and voluntarily agree, on behalf of the Bank, to each of its terms. Before signing this Agreement, I consulted outside counsel for the Bank. Counsel fully advised me of the rights of the Bank, of possible defenses, and of the consequences of entering into this Agreement.

I have carefully reviewed the terms of this Agreement with the Board of Directors of the Bank. I have advised and caused outside counsel for the Bank to advise the Board of Directors fully of the rights of the Bank, of possible defenses, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing this Agreement on behalf of the Bank, in any way to enter into this Agreement.

I am also satisfied with outside counsel's representation in this matter. I certify that I am the Senior Executive Vice President and General Counsel for the Bank and that I have been duly authorized by the Bank to execute this Agreement on behalf of the Bank.

Nothing in this Certificate is intended nor shall it be deemed as a waiver by the Bank of the attorney-client privilege or work product protection.

Date: December 10, 2012

HSBC BANK USA, N.A.

By: _____

Stuart A. Alderoty
Senior Executive Vice President
and General Counsel
HSBC Bank USA, N.A.

COMPANY OFFICER'S CERTIFICATE

I have read this Agreement and carefully reviewed every part of it with outside counsel for HSBC Holdings plc (the "Company"). I understand the terms of this Agreement and voluntarily agree, on behalf of the Company, to each of its terms. Before signing this Agreement, I consulted outside counsel for the Company. Counsel fully advised me of the rights of the Company, of possible defenses, and of the consequences of entering into this Agreement.

I have carefully reviewed the terms of this Agreement with the Board of Directors of the Company. Internal and External counsel have advised the Board of Directors fully of the rights of the Company, of possible defenses, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing this Agreement on behalf of the Company, in any way to enter into this Agreement.

I am also satisfied with outside counsel's representation in this matter. I certify that I am the Group Chief Risk Officer for the Company and that I have been duly authorized by the Company to execute this Agreement on behalf of the Company.

Nothing in this Certificate is intended nor shall it be deemed as a waiver by the Company of the attorney-client privilege or work product protection.

Date: 10 December, 2012

HSBC Holdings plc

By: M. M. Moses

Marc Moses
Group Chief Risk Officer
HSBC Holdings plc

CERTIFICATE OF COUNSEL

I am counsel for HSBC Bank USA, N.A. and HSBC Holdings plc (collectively, the "Bank") in the matter covered by this Agreement. In connection with such representation, I have examined relevant Bank documents and have discussed the terms of this Agreement with the Bank's Boards of Directors. Based on our review of the foregoing materials and discussions, I am of the opinion that the representatives of the Bank have been duly authorized to enter into this Agreement on behalf of the Bank and that this Agreement has been duly and validly authorized, executed, and delivered on behalf of the Bank and is a valid and binding obligation of the Bank. Further, I have carefully reviewed the terms of this Agreement with the Boards of Directors of the Bank and the Senior Executive Vice President and General Counsel for HSBC Bank USA, N.A., and the Group Chief Risk Officer for HSBC Holdings plc. I have fully advised them of the rights of the Bank, of possible defenses, and of the consequences of entering into this Agreement. To my knowledge, the decision of the Bank to enter into this Agreement, based on the authorization of the Boards of Directors, is an informed and voluntary one.

Nothing in this Certificate is intended nor shall it be deemed as a waiver by the Bank of the attorney-client privilege or work product protection.

Date: December 10, 2012

By: David N. Kelley
David N. Kelley
Anirudh Bansal
Cahill Gordon & Reindel LLP
Counsel for HSBC Bank USA, N.A. and HSBC Holdings plc

By: Samuel W. Seymour
Samuel W. Seymour
Alexander J. Willscher
Sullivan & Cromwell LLP
Counsel for HSBC Bank USA, N.A. and HSBC Holdings plc

CBD:DSS/AAS
F.#2009R02380

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

- against -

HSBC BANK USA, N.A. and
HSBC HOLDINGS PLC,

Defendants.

- - - - - - - - - - - - - - - - - - - -X

INFORMATION

Cr. No. 12-763
(T. 18, U.S.C., §§ 2 and 3551 et seq.; T. 31, U.S.C., §§ 5318(h), 5318(i), 5322(b) and 5322(d); T. 50, U.S.C., §§ 1702 and 1705; T. 50, U.S.C. App., §§ 3, 5 and 16)

THE UNITED STATES CHARGES:

INTRODUCTION

At all times relevant to this Information, unless otherwise indicated:

1. Defendant HSBC Bank USA, N.A. was a federally chartered banking institution and subsidiary of HSBC North America Holdings, Inc. HSBC North America Holdings, Inc. was an indirect subsidiary of defendant HSBC Holdings plc.

2. Defendant HSBC Holdings plc was a financial institution holding company registered and organized under the laws of England and Wales.

3. Defendant HSBC Holdings plc, through its subsidiaries, conducted United States Dollar ("USD") clearing at

defendant HSBC Bank USA, N.A., as well as other financial institutions located in the United States.

4. Defendant HSBC Bank USA N.A. was subject to oversight and regulation by the Department of the Treasury, Office of the Comptroller of the Currency ("OCC").

THE BANK SECRECY ACT

5. The Bank Secrecy Act ("BSA"), Title 31 U.S.C. Sections 5311 et seq., and its implementing regulations, which Congress enacted to address an increase in criminal money laundering activities utilizing financial institutions, required domestic banks, insured banks and other financial institutions to maintain programs designed to detect and report suspicious activity that might be indicative of money laundering and other financial crimes, and to maintain certain records and file reports related thereto that are especially useful in criminal, tax or regulatory investigations or proceedings.

6. Pursuant to Title 31, United States Code, Section 5318(h)(1) and Title 12, Code of Federal Regulations, Section 21.21, defendant HSBC Bank USA, N.A. was required to establish and maintain an anti-money laundering ("AML") compliance program that, at a minimum:

(a) provided internal policies, procedures, and controls designed to guard against money laundering;

(b) provided for a compliance officer to coordinate and monitor day-to-day compliance with the BSA and AML requirements;

(c) provided for an ongoing employee training program; and

(d) provided for independent audit function programs.

7. Pursuant to Title 31, United States Code, Section 5318(i), defendant HSBC Bank USA, N.A. was required to establish due diligence, and in some cases enhanced due diligence, policies, procedures and controls that were reasonably designed to detect and report suspicious activity for correspondent accounts it maintained in the United States for non-U.S. persons.

THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

8. The International Emergency Economic Powers Act ("IEEPA"), Title 50, United States Code, Sections 1701 through 1706, authorized the President of the United States (the "President") to impose economic sanctions on a foreign country in response to an unusual or extraordinary threat to the national security, foreign policy or economy of the United States, when the President declared a national emergency with respect to that threat.

The Iranian Sanctions

9. On March 15, 1995, President William J. Clinton issued Executive Order No. 12957, finding that "the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" and declaring "a national emergency to deal with that threat."

10. On May 6, 1995, President Clinton issued Executive Order 12959 to take additional steps with respect to the national emergency declared in Executive Order 12957 and impose comprehensive trade and financial sanctions on Iran. These sanctions prohibited, among other things, the exportation, re-exportation, sale and transportation, directly or indirectly, to Iran or the Government of Iran of any goods, technology or services from the United States or United States persons, wherever located. This prohibition included any transactions or financing of transactions by United States persons relating to goods or services of Iranian origin, and further prohibited any "transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding" such sanctions. On August 19, 1997, President Clinton issued Executive Order 13059 consolidating and clarifying Executive Orders 12957 and 12959 (collectively, the "Iranian

Executive Orders"). The Iranian Executive Orders authorized the United States Secretary of the Treasury to promulgate rules and regulations necessary to carry out the Iranian Executive Orders. Pursuant to this authority, the Secretary of the Treasury promulgated the Iranian Transaction Regulations ("ITRs"), Title 31, Code of Federal Regulations, Part 560, implementing the sanctions imposed by the Iranian Executive Orders.

11. With the exception of certain exempt transactions, the ITRs prohibited, among other things, U.S. depository institutions from servicing Iranian accounts and directly crediting or debiting Iranian accounts. The ITRs also prohibited transactions by any U.S. person who evaded or avoided, had the purpose of evading or avoiding, or attempted to evade or avoid the restrictions imposed under the ITRs. The ITRs were in effect at all times relevant to the Information.

The Libyan Sanctions

12. On January 7, 1986, President Ronald W. Reagan issued Executive Order No. 12543, which imposed broad economic sanctions against Libya. One day later, President Reagan issued Executive Order No. 12544, which also ordered the blocking of all property and interests in property of the Government of Libya in the United States or under the possession or control of United States persons. President George H.W. Bush strengthened those

sanctions in 1992 pursuant to Executive Order No. 12801. These sanctions remained in effect until September 22, 2004, when President George W. Bush issued Executive Order 13357, which terminated the national emergency with regard to Libya and revoked the sanction measures imposed by the prior Executive Orders.

The Sudanese Sanctions

13. On November 3, 1997, President Clinton issued Executive Order No. 13067, which imposed a trade embargo against Sudan and blocked all property and interests in property of the Government of Sudan in the United States or under the possession or control of United States persons. President George W. Bush strengthened those sanctions in 2006 pursuant to Executive Order No. 13412 (collectively, the "Sudanese Executive Orders"). The Sudanese Executive Orders prohibited virtually all trade and investment activities between the United States and Sudan, including, but not limited to, broad prohibitions on: (a) the importation into the United States of goods or services of Sudanese origin; (b) the exportation or re-exportation of any goods, technology or services from the United States or by a United States person, wherever located, to Sudan; (c) trade and service related transactions with Sudan by United States persons, including financing or facilitating such transactions; and (d)

the grant or extension of credits or loans by any United States person to the Government of Sudan. The Sudanese Executive Orders further prohibited "[a]ny transaction by a United States person or within the United States that evades or avoids, has the purposes of evading or avoiding, or attempts to violate any of the prohibitions set forth in [these orders]." With the exception of certain exempt or authorized transactions, the United States Department of Treasury, Office of Foreign Assets Control ("OFAC") regulations implementing the Sudanese Sanctions generally prohibited the export of services to Sudan from the United States.

The Burmese Sanctions

14. On May 20, 1997, President Clinton issued Executive Order No. 13047, which prohibited both new investment in Burma by United States persons and the approval or other facilitation by a United States person, wherever located, of a transaction by a foreign person where the transaction would constitute new investment in Burma.

15. On July 28, 2003, President George W. Bush signed the Burmese Freedom and Democracy Act of 2003 ("BFDA") to restrict the financial resources of Burma's ruling military junta. To implement the BFDA and to take additional steps, President Bush issued Executive Order No. 13310 on July 28, 2003,

which blocked all property and interest in property of other individuals and entities meeting certain criteria. President Bush subsequently issued Executive Order Nos. 13448 and 13464, expanding the list of persons and entities whose property must be blocked. Executive Order No. 13310 also prohibited the exportation or re-exportation, directly or indirectly, to Burma of financial services from the United States, or by United States persons, wherever located, as well as the financing or facilitation, by a United States person, of any prohibited transaction with Burma by a foreign person.

THE TRADING WITH THE ENEMY ACT

16. Beginning with Executive Orders and regulations issued at the direction of President John F. Kennedy, the United States has maintained an economic embargo against Cuba through the enactment of various laws and regulations. These laws, which prohibited virtually all financial and commercial dealings with Cuba, Cuban businesses and Cuban assets, were promulgated under the Trading With the Enemy Act ("TWEA"), Title 50, United States Code Appendix, Sections 1-44, and were generally administered by OFAC.

17. Unless authorized by OFAC, the Cuban Assets Control Regulations ("CACRs") prohibited persons subject to the jurisdiction of the United States from engaging in financial

transactions involving or benefiting Cuba or Cuban nationals, including all "transfers of credit and all payments" and "transactions in foreign exchange." Title 31, Code of Federal Regulations, Sections 515.201(a)(1) and 515.201(a)(2). Furthermore, unless authorized by OFAC, persons subject to the jurisdiction of the United States were prohibited from engaging in transactions involving property in which Cuba or Cuban nationals have any direct or indirect interest, including "[a]ll dealings in . . . any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States" and "[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States." 31 C.F.R. §§ 515.201(b)(1), 515.201(b)(2). The CACRs also prohibited "[a]ny transaction for the purpose or which had the effect of evading or avoiding any of the prohibitions set forth in [the regulations]." 31 C.F.R. § 515.201(c).

COUNT ONE
(Failure to Maintain an Effective Anti-Money Laundering Program)

18. The allegations contained in paragraphs one through seven are realleged and incorporated as if fully set forth in this paragraph.

19. In or about and between January 2006 and December 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Bank USA, N.A., a domestic financial institution, wilfully violated the Bank Secrecy Act, Title 31, United States Code, Sections 5318(h) and 5322(b), by failing to develop, implement and maintain an effective anti-money laundering program.

20. Specifically, the defendant HSBC Bank USA, N.A. knowingly and wilfully failed to implement and maintain effective policies, procedures and internal controls to: (a) obtain and maintain due diligence or "know your customer" information on financial institutions owned by HSBC Holdings plc; (b) monitor wire transfers from customers located in countries which it classified as "standard" or "medium" risk; (c) monitor purchases of physical U.S. dollars ("banknotes") from financial institutions owned by HSBC Holdings plc; and (d) provide adequate staffing and other resources to maintain an effective anti-money laundering program.

(Title 31, United States Code, Sections 5318(h) and 5322(b); Title 18 United States Code, Sections 3551 et seq.)

COUNT TWO
(Failure to Conduct Due Diligence on Correspondent Bank Accounts Involving Foreign Persons)

21. The allegations contained in paragraphs one through seven are realleged and incorporated as if fully set forth in this paragraph.

22. In or about and between January 2006 and December 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Bank USA, N.A., a domestic financial institution, wilfully violated the Bank Secrecy Act, Title 31, United States Code, Sections 5318(i) and 5322(d), by failing to conduct due diligence on correspondent bank accounts for non-United States persons.

23. As part of this offense, the defendant HSBC Bank USA, N.A. knowingly and wilfully failed to obtain and maintain due diligence or "know your customer" information on foreign financial institutions owned by HSBC Holdings plc for which it maintained correspondent accounts, information that if collected and maintained would have reasonably allowed for the detection and reporting of instances of money laundering and other suspicious activity.

(Title 31, United States Code, Sections 5318(i) and 5322(d); Title 18 United States Code, Sections 3551 et seq.)

COUNT THREE
(International Emergency Economic Powers Act)

24. The allegations contained in paragraphs one through four and eight through fifteen are realleged and incorporated as if fully set forth in this paragraph.

25. In or about and between January 2001 and December 2006, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Holdings plc, together with others, knowingly, intentionally and wilfully facilitated prohibited transactions for sanctioned entities in Iran, Libya, Sudan and Burma.

(Title 50, United States Code, Sections 1702 and 1705; Title 18 United States Code, Sections 2 and 3551 et seq.)

COUNT FOUR
(Trading with the Enemy Act)

26. The allegations contained in paragraphs one through four and sixteen through seventeen are realleged and incorporated as if fully set forth in this paragraph.

27. In or about and between January 2001 and December 2006, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant HSBC Holdings plc, together with others, knowingly, intentionally and

wilfully facilitated transactions for sanctioned entities in Cuba.

(Title 50, United States Code Appendix, Sections 3, 5 and 16; Title 18 United States Code, Sections 2 and 3551 et seq.)

12/11/2012
DATE

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

12/11/2012
DATE

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture and
Money Laundering Section
Criminal Division
Department of Justice

12/10/2012
DATE

WILLIAM J. IHLENFELD II
United States Attorney
Northern District of West Virginia

AO 455 (Rev. 5/85) Waiver of Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK (BROOKLYN)

UNITED STATES OF AMERICA

V.

WAIVER OF INDICTMENT

HSBC Bank, et al

CASE NUMBER: 12 CR 763

I, HSBC Bank, et al, the above named defendant, who is accused of

being advised of the nature of the charge(s), the proposed information, and of my rights, hereby waive in open court on Dec. 20, 2012 (Date) prosecution by indictment and consent that the proceeding may be by information rather than by indictment.

HSBC Bank USA, N.A and HSBC Holdings PLC.
Defendant

Counsel for Defendant

Before s/John Gleeson
Judicial Officer

Shamrock Consulting Group
707 Intrepid Way
Davidsonville, MD 21035
May 24, 2013

The Honorable John Gleeson
U.S. District Court for the Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

12CR763

Dear Judge Gleeson:

Thank you for considering overturning the DPA with HSBC. As an anti-money laundering and financial crime specialist, it has been extremely frustrating to me to see financial institutions get away with only paying fines for their criminal behavior. In response to the HSBC agreement and the Permanent Subcommittee's 2012 report, I wrote an article for the Association of Certified Financial Crime Specialists called *Criminal Intent*. Here is the link: http://www.financialcrimeconference.com/wp-content/uploads/2012/09/marie-kerr-1.pdf; attached is a copy.

Perhaps my 12 years of Catholic school inform my abhorrence of letting the bad guys win. In any case, I believe we must prevent further moral hazard by not allowing criminal activity to go unpunished. DPAs seem to be the cost of doing business and the "lapses" continue.

In your position, I understand you will appoint a person to oversee the remediation of HSBC's poor controls, and that this individual will likely be an attorney. While this is important, I also believe oversight is needed of the many back-office functions and software applications that support the detection of money laundering and fraud. That is my specialty—for over 30 years. Please consider that a deep understanding of *how* things work is also important. I would gladly help, and I've enclosed my resume.

Thanks again for your courageous stand against egregious malfeasance by international financial institutions.

Respectfully,

Marie Kerr
Founder

CRIMINAL INTENT
A Consultant's Lament

To call recent bank transgressions "compliance failures" is an insult to those of us who work in the industry. Criminal intent is the only take-away from anyone, like me, who has worked in banking, anti-money laundering (AML), software creation, audit readiness, compliance and process engineering. Blaming "the system" is a typical excuse, as is "we need better training (of our low-level back-office staff)." No, as the HSBC report clearly shows, the bank knew exactly what it was doing. And it wasn't just skirting Bank Secrecy Act (BSA) or AML mandates, it *actively* helped run criminal enterprises by hiding their egregious transactions from scrutiny. HSBC isn't alone here; it shares the following modus operandi (MO) with a long list of financial institutions:

1. Wire stripping—data elements from wire transfers were removed before being sent on to other banks AND from the download sent to the detection/transaction monitoring system(s). The banks knowingly removed data that would identify banned countries or people. This effectively disabled the detection systems because what isn't captured isn't monitored.
2. Risk assessments—the bank assigned low-risk scores to countries and customers that did not pass the most rudimentary smell test. This also disabled the detection systems as risk scores are integral to analytic algorithms. Wire stripping + low-risk scores = junk from the detection system. OK, some structuring might be found, but money laundering, terrorist financing and tax evasion from KNOWN bad guys[1] would not.
3. Organizational bullying—despite pleas from people within the company who knew these things were wrong, they were: dismissed, ignored, reassigned.
4. Revolving door—an adjunct to organizational bullying. A "Who's on First" scorecard is always needed in megabanks, but these banks made keeping up with the scorecard next to impossible.
5. Temporary Organizational Units—ad-hoc groups such as committees, task forces and project teams can often serve to obfuscate. While they may be tasked with "figuring this mess out" they have no real authority and may be the dupes of the bank leaders.
6. Lax oversight—not the topic here, but significant in its enormity.
7. Consultants and more consultants—one of a consultant's mantras might be "you take the glory and I'll take the money," but when financial institutions are guilty of criminal intent, the bank's mantra becomes "you take the blame because you're the expert." Financial institutions whose crimes match the MO of HSBC were filled with big-name consultancies, experts in their field, unjustly maligned. Consultants were also shown the revolving door.

Because one of the topics of the International Financial Crime Conference & Exhibition[2] is "Guarding against the Enemy Within" I think it is only fair that we point to the willful

[1] Catch-all term for money launderers, terrorists and tax evaders.
[2] Annual conference of the Association of Financial Crime Specialists (ACFCS)

acts of C-Suite executives as the perpetrators of these egregious 'lapses." The best process and IT controls are useless against a loss-of-job threat. If controls and their documentation are in all the right places—and that is possible—then only an override of the control(s) can explain the "lapse."

Overrides are cousins to "walk-throughs," something I discovered early in my career. A C-suite executive has an important client (or need) that has to be done NOW, so policies and procedures are pushed aside. This executive typically has employment power over all concerned and only needs to state a broad reason for the override. And the lower the level of the person performing the override, the less likely they are to speak up. Here's an example: C-Suite Guy asks a wires clerk to not enter certain data for international wires[3]. Perhaps the reason is "they're swamped, understaffed." The low-level person accepts this and no one is the wiser. Policies and procedures remain intact and an audit might only reveal that this back-office employee needs more training.

Detection systems are not rocket science, the concept of controls is not new nor is linking policies to procedures and documentation. Best practices for all of these things are common: anti-money laundering, project management, e-discovery, business process modeling, fraud examination, etc. Did all of these banks have 'lapses" because of poor staffing? No, the regulations are clear (there's no ambiguity re bulk cash movement) and expertise abounds.

As a fraud/AML/IT specialist and a writer I would love to point out how these cases could have been avoided. But it's hard to make a case for controls, training, new systems, etc., when what I is see is gross misconduct and criminal intent—actions made by *people*. It's hard to guard against this level of "enemy within."

[3] Some wire data is still manually entered and these can be important fields for analyzing. Hidden codes, such as "FFC abcllc" might indicate that a company called ABC, LLC is the actual beneficiary. Or, "boo abcllc" could mean that the company is the actual originator. FFC means "for further credit; BOO means "by order of." There are more hidden but meaningful codes within free-text fields.

MARIE G. KERR, CFCS, PMP

707 Intrepid Way, Davidsonville, MD 21035 (410) 353-4414
mkerr@shamrockAML.com

EXECUTIVE SUMMARY

Financial industry veteran with a deep understanding of how financial institutions work, specializing in financial crime/fraud detection, anti-money laundering (AML), regulatory issues, compliance solutions, process design, data analytics, IT development/implementation. Practice includes both high-level advisory and hands-on expertise in the public and private sectors including:

- Risk analysis and mitigation
- Program development and project management
- Operational strategy development
- Vendor management, acquisition and competitive intelligence
- Gap and data analysis
- Forensic financial analysis

PROFESSIONAL EXPERIENCE

President **Shamrock Consulting Group**
2001 – Present **Washington, DC metro area**

Created consultancy offering unique competencies in technology, back/middle office, financial crime/fraud/AML detection and mitigation. Recent engagements include:

- *Litigation Support*—developed strategy and interrogatories for financial crime (fraud) case involving two large international banks;
- *Homeland Security Program Advisor and SME*—stood up a Know Your Customer (KYC)/Compliance/fraud detection program for a DHS program;
- *Bank Merger + Acquisition: IT and AML Advisor*—developed IT and AML integration plans for a three-bank merger;
- *Forensic AML "Look-back"*—member of a forensic AML investigation with a concentration on due diligence of parties and counterparties in wire transfer transactions;
- *AML Program Assessment and Development—International Gaming Company*—advised Mexico-based gaming company on their money laundering risks and mitigation strategies;
- *AML Product Assessment for Large Vendor*—created product strategy and competitive assessment for a major transaction monitoring vendor experiencing slowing sales;
- *AML Program and Risk Assessment*—assessed Bank Secrecy Act/AML compliance for a large mortgage financing company (now infamous);
- *Project Manager for AML Transaction Monitoring systems*—implemented several commercial off-the-shelf (COTS) AML transaction monitoring/ case management systems.

Program Manager **ACI Worldwide, New York, NY**
1997 – 2000

Project expert and champion for my Regulation E software creation, Claim*Track*, after the product was purchased by ACI. As Program Manager, exhibited product; created sales and marketing collateral; trained staff; and worked with other vendors to create new solutions using Claim*Track* as the base technology. Claim*Track* is still being sold by ACI under the name ACI Claims Manager.

Co-Founder and COO **Shamrock Systems Corporation, Crofton, MD**
1988 – 1997
Designed, developed, marketed and supported Claim*Track*, the first COTS product for debit card claims, adjustments, chargebacks and Regulation E compliance. The software included case management, fraud detection and compliance functionality; it was used by over 100 financial institutions worldwide, including Bank of America, Washington Mutual and Citibank. Responsible for identifying marketing venues, advertising strategy, functional enhancements and customer satisfaction. Sold the company and product to ACI Worldwide in 1997.

1979 – 1988 **Riggs Bank N.A., Washington, DC**
Vice President and Manager, Electronic Banking
Implemented technical infrastructure and processes for Riggs' entrance into regional and international debit card networks; member of networks' operating committees; member of American Bankers Association (ABA) conference development committees.
Assistant Vice President, Business Systems Analysis
Managed staff of internal consultants and Project Managers during period of rapid growth, organizational change and new technologies.

EDUCATION

Cornell University, BS, Economics
Kellogg School of Management, Northwestern University, 1 year of MBA coursework

DISTINCTIONS/CERTIFICATIONS/MEMBERSHIPS

Certified Financial Crime Specialist (CFCS)
Certified Anti-Money Laundering Specialist (CAMS)
Certified Project Management Professional (PMP)
Cornell Alumni Admissions Ambassador Network (CAAAN)

PUBLICATIONS (Partial List)

- *Criminal Intent,* Association of Certified Financial Crime Specialists (ACFCS), 2012
- *Anatomy of Financial Crime through the Lens of IT Systems,* ACFCS webinar, 2012
- *How Back Office Processes can sabotage even the best Transaction Monitoring Systems,* Money Laundering Alert, June, 2007
- *The Infrastructure of Compliance—Building a Bridge to Vendor BSA/AML Solutions,* Money Laundering Alert conference paper, 2005
- *It's All about the Data,* ACAMS Anti-Money Laundering Technology Resource Directory, 2003-2004

SPEAKING ENGAGEMENTS (Partial List)

- **ACFCS International Financial Crime Conference**, 2012
- **10th and 12th Annual International Money Laundering Conference & Exhibition,** 2005 and 2007; Featured Speaker in 2007
- **Financial Markets World:** *AML in the Securities and Investments Industries*, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, - versus - HSBC BANK USA, N.A. AND HSBC HOLDINGS PLC, Defendants.	MEMORANDUM AND ORDER 12-CR-763

JOHN GLEESON, United States District Judge:

On December 11, 2012 the government filed an Information charging HSBC Bank USA, N.A. ("HSBC Bank USA") with violations of the Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311 *et. seq.*, including, *inter alia*, willfully failing to maintain an effective anti-money laundering ("AML") program. *See* Information, ECF No. 3-1. The Information also charges HSBC Holdings plc ("HSBC Holdings") with willfully facilitating financial transactions on behalf of sanctioned entities in violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1702 & 1705, and the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 3, 5, 16. *See id.*

On the same day the government filed the Information, it also filed a Deferred Prosecution Agreement ("DPA"), a Statement of Facts, and a Corporate Compliance Monitor agreement. The government filed these documents as exhibits to a letter application requesting that the Court hold the case in abeyance for five years in accordance with the terms of the DPA and exclude that time pursuant to 18 U.S.C. § 3161(h)(2) from the 70-day period within which trial must otherwise commence.[1] Gov't Letter, Dec. 11, 2012, ECF No. 3. The DPA provides

[1] HSBC Bank USA and HSBC Holdings joined in the government's application.

16-308(L)
United States v. HSBC Bank USA, N.A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: March 1, 2017 Decided: July 12, 2017)

Docket Nos. 16-308(L), 16-353, 16-1068, 16-1094

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-- v. --

HSBC BANK USA, N.A., and HSBC HOLDINGS PLC,

Defendants-Appellants,

HUBERT DEAN MOORE, JR.,

Appellee.

Before:

KATZMANN, *Chief Judge*, POOLER, and LYNCH, *Circuit Judges*.

In December 2012, the government entered into a five-year deferred prosecution agreement (the "DPA") with HSBC Holdings plc and HSBC Bank, USA, N.A. (collectively, "HSBC"), deferring prosecution of charges under the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act. The DPA provided for the appointment of an independent monitor charged with preparing periodic reports on HSBC's ongoing compliance with anti-money laundering laws and with the DPA itself. When the parties moved to exclude time under the Speedy Trial Act, the district court concluded that it had supervisory authority to approve or reject the DPA and conditioned its approval of the DPA on its own continued monitoring of the DPA's implementation. In the exercise of that asserted supervisory authority, the district court later ordered the government to file an annual report prepared by the monitor (the "Monitor's Report") regarding HSBC's compliance efforts. The government did so. In November 2015, the district court received a letter from a member of the public, which it construed as a motion to unseal the Monitor's Report. The district court granted the motion, subject to redactions, finding that the Monitor's Report was a judicial document to which the public enjoyed a qualified First Amendment right of access. HSBC and the government appealed the district court's unsealing and redaction orders, which the district court stayed pending appeal.

We hold that the Monitor's Report is not a judicial document because it is not now relevant to the performance of the judicial function. *First*, the district court misapprehended its supervisory authority. By *sua sponte* invoking its supervisory power at the outset of this case to oversee the government's entry into and implementation of the DPA, the district court impermissibly encroached on the Executive's constitutional mandate to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In the absence of a showing of impropriety, a district court has no authority to supervise the implementation of a DPA. To hold otherwise would be to turn the presumption of regularity on its head. *Second*, the Monitor's Report is not relevant to the district court's role under the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(2). Section 3161(h)(2) excludes from the speedy trial clock "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). We hold that

the statute's requirement of court approval does not imbue the judiciary with ongoing authority to oversee a DPA, but rather authorizes courts to determine that a DPA is genuine and not merely a means of circumventing the speedy trial clock. *Third*, though the Monitor's Report *might* one day be relevant to the judicial function, that is not sufficient to render the Monitor's Report a "judicial document" today. Accordingly, we reverse.

JUDGE POOLER concurs in a separate opinion.

JENNY C. ELLICKSON (Kenneth A. Blanco and Sung-Hee Suh, Deputy Assistant Attorneys General; M. Kendall Day, Chief, Asset Forfeiture and Money Laundering Section; Laura Billings, Trial Attorney, Asset Forfeiture and Money Laundering Section, *on the brief*), U.S. Department of Justice, Criminal Division, Appellate Section, *for* Leslie R. Caldwell, Assistant Attorney General, Washington, DC; Julia Nestor and Alexander A. Solomon (*on the brief*), Assistant United States Attorneys for the Eastern District of New York, *for* Robert L. Capers, United States Attorney for the Eastern District of New York.

PAUL D. CLEMENT (Viet D. Dinh, Jeffrey M. Harris, Megan M. Wold, Christopher G. Michel, *on the brief*), Kirkland & Ellis LLP, Washington, DC; Samuel W. Seymour and Alexander J. Willscher (*on the brief*), Sullivan & Cromwell LLP, New York, NY; Jeffrey B. Wall (*on the brief*), Sullivan & Cromwell LLP, Washington, DC, *for Defendants-Appellants.*

DAVID A. SCHULZ (Thomas B. Sullivan, Maxwell S. Mishkin, *on the brief*), Levine Sullivan Koch & Schulz, LLP, New York, NY, *for Appellee*.

Kevin W. Goering, Norwick, Schad & Goering, New York, NY, *for Amicus Curiae* Brandon L. Garrett, *in support of Appellee*.

Dennis M. Kelleher, Better Markets, Inc., Washington, DC, *for Amicus Curiae* Better Markets, Inc., *in support of Appellee*.

Bruce D. Brown (Gregg P. Leslie, D. Victoria Baranetsky, *on the brief*), The Reporters Committee for Freedom of the Press, Washington, DC, *for Amici Curiae* The Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, CNBC, Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Forbes Media LLC, The Foundation for National Progress, Gannett Co., Inc., Hearst Corporation, International Documentary Assn., Investigative Reporting Workshop at American University, Digital First Media, MPA – The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, The New York Times Company, The Newspaper Guild Communications Workers of America, Online News Association, Reporters Without Borders, Seattle Times Company, Tully Center for Free Speech, and National Public Radio, Inc., *in support of Appellee*.

KATZMANN, *Chief Judge*:

We are called upon in this case to address the role of a district court in monitoring the implementation of a deferred prosecution agreement. In December 2012, plaintiff-appellant the United States entered into a five-year deferred prosecution agreement (the "DPA") with defendants-appellants HSBC Holdings plc and HSBC Bank, USA, N.A. (collectively, "HSBC"), deferring prosecution of charges under the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act. The still-pending agreement provides that if HSBC complies with its extensive obligations under

the DPA, the government will seek the dismissal of those charges at the conclusion of the DPA's term. If, on the other hand, HSBC breaches the DPA, the government may seek to convict HSBC on the deferred charges. To inform that determination, the DPA provides for the appointment of an independent monitor charged with preparing periodic reports on HSBC's ongoing compliance with anti-money laundering laws and with the DPA itself.

When the government and HSBC jointly moved for a speedy trial waiver, the district court (Gleeson, *J.*) invoked its supervisory power both to review and "approve" the DPA on its merits and to condition its approval on the court's monitoring of the DPA's implementation. In the exercise of that asserted authority, the district court subsequently ordered the government to file a confidential report prepared by the independent monitor regarding HSBC's compliance with the DPA (the "Monitor's Report"). In November 2015, appellee Hubert Dean Moore, Jr., a member of the public, moved to unseal the Monitor's Report. The district court granted the motion, subject to redactions, finding that the Monitor's Report was a "judicial document" to which the public enjoyed a qualified First Amendment right of access. The government and HSBC appeal the district court's unsealing and redaction orders, arguing that the district court

ran afoul of separation of powers principles in involving itself in the implementation of the DPA.

We agree. By *sua sponte* invoking its supervisory power at the outset of this case to oversee the government's entry into and implementation of the DPA, the district court impermissibly encroached on the Executive's constitutional mandate to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In the absence of evidence to the contrary, the Department of Justice is entitled to a presumption of regularity—that is, a presumption that it is lawfully discharging its duties. Though that presumption can of course be rebutted in such a way that warrants judicial intervention, it cannot be preemptively discarded based on the mere theoretical possibility of misconduct. Absent unusual circumstances not present here, a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise. Because the Monitor's Report is not now relevant to the performance of the judicial function, it is not a "judicial document" and the district court erred in ordering it unsealed. Accordingly, we reverse.

BACKGROUND

A. The DPA

HSBC Holdings plc ("HSBC Holdings"), incorporated and headquartered in England, is the ultimate parent company of one of the largest banking and financial services groups in the world. HSBC Bank USA, N.A., headquartered in the United States, is a federally chartered banking institution and an indirect subsidiary of HSBC Holdings.

In December 2012, following an investigation that lasted more than four years, the United States entered into a five-year deferred prosecution agreement with HSBC. *See* Joint App. 30–104. Under a typical DPA with a corporate defendant, the defendant admits to a statement of facts, submits to the filing of criminal charges against it on the basis of those facts, and agrees to a forfeiture or fine and to institute remedial measures. In exchange, the government agrees to defer prosecution and to ultimately seek dismissal of all charges if the defendant complies with the DPA. If the government determines that the defendant has breached the DPA, however, the government may rip up the agreement and pursue the prosecution.

The government's DPA with HSBC followed this framework. As contemplated by the DPA, the government filed a four-count criminal information (the "Information") charging HSBC Bank, USA, N.A. with willfully violating the Bank Secrecy Act by failing to develop, implement, and maintain an effective anti-money laundering program (Count 1) and by failing to conduct due diligence on correspondent bank accounts held on behalf of foreign persons (Count 2). As a result of these failures, some $881 million in drug trafficking proceeds were laundered through HSBC Bank USA, N.A. The government also charged HSBC Holdings with violating U.S. sanctions laws by willfully facilitating financial transactions in the United States for various sanctioned entities, in violation of the International Emergency Economic Powers Act (Count 3), and with willfully facilitating financial transactions for sanctioned entities in Cuba, in violation of the Trading with the Enemy Act (Count 4). In addition, HSBC admitted to a 30-page Statement of Facts and agreed to forfeit $1.256 billion to the United States.

HSBC further agreed to continue to cooperate fully with the government and to adopt (or continue to adhere to) dozens of measures designed to remediate the deficiencies in its compliance program. To that end, HSBC

Holdings agreed to retain an independent compliance monitor (the "Monitor") to be approved by the government. As set forth in an attachment to the DPA, the Monitor is charged with "evaluat[ing] . . . the effectiveness of the internal controls, policies and procedures of HSBC Holdings and its subsidiaries . . . as they relate to [those entities'] ongoing compliance with the Bank Secrecy Act, International Emergency Economic Powers Act, Trading With The Enemy Act and other applicable anti-money laundering laws . . ., as well as [with] the enumerated remedial measures [in the DPA]." DPA, Attach. B ¶ 1. The DPA requires the Monitor to submit periodic reports to HSBC and the government detailing his findings and making recommendations designed to improve HSBC's compliance with the DPA and with anti-money laundering laws generally. By the terms of the DPA, the Monitor's reports are intended to remain non-public.

Finally, the DPA provides that the government will seek to dismiss the Information with prejudice at the conclusion of the DPA's term if the government determines that HSBC has fully complied with the DPA. If, on the other hand, the government "determines, in its sole discretion, that [HSBC] ha[s] (a) committed any crime under U.S. federal law subsequent to the signing of

th[e] [DPA], (b) at any time provided in connection with th[e] [DPA] deliberately false, incomplete, or misleading information, or (c) otherwise breached the [DPA]," all bets are off and the government may pursue the deferred charges. DPA ¶ 16.

B. Proceedings Before the District Court

For a DPA to function as intended, the parties must obtain an exemption from the Speedy Trial Act's general requirement that a criminal trial "begin within 70 days after a defendant is charged or makes an initial appearance." *Zedner v. United States*, 547 U.S. 489, 492 (2006) (citing 18 U.S.C. § 3161(c)(1)). Absent such an exemption, the logic of any DPA would unravel, as the filed charges would be subject to mandatory dismissal once the 70-day period had run. *See* 18 U.S.C. § 3162(a)(2) (providing that "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant"). Congress anticipated this problem and excluded from the speedy trial clock "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant,

with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2).

Accordingly, when the government filed the Information and the DPA with the district court, the government and HSBC jointly requested that the district court "place th[e] matter into abeyance for a period of sixty months and exclude that time" under the Speedy Trial Act. Joint App. 15. At a subsequent hearing at which the defendants entered pleas of not guilty, the district court asked counsel "what [they] contemplated of the Court's participation, if any, in the proceedings as they go forward." *Id.* at 109. The government responded that it "had not asked the Court to actively take part in overseeing the deferred prosecution agreement," but instead "simply asked the Court to accept the information for filing and [to] exclude time during the period of the deferred prosecution agreement." *Id.* The district court asked the parties to put in submissions explaining why the court should accept the DPA. At the time it made this request, the district court was operating under the misconception that the DPA was "really a plea agreement in the form of an 11C1A charge bargain," *id.*, and that the United States Sentencing Guidelines therefore instructed it to consider whether the "charges adequately reflect[ed] the seriousness of the

actual offense behavior and [whether] accepting the agreement [would] undermine the statutory purposes of sentencing or the sentencing guidelines," *id.* at 110. In their resulting submissions, both the government and HSBC took the position that Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure did not apply and that the district court's authority at this juncture was limited to determining whether to exclude time under 18 U.S.C. § 3161(h)(2).

1. The July 1, 2013 Approval Order

On July 1, 2013, the district court issued a Memorandum and Order granting the parties' request to hold the case in abeyance pursuant to the Speedy Trial Act and "approv[ing] the DPA pursuant to the Court's supervisory power." *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013) ("Approval Order"). After concluding that Rule 11(c)(1)(A) did not apply because the defendants had not entered pleas of guilty or *nolo contendere*, the district court turned to the text of the Speedy Trial Act, noting that the statute is "silent as to the standard the court should employ when evaluating whether to grant 'approval' to a deferred prosecution agreement under 18 U.S.C. § 3161(h)(2)." *Id.* at *3. Based on its review of legislative history, however, the district court surmised that "§ 3161(h)(2) appears to instruct courts

to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date." *Id.*

The district court harbored no doubt that the DPA was truly about deferring prosecution. *Id.* Nevertheless, it concluded that it had the authority to approve or reject the DPA on the merits pursuant to its inherent supervisory power. *Id.* at *4. The exercise of such power was appropriate, the district court reasoned, because "it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court." *Id.* at *6. Though the district court "recognize[d] that the exercise of supervisory power in this context [was] novel" and that any such power must be limited, *id.*, it believed its supervisory power was plainly implicated by virtue of the government filing criminal charges in federal court:

> [F]or whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant. By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.

> . . . The inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety. . . . The parties have asked the Court to lend precisely such a judicial imprimatur to the DPA, by arranging for its implementation within the confines of a pending case. The Court will therefore exercise its supervisory authority over the DPA.

Id. at *5–6 (footnote omitted).

Having determined that it had supervisory power over the DPA, the district court "approve[d] the DPA . . . subject to [the court's] continued monitoring of its execution and implementation." *Id.* at *7. Pursuant to the court's declared supervisory power "to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court," the district court directed the parties "to file quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA." *Id.* at *11.

2. The Monitor's Report

Beginning in September 2013, in compliance with the district court's Approval Order, the government began filing quarterly letters with the district court apprising the court of the Monitor's progress and findings. The government's April 2015 quarterly report advised the district court that the

Monitor had submitted his first annual follow-up report (which, again, we refer to here as the "Monitor's Report") and described the Monitor's findings in some detail. The government noted that though the Monitor believed that HSBC was acting in good faith and making meaningful progress in developing an effective compliance program, he also believed that "in certain instances . . . [HSBC's] progress ha[d] been too slow" and that HSBC "ha[d] a substantial amount of work left to do to implement its written policies." Joint App. 181. The government also relayed the Monitor's finding that senior managers at one HSBC business line had failed to properly cooperate with internal compliance reviews, and the government outlined the steps HSBC was taking to address the situation. On April 28, 2015, the district court ordered the government to file the Monitor's Report with the court.

The government sought leave to file the Monitor's Report under seal, citing confidentiality considerations and concerns that public disclosure of the Monitor's Report would undermine the effectiveness of the Monitor and serve as a road map for criminals who wished to exploit vulnerabilities in HSBC's compliance regime. The district court initially accepted the filing of the Monitor's Report under seal. In November 2015, however, Hubert Dean Moore, Jr., a

member of the public, filed a *pro se* letter with the district court suggesting that the Monitor's Report might be relevant to a complaint he had filed against HSBC with the Consumer Financial Protection Bureau. The district court entered an order construing Moore's letter as a motion to unseal the Monitor's Report. Both the government and HSBC filed letters opposing unsealing.

3. The January 28, 2016 Unsealing Order and the March 9, 2016 Redaction Order

On January 28, 2016, the district court issued a Memorandum and Order granting Moore's motion to unseal the Monitor's Report in part. In this Circuit, a document filed with the court is a judicial document subject to a presumptive right of access if it is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (internal quotation mark omitted). The district court determined that the Monitor's Report satisfied this test for two reasons. First, the Monitor's Report was relevant to the exercise of its supervisory power, as the court could not "perform [the] task" of "ensur[ing] that the DPA remains within the bounds of lawfulness and respects the integrity of th[e] Court . . . without receiving at least some updates from the parties about HSBC's compliance with the DPA." *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2016 WL

347670, at *3 (E.D.N.Y. Jan. 28, 2016) ("Unsealing Order"). Second, the Monitor's Report would be "be integral to the future resolution of the case." *Id.* In particular, if the government were to determine that HSBC breached the DPA and that the government would pursue the pending charges, the district court would oversee those proceedings. If, on the other hand, the government were to seek to dismiss the charges at the conclusion of the DPA's term, such a dismissal could only be effectuated under Federal Rule of Criminal Procedure 48 with leave of court. The decision whether to grant such leave, the district court reasoned, could not "properly be made without judicial review of the [Monitor's] Report." *Id.*

The district court then concluded that a qualified First Amendment right of public access attached to the Monitor's Report and that the confidentiality concerns articulated by the government and HSBC could be addressed with targeted redactions and by maintaining five of the Monitor's Report's six appendices under seal. To that end, the district court invited the parties to submit proposed redactions to the Monitor's Report, which the parties did. On March 9, 2016, the district court issued an order (the "Redaction Order") describing the

redactions it had made to the Monitor's Report and staying the unsealing of the Monitor's Report pending appellate review.

The government and HSBC timely appealed the Unsealing Order and the Redaction Order. Because the government and HSBC are aligned on this appeal, this Court granted Moore, who is now represented by *pro bono* counsel, leave to intervene as appellee.

DISCUSSION

I.

Before assessing the merits, we must first determine whether we have jurisdiction over this consolidated appeal of interlocutory orders.[1] Ordinarily, "interlocutory orders are not appealable as a matter of right." *United States v. Graham*, 257 F.3d 143, 147 (2d Cir. 2001) (internal quotation mark omitted). An exception to this rule is the collateral order doctrine, which provides that interlocutory orders are appealable if they: (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) will "be effectively unreviewable on appeal from a final judgment." *Id.* (internal quotation mark omitted). We find each criterion

[1] The parties agree that we have jurisdiction under the collateral order doctrine. That, of course, does not settle the issue, because "[j]urisdiction cannot be created by the consent of the parties." *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012).

met here. First, the challenged orders "conclusively determine the disputed question[s]" of whether the Monitor's Report is a judicial document and the extent to which it must be disclosed. *Id.* Second, the challenged orders "resolve an important issue completely separate from the merits of the action," as whether the Monitor's Report is a judicial document that must be unsealed has nothing to do with the merits of the underlying criminal charges. *Id.* Third, the challenged orders will "be effectively unreviewable on appeal from a final judgment," *id.* (internal quotation mark omitted), as "[o]nce the information is disclosed, the 'cat is out of the bag' and appellate review is futile." *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (invoking collateral order doctrine to exercise jurisdiction over appeal of order compelling government to share classified information with petitioners' counsel); *see also S.E.C. v. TheStreet.Com*, 273 F.3d 222, 228 (2d Cir. 2001) (finding interlocutory unsealing order "unreviewable on appeal from a final judgment" "because the alleged harm caused by disclosure . . . will be immediate and irreparable"); *Graham*, 257 F.3d at 147–48 (exercising jurisdiction pursuant to collateral order doctrine over appeal of district court's interlocutory order requiring government to release tapes to media).[2]

[2] Because we find that we have jurisdiction under the collateral order doctrine, we

II.

The threshold merits question in this case is whether the Monitor's Report is a judicial document, as only judicial documents are subject to a presumptive right of public access, whether on common law or First Amendment grounds.[3] *See Lugosch*, 435 F.3d at 119–20. Though we review the "ultimate decision to seal or unseal for abuse of discretion," we review the determination that the Monitor's Report is a judicial document *de novo*. *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016). In this Circuit, to qualify as a "judicial document" subject to a presumptive right of public access, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*").

The appellants contend that the Monitor's Report is not a judicial document, but rather an "executive document" designed to inform the executive branch's exercise of its prosecutorial discretion in determining whether to

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dismiss HSBC's petition for a writ of mandamus as moot.

[3] HSBC asserts that because the Monitor's Report is a confidential executive document, we should not even reach the question of whether the Monitor's Report is a judicial document. But HSBC cites no authority for the proposition that we can simply set aside the test for whether a given document constitutes a judicial document. To do so would be to assume the answer before undertaking the inquiry.

dismiss or pursue the deferred charges. That discretion, HSBC notes, flows from the Executive's duty under Article II of the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see also United States v. Huerta*, 878 F.2d 89, 92 (2d Cir. 1989) ("The Executive . . . has the exclusive authority to decide whether to prosecute . . . ."); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) ("Decisions to initiate charges, or to dismiss charges once brought, lie at the core of the Executive's duty to see to the faithful execution of the laws." (internal quotation marks and alteration omitted)). The appellants thus argue that the district court invaded the province of the Executive in preemptively invoking the court's supervisory authority to oversee the implementation of the DPA and the Monitor's work. Because the district court lacked the authority it claimed to have, the argument goes, the Monitor's Report cannot be a judicial document.

Moore and his amici, by contrast, assert that the Monitor's Report is relevant to the performance of the judicial function on four separate grounds. Specifically, they assert that the Monitor's Report is relevant to: (1) the district court's supervisory authority to approve and supervise the implementation of the DPA; (2) the district court's authority to approve the DPA under the Speedy

Trial Act; (3) the district court's assessment of any Rule 48(a) motion for dismissal that the government might bring at the conclusion of the DPA's term; and (4) the district court's adjudication of the proceedings in the event that the government alleges that HSBC breached the DPA. We analyze these proffered bases for treating the Monitor's Report as a judicial document in turn.

A. The District Court's Asserted Supervisory Power

The district court ordered the filing of the Monitor's Report for its review in the exercise of its stated supervisory power to monitor the implementation of the DPA and to condition its approval of the DPA on such monitoring. If the district court's conception of its supervisory power in this context were correct, the Monitor's Report would quite obviously "be relevant to the performance of the judicial function and useful in the judicial process." *Amodeo I*, 44 F.3d at 145. Thus, even though the appellants did not attempt to appeal the district court's Approval Order announcing its supervisory power over the DPA, whether the district court was correct to assert such a power is squarely at issue on this appeal. We hold that the district court erred in *sua sponte* invoking its supervisory power to monitor the implementation of the DPA in the absence of a showing of impropriety.

The supervisory power "permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). "The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted); *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) ("This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted." (footnote omitted)). Courts have also traditionally exercised their supervisory powers to establish rules of evidence and procedure to govern the administration of justice in the federal courts. *See, e.g.*, *McNabb*, 318 U.S. at 340–45 (holding that confessions obtained in violation of congressional requirement to promptly present defendant to court must be excluded, even though Congress had not explicitly forbidden the admission of such confessions); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("In

the exercise of its supervisory authority, a federal court may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." (internal quotation marks omitted)).

However, "[t]he supervisory power doctrine is an extraordinary one which should be 'sparingly exercised.'" *United States v. Jones*, 433 F.2d 1176, 1181–82 (D.C. Cir. 1970) (quoting *Lopez v. United States*, 373 U.S. 427, 440 (1963)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion."). As the district court recognized below, "[i]n the typical supervisory power case, the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety." *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *6; *see also United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000) ("[G]enerally the exercise of supervisory power arises in the context of requests by defendants to vacate convictions, dismiss indictments, or invalidate sentences . . . ." (citations omitted)). Indeed, "the federal judiciary's supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all." *United States v. Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir. 1983).

The district court justified its concededly "novel" exercise of supervisory power in this context by observing that "it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court." *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *6. We agree that it is not difficult to *imagine* such circumstances. But the problem with this reasoning is that it runs headlong into the presumption of regularity that federal courts are obliged to ascribe to prosecutorial conduct and decisionmaking. That presumption is rooted in the principles that undergird our constitutional structure. In particular, "because the United States Attorneys are charged with taking care that the laws are faithfully executed, there is a 'presumption of regularity support[ing] their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008) (alteration in original) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). In resting its exercise of supervisory authority on hypothesized scenarios of egregious misconduct, the district court turned this presumption on its head. *See HSBC Bank USA, N.A.*, 2013 WL

3306161, at *6 ("[C]onsider a situation where the current monitor needs to be replaced. What if the replacement's only qualification for the position is that he or she is an intimate acquaintance of the prosecutor proposing the appointment?" (citation omitted)). Rather than presume "in the absence of clear evidence to the contrary" that the prosecutors administering the DPA were "properly discharg[ing] their official duties," the district court invoked its supervisory power—and encroached on the Executive's prerogative—based on the mere theoretical possibility that the prosecutors might one day abdicate those duties. *Sanchez*, 517 F.3d at 671 (internal quotation mark omitted).

To be sure, in its history, this nation has not been free of executive misconduct and abuse of power. And if misconduct in the implementation of a DPA came to a district court's attention (for example, through a whistleblower filing a letter with the court), the district court might very well be justified in invoking its supervisory power *sua sponte* to monitor the implementation of the DPA or to take other appropriate action.[4] The point is not that the court can or

[4] Moore suggested at oral argument that such misconduct *had* come to the district court's attention via the government's April 2015 quarterly report, the filing of which precipitated the district court's order that the government file the Monitor's Report with the court. But by "misconduct," we do not mean revelations of the kind included in the April 2015 quarterly report regarding the pace of HSBC's remediation efforts and

should disregard governmental misconduct, but rather that a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct. *See Fokker Servs. B.V.*, 818 F.3d at 744 ("[A]lthough charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions."); *In re U.S.*, 503 F.3d 638, 641 (7th Cir. 2007) ("[A] judicial effort to supervise [a prosecutor's] process of reaching a decision intrudes impermissibly into the activities of the Executive Branch of government.").

In sum, because the district court has no freestanding supervisory power to monitor the implementation of a DPA, the Monitor's Report cannot be deemed "relevant to the performance of the judicial function" on that basis. *Lugosch*, 435 F.3d at 119.

B. The District Court's Role under the Speedy Trial Act

Amicus Curiae Professor Brandon Garrett suggests that the Monitor's Report is relevant to the district court's role under the Speedy Trial Act as specified by 18 U.S.C. § 3161(h)(2). Section 3161(h)(2) excludes from the speedy trial clock "[a]ny period of delay during which prosecution is deferred by the

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deficiencies in HSBC's corporate culture that HSBC leadership was working to address. We mean misconduct that smacks of impropriety.

attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2) (emphasis added). But what is it that courts are to approve and on what basis? On one hand, the text could be read to limit the court's inquiry to the issue of whether the parties' agreement is genuinely "for the purpose of allowing the defendant to demonstrate his good conduct"—that is, to the issue of whether the parties are acting in good faith. *Id.* On the other hand, at least in isolation, the text could plausibly be read to imbue courts with the authority to "approve" (or reject) a DPA as a public policy matter and to decline to grant a speedy trial waiver for virtually any reason.[5] Indeed, according to Professor Garrett, "whether to approve a DPA" pursuant to § 3161(h)(2) "is necessarily combined with substantive review of [the DPA] and is joined with ongoing supervision of the case." Amicus Br. of Prof. Brandon L. Garrett 26.

In *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), the D.C. Circuit confronted this interpretive question when the parties in that case appealed the district court's refusal to grant a speedy trial waiver based on its

[5] Of course, the district court granted the government and HSBC a speedy trial waiver well before the Monitor's Report even existed, so the Monitor's Report could not be deemed relevant to that initial determination.

view that the DPA at issue was too lenient. *See id.* at 737–38, 742–45. The D.C Circuit vacated the district court's order, reasoning that Congress, in enacting § 3161(h)(2), "acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions" and that "[n]othing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges." *Id.* at 738.

We agree. At least in the absence of any clear indication that Congress intended courts to evaluate the substantive merits of a DPA or to supervise a DPA's out-of-court implementation, the relative functions and competence of the executive and judicial branches counsel against Professor Garrett's interpretation. Subject to constitutional constraints, "[t]he Executive . . . has the exclusive authority to decide whether to prosecute and to choose among alternative charges." *Huerta*, 878 F.2d at 92 (citations omitted). There are good reasons for that delegation of authority: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made,

or whether to dismiss a proceeding once brought." *United States v. Ross*, 719 F.2d 615, 620 (2d Cir. 1983); *Holley v. Lavine*, 553 F.2d 845, 850 (2d Cir. 1977). As the Supreme Court has explained, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Put simply, our role is not to act as "superprosecutors," second-guessing the legitimate exercise of core elements of prosecutorial discretion, but rather as neutral arbiters of the law. *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (internal quotation marks omitted).

If, in the context of DPAs, Congress intended to rejigger the historical allocation of authority between the courts and the Executive, we would expect it to do so rather clearly. Congress, at least as a general matter, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). But Congress did not speak clearly in § 3161(h)(2)—far from it—and we thus decline to interpret that provision's vague "approval" requirement as imbuing courts with an ongoing oversight power over the government's entry

into or implementation of a DPA. Rather, we hold that § 3161(h)(2) authorizes courts to determine that a DPA is *bona fide* before granting a speedy trial waiver—that is, that the DPA in question is genuinely intended to "allow[] the defendant to demonstrate his good conduct," § 3161(h)(2), and does not constitute a disguised effort to circumvent the speedy trial clock. *See Fokker Servs. B.V.*, 818 F.3d at 744–45 (adopting this interpretation). As the D.C. Circuit reasoned in *Fokker*, such an interpretation accords with the ordinary distribution of power between the judiciary and the Executive in the realm of criminal prosecution.[6] *See id.* at 738, 741–45.

To the extent that Moore and Professor Garrett contend that the district court's mandate to assess the *bona fides* of a DPA survives as long as the DPA is pending—and that the Monitor's Report was relevant to this function—we are

[6] The D.C. Circuit in *Fokker*, like the district court here, also pointed to legislative history in support of its interpretation of § 3161(h)(2). In particular, the court noted that the Senate Committee Report accompanying the Speedy Trial Act explained that the purpose of the "approval" requirement was to "assure[] that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits." *Fokker Servs. B.V.*, 818 F.3d at 745 (quoting S. Rep. No. 93–1021, at 37 (1974)); *see also HSBC Bank USA, N.A.*, 2013 WL 3306161, at *3 (quoting same). While the Senate Committee Report reinforces the notion that Congress was concerned with potential abuse of DPAs as a means to circumvent the speedy trial clock, the Report's reference to a district court's "involv[ment] in the decision to divert" is opaque. S. Rep. No. 93–1021, at 37. By our lights, the legislative history is ambiguous and does not clearly support either the D.C. Circuit's view or Professor Garrett's view.

not persuaded. Even assuming *arguendo* that a district court could revoke a speedy trial waiver were it to later come to question the *bona fides* of a DPA, the presumption of regularity precludes a district court from engaging in the sort of proactive and preemptive monitoring of the prosecution undertaken here.

C. The District Court's Role when Considering a Rule 48(a) Motion or Adjudicating a Claimed Breach of the DPA

Moore next argues that the Monitor's Report is a judicial document because it will either be relevant to deciding a motion to dismiss the Information at the conclusion of the DPA's term or, alternatively, to adjudicating any claimed breach of the DPA. These arguments fail.

Even if we assume that the Monitor's Report might be relevant to the judicial function at a later point in this case, that would not be sufficient to render the Monitor's Report a judicial document *now*. Critically, as we held above, the district court erred in ordering the government to file the Monitor's Report pursuant to its authority over the implementation of the DPA for the simple reason that the district court had no such authority. Thus, although the government complied with the district court's order, the Monitor's Report—for purposes of the public access doctrine—is not unlike a document exchanged by the parties in the course of litigation that has not yet been brought to the

attention of the court. And we have long recognized that documents "passed between the parties in discovery[] lie entirely beyond the . . . reach" of the presumption of public access. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("*Amodeo II*"); *cf. Amodeo I*, 44 F.3d at 145 ("[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document . . . ."). If the rule were otherwise, deposition transcripts, interrogatories, and documents exchanged in discovery would become "judicial documents" to which the public could demand access before the parties had even contemplated filing such documents with the court. While "public monitoring is an essential feature of democratic control," such an approach would constitute a radical expansion of the "public access" doctrine. *Amodeo II*, 71 F.3d at 1048 ("Unlimited access to every item turned up in the course of litigation would be unthinkable."); *S.E.C. v. Am. Int'l Grp.*, 712 F.3d 1, 4 (D.C. Cir. 2013) ("[T]hough filing a document with the court is not sufficient to render the document a judicial record, it is very much a prerequisite.").

Two of our prior cases warrant further discussion in light of their superficial similarity to this case. In *Amodeo I*, a "Court Officer" charged with investigating union-related corruption pursuant to a consent decree filed a

progress report with the district court that included a sealed exhibit. 44 F.3d at 143–44. We held that the progress report and the exhibit were judicial documents. *Id.* at 146. We reached that conclusion in part because the court officer was permitted under the governing consent decree to apply for assistance from the court and because "the progress report certainly would be germane in assessing such an application." *Id.* We also noted that the consent decree "provide[d] for any party to seek enforcement of, or relief from, any of the provisions of the [d]ecree" and that the record to be considered on such an application "surely would include the matters reported by the Court Officer." *Id.* Moore thus suggests that *Amodeo I* stands for the proposition that if a filed document *could* later become relevant to the judicial function, then it *is* relevant to the judicial function. But, to the contrary, the court officer's reports in *Amodeo I* were immediately relevant to the judicial function because they went to the district court's authority "to make sure that the court officer [was] doing what she was appointed to do." *Id.* (internal quotation mark omitted). As we explained, "[i]t certainly was helpful to the court to know that the Court Officer was fulfilling the duties assigned to her by the Consent Decree in this case." *Id.* Moreover, the consent decree at issue in *Amodeo I* explicitly contemplated court

involvement in enforcing the decree, whereas the DPA entrusts the implementation of the DPA to the Justice Department. The consent decree thus "itself ma[de] the reports and exhibits filed by the Court Officer relevant to the performance of the judicial function and useful in the judicial process." *Id.* The DPA does no such thing.

Similarly, in *United States v. Erie County, New York*, 763 F.3d 235 (2d Cir. 2014), the United States and Erie County settled constitutional claims arising out of conditions at two Erie County correctional facilities. *Id.* at 236–37. The settlement agreement provided for the appointment of two "compliance consultants" and required the compliance consultants to file their reports with the district court. *Id.* at 237. The settlement agreement also empowered the district court to order "any relief permitted by law or equity" in the event that Erie County breached the settlement agreement. *Id.* (internal quotation marks omitted). Noting that the "the compliance reports could form the basis for the District Court reinstating the civil proceedings *sua sponte* if the Court believe[d] that the substance of the stipulated order of dismissal [was] not being fulfilled," we held that the compliance reports were judicial documents subject to a right of public access. *Id.* at 240. Critically, the district court in *Erie County* was "involved

in effectuating [the] settlement agreement," *id.* at 241, and had a "role in overseeing [the] progress" being made thereunder, *id.* at 242. "The fact that the District Court ha[d] not yet acted *sua sponte* or adjudicated an enforcement action brought by the parties d[id] not alter our analysis" because "even the District Court's inaction [was] subject to public accountability." *Id.* By contrast, because the district court here lacked authority to oversee the implementation of the DPA, the district court's inaction during the pendency of the DPA would have been indicative of nothing other than due respect for a coordinate branch of government.

We also disagree with Moore's assertion that "the [Monitor's] Report necessarily will be useful, one way or the other, when the DPA ends." Appellee Br. 30. Rule 48(a) of the Federal Rules of Criminal Procedure provides that "[t]he government may, *with leave of court*, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a) (emphasis added). In *Rinaldi v. United States*, 434 U.S. 22 (1977) (per curiam), the Supreme Court explained that though the "leave of court" requirement "obviously vest[s] some discretion in the court," "[t]he principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and

recharging, when the Government moves to dismiss an indictment over the defendant's objection." *Id.* at 29 n.15. The Court noted that Rule 48(a) "has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest." *Id.* But the Court reserved decision on whether such an approach was permissible. *Id.*

For our part, we have suggested (in dictum) that any authority a court might have to deny a Rule 48(a) motion would be limited to cases in which dismissal is "clearly contrary to manifest public interest." *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991) (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975)). Some courts of appeals that have elucidated this "public interest" test have stressed how "severely cabined" it is, "equat[ing] a dismissal that is clearly contrary to the public interest with one in which the prosecutor appears motivated by bribery, animus towards the victim, or a desire to attend a social event rather than trial"—in other words, bad faith. *In re Richards*, 213 F.3d 773, 787–88 (3d Cir. 2000); *see also Rice v. Rivera*, 617 F.3d 802, 811 (4th Cir. 2010) ("Put succinctly, a Rule 48 motion that is not motivated by bad faith is not clearly contrary to manifest public interest, and it *must* be granted."

(internal quotation marks omitted)). Others have emphasized that a court deciding a Rule 48(a) motion should not "serve merely as a rubber stamp for the prosecutor's decision." *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973); *see also Cowan*, 524 F.2d at 512–13.

Whatever the precise contours of a district court's authority in resolving a Rule 48(a) motion, it is certainly not the case that the Monitor's Report will, as Moore contends, *necessarily* be relevant to deciding such a motion. For example, where a Rule 48(a) motion is uncontested and the parties' good faith is not in doubt, a district court is unlikely to have any occasion to demand a monitor's reports (or analogous work product) for the court's inspection before granting the Rule 48(a) motion. Nor do we accept that the Monitor's Report will *necessarily* be relevant to adjudicating any claimed breach of the DPA, as the claimed breach could be based, for example, on HSBC's obligation not to commit a crime under federal law or its obligation not to contradict the Statement of Facts in a public statement. Conversely, the Monitor's Report may indeed be relevant in determining whether to grant an eventual Rule 48(a) motion or in adjudicating a claimed breach of the DPA. For example, there may be circumstances that suggest that the motion is being made in bad faith, thereby raising a question as

to whether dismissing the Information would be "clearly contrary to manifest public interest." *Pimentel*, 932 F.2d at 1033 n.5. The salient point is that attempting to forecast the relevance of the Monitor's Report at the conclusion of the DPA's term is inherently speculative. Such prognostication cannot support treating the Monitor's Report as a judicial document now.

To be clear, we do not hold that documents can be deemed "judicial documents" only once a court has already considered them. Our case law is clear that pleadings and summary judgment papers, for example, are judicial documents upon filing—which is eminently sensible given that such documents, by definition, ask the court to grant (or reject) some relief. *See Bernstein*, 814 F.3d at 140; *Lugosch*, 435 F.3d at 120–23. But that does not mean that any document that is docketed with a court is a judicial document, regardless of the likelihood that it will ever be relevant to the judicial function.

Because the Monitor's Report is not a judicial document, the district court abused its discretion in ordering it unsealed.[7]

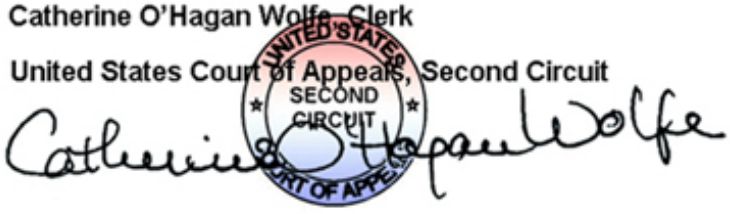
[7] In light of our conclusion that the Monitor's Report is not a judicial document, we do not reach whether a First Amendment or common law right of access would have ultimately required the unsealing of the document (in any form) under the circumstances of this case. In addition, that the Monitor's Report is not a judicial document does not mean that Moore or other members of the public are necessarily without recourse. "The appropriate device" for obtaining executive records "is a

CONCLUSION

Striking the appropriate balance between the prerogatives of the three branches of government is never easy. We emphasize that while the district court exceeded its authority in this case, the Take Care Clause of the Constitution is not a blank check. Where the presumption of regularity has been called into question, we do not foreclose the possibility that steps of the kind taken by the district court here could be warranted. But that is not this case.

For the foregoing reasons, the orders of the district court are **REVERSED**.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



Freedom of Information Act request addressed to the relevant agency." *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). We offer no view on whether any of FOIA's exemptions would apply.

that if HSBC Bank USA and HSBC Holdings (collectively, "HSBC") comply with its terms and provisions, the government will seek to dismiss the Information after five years.

On December 20, 2012 the parties appeared before the Court for a status conference. At the conference, I indicated that this Court has authority to accept or reject the DPA pursuant to Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 11(c)(1)(A) and United States Sentencing Guideline ("U.S.S.G.") § 6B1.2.[2] Accordingly, I inquired as to whether, under the rubric of U.S.S.G. § 6B1.2, the DPA adequately reflects the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme. I granted the parties leave to respond to these queries in writing.

For the reasons set forth herein, I approve the DPA pursuant to the Court's supervisory power and grant the parties' application to place the case in abeyance for five years pursuant to the Speedy Trial Act. The Court will maintain supervisory power over the implementation of the DPA and directs the government to file quarterly reports with the Court while the case is pending.

A. *The Authority of the Court*

1. *Fed. R. Crim. P. 11(c)(1)(A) and U.S.S.G. § 6B1.2*

In their written submissions to the Court, the parties contest the applicability of Fed. R. Crim. P. 11(c)(1)(A) and U.S.S.G. § 6B1.2 to the DPA.[3] Gov't Mem. in Supp. DPA 2 n.1, ECF No. 14; Defs.' Letter in Supp. DPA 1-2, ECF No. 15. The parties assert that these provisions apply to cases where a defendant pleads guilty or *nolo contendere* to a charged (or lesser-included) offense and the plea agreement provides that the government will not bring, or

[2] The parties expressed their agreement with this characterization of the Court's authority at the status conference. Dec. 20, 2012 Tr. 5:20-6:17.

[3] The government nevertheless addresses why the DPA adequately reflects the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme. Gov't Mem. in Supp. DPA 2 n.1.

will move to dismiss, other criminal charges. Gov't Mem. in Supp. DPA 2 n.1; Defs.' Letter in Supp. DPA 2. They submit that this scenario is not presently before the Court because HSBC has not agreed to plead guilty. Rather, HSBC has entered into an agreement to defer prosecution, whereby the government agrees to dismiss the Information if HSBC complies with the terms and provisions of the DPA. Gov't Mem. in Supp. DPA 2 n.1; Defs.' Letter in Supp. DPA 2.

The parties have a sound textual basis for their position. Fed. R. Crim. P. 11(c)(1)(A) states:

> **(c) Plea Agreement Procedure.**
>
> **(1) In General.** An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> **(A)** not bring, or will move to dismiss, other charges

The parties have not reached a plea agreement within the meaning of Fed. R. Civ. P. 11(c)(1)(A). HSBC has not agreed to plead guilty or *nolo contendere* to any of the charged offenses; it entered pleas of not guilty at the arraignment and expects that the charges will eventually be dismissed. Minute Entry, Dec. 20, 2012, ECF No. 13. Nor has the government agreed to dismiss other charges in exchange for a plea of guilty. Accordingly, neither Fed. R. Crim. P. 11(c)(1)(A) nor U.S.S.G. § 6B1.2 is applicable here.[4]

[4] U.S.S.G. Chapter Six, Section B sets forth "[p]olicy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P. . . . to ensure that plea negotiation practices (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity." U.S. SENTENCING GUIDELINES MANUAL ch. 6, pt. B, introductory cmt. (2012). Since the parties have

2. *The Speedy Trial Act*

The parties assert that 18 U.S.C. § 3161(h)(2) of the Speedy Trial Act "provides the applicable legal standard for the Court's review, as it requires the Court's approval for the exclusion of time." Defs.' Letter in Supp. DPA 2; *see also* Gov't Mem. in Supp. DPA 2 n. 1 ("In connection with a DPA, once a defendant has made an appearance and the speedy trial clock has begun to run, as it has here, the Court has the authority to determine whether to grant or deny a speedy trial waiver . . . ."). Pursuant to 18 U.S.C. § 3161(h)(2), "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct" "shall be excluded . . . in computing the time within which the trial of any such offense must commence." As HSBC observes, "subsection (h)(2) does not itself set forth a standard for the exclusion of time in the deferred prosecution context." Defs.' Letter in Supp. DPA 2. HSBC argues, however, that "subsection (h)(7), the Act's catch-all provision, provides that time should be excluded if the interests of justice served by the exclusion outweigh the best interests of the defendant and the public in a speedy trial." *Id*. (citing 18 U.S.C. § 3161(h)(7)).

I disagree with HSBC's assertion that the standard for excluding time pursuant to 18 U.S.C. § 3161(h)(2) is the ends-of-justice balancing inquiry articulated by 18 U.S.C. § 3161(h)(7). In *Zedner v. United States*, the Supreme Court explained:

> [T]he [Speedy Trial] Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. See

neither engaged in plea discussions nor entered a plea agreement, U.S.S.G. § 6B1.2, which articulates "Standards for Acceptance of Plea Agreements," is similarly inapplicable.

> § 3161(h). For example, the Act excludes "delay resulting from other proceedings concerning the defendant," § 3161(h)([1]), "delay resulting from the absence or unavailability of the defendant or an essential witness," § 3161(h)(3)(A), "delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4), and "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted," § 3161(h)([6]).
>
> Much of the Act's flexibility is furnished by § 3161(h)([7]), which governs ends-of-justice continuances . . . . This provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. This provision gives the district court discretion – within limits and subject to specific procedures – to accommodate limited delays for case-specific needs.

547 U.S. 489, 497-99 (2006). The Court's interpretation makes clear that 18 U.S.C. § 3161(h)(7) is not a "catch-all provision;" rather, it describes one specific type of exclusion – *i.e.*, when the ends of justice served by the exclusion outweigh the best interests of the public – permitted by the Speedy Trial Act.[5] This interpretation accords with a straightforward reading of the provision, which nowhere suggests that this balancing inquiry applies to the myriad other types of exclusion enumerated in 18 U.S.C. § 3161(h).

Returning then to 18 U.S.C. § 3161(h)(2), the exclusion applies to that "delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." Thus, under a plain reading of this provision, a court is to exclude the delay occasioned by a deferred prosecution agreement, but only upon

[5] 18 U.S.C. § 3161(h)(7) does operate as a "catch-all provision" in the sense that "[t]he exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act." *Zedner*, 547 U.S. at 508. Indeed, the parties could have chosen to request the exclusion of delay on ends-of-justice grounds in addition to or in lieu of the 18 U.S.C. § 3161(h)(2) exclusion.

approval of the agreement by the court. This interpretation is buttressed by the legislative history of the provision. The Report of the Senate Judiciary Committee on the Speedy Trial Act states that this provision "assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits." S. REP. NO. 93-1021, at 37 (1974).

The Speedy Trial Act is silent as to the standard the court should employ when evaluating whether to grant "approval" to a deferred prosecution agreement under 18 U.S.C. § 3161(h)(2). Case law on this point is barren both in the Second Circuit and in other Circuits. However, the Report of the Senate Judiciary Committee suggests that such approval is grounded in a concern, to put it bluntly, that parties will collude to circumvent the speedy trial clock. S. REP. NO. 93-1021, at 37. 18 U.S.C. § 3161(h)(2) appears to instruct courts to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date.

The DPA at issue here is, without a doubt, about diverting HSBC from criminal prosecution. But approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself. As I discuss in greater detail below, the parties erroneously assume that the Court lacks authority to consider the latter question, and therefore need only decide the former. They are wrong. As such, the question of whether to exclude the duration of the DPA from the speedy trial clock hinges on a determination of whether the Court approves the DPA.

3. *The Court's Supervisory Power*

This Court has authority to approve or reject the DPA pursuant to its supervisory power. "The supervisory power . . . permits federal courts to supervise 'the administration of

criminal justice' among the parties before the bar." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("[E]very United States court has an inherent supervisory authority over the proceedings conducted before it . . . ."). The courts have wielded this authority substantively, that is, to provide a remedy for the violation of a recognized right of a criminal defendant. *See McNabb*, 318 U.S. at 345 (holding that "a conviction resting on evidence secured through . . . a flagrant disregard of the procedure which Congress has commanded [then 18 U.S.C. § 595, now Fed. R. Crim. P. 5(a)(1)] cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law"); *see also United States v. Hasting*, 461 U.S. 499, 505 (1983) (recognizing the "implement[ation of] a remedy for violation of recognized rights" as one of the proper uses of the supervisory power). They have also wielded this authority to fashion "civilized standards of procedure and evidence" applicable to federal criminal proceedings. *McNabb*, 318 U.S. at 340; *see, e.g.*, *McCarthy v. United States*, 394 U.S. 459 (1969) (establishing procedure for accepting guilty plea); *Elkins v. United States*, 364 U.S. 206 (1960) (overruling "silver platter" doctrine, which permitted federal courts to receive evidence illegally seized by state officials without the involvement of federal officials); *Ballard v. United States*, 329 U.S. 187 (1946) (holding that jurors must be selected from fair cross-section of community).

One of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings. *Hasting*, 461 U.S. at 526 ("[Our] cases have acknowledged the duty of reviewing courts to preserve the integrity of the judicial process."); *Payner*, 447 U.S. at 735 n.8 ("[T]he supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity."); *Elkins*, 364 U.S. at 216, 222-23 (discussing "the imperative of judicial

integrity" in invoking the supervisory power). Justice Louis Brandeis eloquently articulated this distinct duty to uphold judicial integrity:

> The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.
>
> . . . The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. . . . It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . The court protects itself.

Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting), overruled by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Justice Brandeis's words have since resonated throughout the Supreme Court's supervisory power jurisprudence. *See Elkins*, 364 U.S. at 223 (stating that federal courts will not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold"); *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) ("This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted."); *McNabb*, 318 U.S. at 347 ("We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.").

Both parties assert that the Court lacks any inherent authority over the approval or implementation of the DPA. They argue that the Court's authority is limited to deciding, in the present, whether to invoke an exclusion of time under the Speedy Trial Act and, in the distant

future, whether to dismiss the charges against HSBC. Gov't Mem. in Supp. DPA 2 n.1; Defs.' Letter in Supp. DPA 2. I conclude that the Court's authority in this setting is not nearly as cabined as the parties contend it is.

The government has absolute discretion to decide not to prosecute. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review."). Even a formal, written agreement to that effect, which is often referred to as a "non-prosecution agreement," is not the business of the courts.[6] In addition, the government has near-absolute power under Fed. R. Crim. P. 48(a) to extinguish a case that it has brought. *See United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991) ("Rule 48(a) provides that prosecutors may, 'by leave of court,' file a dismissal of an indictment, information or complaint. A court is generally required to grant a prosecutor's Rule 48(a) motion unless dismissal is 'clearly contrary to manifest public interest.'"). In my view, if the government were now moving to dismiss this case, it would be an abuse of discretion to deny that motion.

The government has chosen neither of those paths. Rather, it has built into the DPA with HSBC a criminal prosecution that will remain pending (assuming all goes well) for at least five years. DPA ¶ 3, ECF No. 3-2. Just as a non-prosecution agreement is perceived as a public relations benefit to a company,[7] perhaps the filing and maintenance of criminal charges

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[6] *See* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components, U.S. Att'ys re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf (last visited June 28, 2013) ("In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.").

[7] The major distinction between a deferred prosecution agreement and a non-prosecution agreement appears to be the stigma associated with the former (*i.e.*, filing a criminal charge). *See* Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 314 n.9 (2007), http://yalelawjournal.org/images/pdfs/528.pdf ("A deferred prosecution agreement involves the filing of criminal charges that will be dismissed after an agreed term so long as the company fulfills all the requirements of the agreement. A non-

was intended to produce a public relations benefit for the government.[8] But for whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant.[9] By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.

The courts "are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement." *McNabb*, 318 U.S. at 347. The inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety. "The court protects itself." *Olmstead*, 277 U.S. at 485. The parties have asked the Court to lend precisely such a judicial imprimatur to the DPA, by arranging for its implementation within the confines of a pending case. The Court will therefore exercise its supervisory authority over the DPA.

I recognize that the exercise of supervisory power in this context is novel. In the typical supervisory power case, the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety. *See United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000) ("[G]enerally the exercise of supervisory power arises in the context of requests by defendants to vacate convictions, dismiss indictments, or invalidate

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prosecution agreement is similar except that the charges are not filed, thus giving a small public relations benefit to the company, which can truthfully assert it was never prosecuted for the misconduct.").

[8] On the day that the government filed the Information and DPA in this case, it issued a press release, in which the United States Attorney for the Eastern District of New York, Loretta E. Lynch, stated: "Today we announce the filing of criminal charges against HSBC, one of the largest financial institutions in the world. . . . Today's historic agreement, which imposes the largest penalty in any BSA prosecution to date, makes it clear that all corporate citizens, no matter how large, must be held accountable for their actions." Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html (last visited June 28, 2013).

[9] *See Attorney Brendan Sullivan, Counsel for Lieutenant Colonel Oliver North, Tells the Iran-Contra Committee He is Not a Potted Plant and that It Is His Job to Answer for His Client*, NBC NEWS (July 9, 1987), http://www.nbcuniversalarchives.com/nbcuni/clip/5112536441_003.do.

sentences . . . .") (internal citations omitted). In the deferred prosecution context, the defendant is presented with the opportunity for diversion from the criminal proceeding altogether. For obvious reasons, a defendant in these circumstances is less likely to raise a purported impropriety with the process, let alone seek the court's aid in redressing it, given the risk of derailing the deferral of prosecution.

Nevertheless, it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court. For example, the DPA, like all such agreements, requires HSBC to "continue to cooperate fully with the [government] in any and all investigations." DPA ¶ 6. Recent history is replete with instances where the requirements of such cooperation have been alleged and/or held to violate a company's attorney-client privilege and work product protections,[10] or its employees' Fifth[11] or

[10] For nearly ten years – from 1999 to 2008 – the Department of Justice's corporate charging policies, as articulated in the Holder, Thompson, McCallum, and McNulty Memos, emphasized the importance of corporate cooperation, including a willingness to waive the attorney-client and work product protections. *See* Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF (last visited June 28, 2013) [hereinafter Holder Memo]; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003), *available at* http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf (last visited June 28, 2013) [hereinafter Thompson Memo]; Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf (last visited June 28, 2013); Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/ mcnulty_memo.pdf (last visited June 28, 2013).

These policies engendered an enormous backlash. They catalyzed the formation of the Coalition to Preserve the Attorney-Client Privilege, composed of a broad swath of organizations including the American Civil Liberties Union, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the United States Chamber of Commerce. *Answers to Questions About the Attorney-Client Privilege*, ABANOW (Dec. 1, 2006), http://www.abanow.org/2006/12/answers-to-questions-about-the-attorney-client-privilege/ ("The Coalition to Preserve the Attorney-Client Privilege represents a remarkable political and philosophical diversity, demonstrating just how widespread concerns about government policy in this area have become in the business, legal, and public policy communities."). It also led the American Bar Association ("ABA") to create the Presidential Task Force on Attorney-Client Privilege to study and address the erosion of attorney-client privilege. *ABA President Robert Grey Creates Task Force to Advocate for Attorney-Client Privilege*, ABANOW (Oct. 6, 2004), http://www.abanow.org/2004/10/aba-president-robert-grey-creates-task-force-to-advocate-for-attorney-client-privilege/. In August 2005, the ABA House of Delegates approved Recommendation 111, submitted by the Task Force, which held:

Sixth Amendment rights.[12] The DPA also contemplates, in the event of a breach by HSBC, an explanation and remedial action, which the government will consider in determining whether to prosecute the pending charges and/or bring new ones. DPA ¶¶ 16-17. What if, for example, the "remediation" is an offer to fund an endowed chair at the United States Attorney's *alma mater*?

> RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and
>
> FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.
>
> FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

REPORT TO THE ABA HOUSE OF DELEGATES, ABA TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE 3 (2006), *available at* http://apps.americanbar.org/buslaw/newsletter/0052/materials/pp4.pdf (last visited June 28, 2013).

In August 2008 the DOJ revised its corporate charging guidelines to provide, *inter alia*, that credit for cooperation would no longer depend on a corporation's waiver of the attorney-client privilege or work product protections. Press Release, U.S. Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), *available at* http://www.justice.gov/opa/pr/2008/August/08-odag-757.html (last visited June 28, 2013).

[11] The DOJ's corporate charging policies, as articulated in the Holder and Thompson Memos, also instructed federal prosecutors to consider the extent to which a cooperating company makes witnesses available to the government. Holder Memo, *supra* note 9, at 5; Thompson Memo, *supra* note 9, at 6. In *United States v. Stein*, the United States District Court for the Southern District of New York held that by pressuring the corporate defendant to use its power over its employees to coerce them to make statements to the government, such coercive tactics were attributable to the government, and suppressed some of the statements made by employees. 440 F. Supp. 2d 315, 337-38 (S.D.N.Y. 2006).

[12] The DOJ's corporate charging policies, as articulated in the Holder and Thompson Memos, also instructed federal prosecutors to consider a company's advancing of legal fees to employees, except as required by law, as potentially indicative of an attempt to shield culpable individuals, and therefore a factor weighing in favor of indictment of the company. Holder Memo, *supra* note 9, at 6; Thompson Memo, *supra* note 9, at 7-8. In *United States v. Stein*, the United States District Court for the Southern District of New York held in another opinion that the government, in "tak[ing] into account, in deciding whether to indict [the corporate defendant], whether [the corporate defendant] would advance attorneys' fees to present or former employees in the event they were indicted . . . interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution." 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006). The Second Circuit affirmed this decision, finding that the government had "unjustifiably interfered with [employees'] relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment," but did not reach the lower court's Fifth Amendment ruling. *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008).

Or consider a situation where the current monitor needs to be replaced. *See* Gov't Letter, June 5, 2013, ECF No. 22 (advising the Court of the selection of an independent compliance monitor). What if the replacement's only qualification for the position is that he or she is an intimate acquaintance of the prosecutor proposing the appointment? *See* DPA ¶ 10 ("The Department may also propose the names of qualified Monitor candidates for consideration.").

I do not intend to catalog all of the possible situations that might implicate the Court's supervisory power in this case. I couldn't even if I wanted to; the exercise would amount to looking through a glass, darkly, at five years of potential future developments in the case. What I can say with certainty is that by placing the DPA on the Court's radar screen in the form of a pending criminal matter, the parties have submitted to far more judicial authority than they claim exists.

B. *Approval of the DPA*

I approve the DPA. However, for the reasons set forth above, my approval is subject to a continued monitoring of its execution and implementation.

In approving the DPA, I am as mindful of the limits of the supervisory power as I am of its existence. For the most part, "when supervisory powers have been invoked the Court has been faced with intentional illegal conduct." *Payner*, 447 U.S. at 746 (Marshall, J., dissenting). My review of the DPA, and my knowledge of the actions that have been taken pursuant to the DPA thus far, reveal no impropriety that implicates the integrity of the Court and therefore warrants the rejection of the agreement.

I am aware of the heavy public criticism of the DPA. *See, e.g.* Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 11, 2012; Jesse Singal, *HSBC Report Should Result in Prosecutions, Not Just Fines, Say Critics*, THE DAILY BEAST, July 18, 2012; Matt Taibbi, *Gangster Bankers:*

Too Big to Jail, ROLLING STONE, Feb. 14, 2013. Indeed, I have received unsolicited input from members of the public urging me to reject the DPA. *See* ECF Nos. 16, 17, 18, 21. These criticisms boil down to the argument that the government should seek to hold HSBC criminally liable, rather than to divert HSBC from the criminal process. But even if I were to reject the DPA, I would have no power to compel the government to prosecute the pending charges against HSBC to adjudication. To the contrary, as mentioned above, if the government moved under Fed. R. Crim. P. 48(a) to dismiss the Information, it would be an abuse of discretion not to grant that motion.

Significant deference is owed the Executive Branch in matters pertaining to prosecutorial discretion. The Executive Branch alone is vested with the power to decide whether or not to prosecute. *United States v. Bonnet-Grullon*, 212 F.3d 692, 701 (2d Cir. 2000) ("It is well established that the decision as to what federal charges to bring against any given suspect is within the province of the Executive Branch of the government."), *superseded by statute on other grounds by United States v. Levia-Deras*, 359 F.3d 183, 188 (2d Cir. 2004). The decision whether to seek a criminal conviction implicates a complex of factors that "do not lend themselves to resolution by the judiciary." *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (stating that "the task of supervising prosecutorial decisions" would place reviewing courts "in the undesirable and injudicious posture of becoming 'superprosecutors.'"). The Supreme Court has observed that a prosecutor's

> broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent

> to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern.

Wayte v. United States, 470 U.S. 598, 607 (1985). With respect to cases of corporate misconduct, prosecutors must consider such factors as the nature and seriousness of the conduct, the pervasiveness of the conduct within the company, and the company's reaction to its own misconduct. They must also consider the ripple effects a conviction might have on innocent parties, such as employees (present and former) and shareholders. I have no doubt resource allocations concerns within the Department of Justice ("DOJ") play a legitimate role as well. Judges (even, and perhaps especially, judges who themselves once exercised prosecutorial discretion) need to be mindful that they have no business exercising that discretion and, as an institutional matter, are not equipped to do so.

I observed many years ago that although the Supreme Court's language in *Wayte* addressed "the decision of *whether* to prosecute, it is equally applicable to the decision of how aggressively to prosecute, and specifically to whether an arguably reasonable sentence bargain is appropriate." John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT'G REP. 314, 315 (1996) ("[T]he judicial policing of sentence bargaining is unrealistic. The prosecutor may defend a plea agreement by reference to an office policy on such cases, but the probation officer may conclude that the AUSA is simply too lazy to try the case, or overly intimidated by the defense attorney. The probation officer may be right, but courts have no business engaging in that inquiry and have no ability to do so."). I add here that this language is just as applicable to the decision to enter into a deferred prosecution agreement.

Bearing in mind the appropriate degree of deference that is owed to the Executive Branch, the decision to approve the DPA is easy, for it accomplishes a great deal.

1. *HSBC's Offense Conduct*

According to the Statement of Facts, incorporated as part of the DPA, from 2006 to 2010, HSBC Bank USA failed to implement an effective AML program to monitor suspicious transactions from Mexico. Statement of Facts ¶ 9, ECF No. 3-3. During the same period, Grupo Financiero HSBC, S.A. de C.V. ("HSBC Mexico"), one of HSBC Bank USA's largest Mexican customers, had its own significant AML failings. *Id*. These collective AML failures permitted Mexican and Colombian drug traffickers to launder at least $881 million in drug trafficking proceeds through HSBC Bank USA undetected. *Id*. HSBC Holdings was aware of HSBC Mexico's AML compliance problems as early as 2002, but failed to inform HSBC Bank USA of these problems or their potential impact on HSBC Bank USA's AML program. *Id*. ¶¶ 9, 42-45; *see also* Gov't Mem. in Supp. DPA 6.

In addition, from at least 2000 to 2006, HSBC Group[13] knowingly and willfully engaged in practices outside the United States that caused HSBC Bank USA and other U.S. financial institutions to process payments on behalf of banks and other entities located in Cuba, Iran, Libya, Sudan, and Burma, in violation of U.S. sanctions. Statement of Facts ¶ 63. HSBC Group Affiliates[14] ensured that these transactions went undetected in the U.S. by altering and routing payment messages in a manner that hid the identities of these sanctioned identities from HSBC Bank USA and other U.S. financial institutions. *Id*. The total value of these transactions during this period was approximately $660 million. *Id*.

The government identifies three major causes for the failures in HSBC's AML and sanctions programs. Gov't Mem. in Supp. DPA 6-9. First, there was an "an institution-wide lack of accountability and diffusion of responsibility." *Id*. at 7. "At the HSBC Holdings level,

[13] HSBC Group refers collectively to HSBC Holdings and its subsidiaries. Statements of Facts ¶ 3.

[14] HSBC Group Affiliates "refer to financial institutions throughout the world . . . that are owned by various intermediate holding companies and ultimately, but indirectly, by HSBC Holdings." *Id*.

HSBC Group Compliance lacked the authority to mandate corrective or other action by any HSBC Group Affiliate." *Id.* And "[a]t the Affiliate level, HSBC's internal policies about whether AML officers or business executives were ultimately responsible for the AML and sanctions programs were unclear." *Id.* The result was that AML compliance and sanctions problems, even when identified at the HSBC Holdings level, went unresolved.

Second, HSBC Bank USA failed to provide adequate staffing and other resources to maintain an effective AML program. Statement of Facts ¶¶ 25-28. Beginning in 2007, HSBC Bank USA began to "freeze" staffing levels in its AML department "as part of a bank-wide initiative to cut costs and increase the bank's return on equity." *Id.* ¶ 25. As a result of this policy, HSBC Bank USA and HSBC North America Holdings, Inc. ("HSBC North America"[15]) did not replace departing compliance and AML staff, even senior officers such as HSBC Bank USA's AML Director and HSBC North America's Regional Compliance Officer (who oversaw compliance and AML at HSBC Bank USA). *Id.* ¶¶ 25-26. HSBC Bank USA also combined multiple positions into one, for example, charging HSBC Bank USA's Head of Compliance with the responsibilities of HSBC Bank USA's AML Director, and charging HSBC North America's General Counsel with the responsibilities of HSBC North America's Regional Compliance Officer. *Id.* Finally, "requests for additional resources were discouraged and, ultimately [AML] employees stopped making staffing requests." *Id.* ¶ 28.

Third, the corporate culture of HSBC "discouraged sharing of information within the organization." Gov't Mem. in Supp. DPA 8. At the HSBC Holdings level, a philosophy that "HSBC does not 'air the dirty linen of one affiliate with another,'" defined the approach to compliance. Statement of Facts ¶ 45 (quoting HSBC's Head of Compliance). As a result, HSBC

[15] HSBC Bank USA is a subsidiary of HSBC North America, which, in turn, is an indirect subsidiary of HSBC Holdings. *Id.*

Holdings failed to inform HSBC Bank USA about HSBC Mexico's AML compliance problems or their potential impact on HSBC Bank USA's AML program. *Id.* ¶¶ 42-45. At the HSBC Bank USA level, it adhered to a formal policy not to conduct due diligence on other HSBC Group Affiliates, which "impeded [its] ability to assess its money laundering vulnerabilities, including the extensive AML problems at HSBC Mexico." Gov't Mem. in Supp. DPA 8-9; Statement of Facts ¶ 15. "With respect to U.S. sanctions, despite HSBC Bank USA's request for full details in transactions processed by HSBC Group Affiliates, some Group Affiliates structured transactions so that . . . HSBC Bank USA could not properly review the transactions to determine whether they violated U.S. sanctions." Gov't Mem. in Supp. DPA 9; Statement of Facts ¶¶ 65-67.

2. *The Deferred Prosecution Agreement*

The DPA requires HSBC to undertake (or continue to undertake) remedial measures that address these systemic failures. HSBC Holdings and HSBC North America have overhauled their leadership teams. HSBC Holdings installed a new Chief Executive Officer ("CEO"), Chairman, Chief Legal Officer, and Head of Global Standards Assurance; HSBC North America installed a new CEO, General Counsel, Chief Compliance officer, AML Director, Deputy Chief Compliance Officer, and Deputy Director of Global Sanctions. DPA ¶¶ 5(a), (m).

HSBC Holdings and HSBC Bank USA have taken steps to address the lack of accountability over their AML and sanctions compliance programs. HSBC Holdings elevated the Head of HSBC Group Compliance to the status of a Group General Manager, one of the 50 most senior positions at HSBC globally, and granted him direct oversight over every HSBC compliance and AML officer. *Id.* ¶¶ 5(q)-(r); Gov't Mem. in Supp. DPA 12. It also restructured its senior executive bonus system so that bonuses are dependent on meeting compliance and

AML standards. DPA ¶ 5(v). HSBC Bank USA reorganized its AML department "to strengthen its reporting lines and elevate its status within the institution as a whole" by, *inter alia*, requiring that the AML Director report directly to the Board and senior management regarding HSBC Bank USA's AML program. *Id.* ¶ 5(e).

HSBC Bank USA has made significant investments in its AML program, spending $244 million in 2011. *Id.* ¶ 5(c). It increased its AML department staff from 92 full-time employees and 25 consultants in January 2010 to approximately 880 full-time employees and 267 consultants as of May 2012. *Id.* ¶ 5(d). Whereas in 2008, it had only four employees to review suspicious wire transactions, it now employs approximately 430 individuals to undertake this task. Gov't Mem. in Supp. DPA 8.

Finally, HSBC has taken steps to promote the sharing of information within the organization. HSBC Holdings "implemented procedures that require the sharing of information pertaining to AML weaknesses at one Group Affiliate horizontally throughout the HSBC Group." Gov't Mem. in Supp. DPA 13-14 (citing DPA ¶ 5(t)). HSBC Bank USA has reformed its due diligence and risk-rating policies so as to subject HSBC Group Affiliates to a heightened level of scrutiny. DPA ¶¶ 5(f)-(g). And it has implemented a new monitoring system, which allows it to track the originator, sender, and beneficiary of every wire transaction that moves through HSBC Bank USA. *Id.* ¶ 5(j).

The DPA requires a corporate compliance monitor to supervise HSBC's remedial measures, as well as evaluate HSBC's ongoing compliance with the BSA, IEEPA, and TWEA, during the pendency of the agreement. *Id.* ¶ 5; *see also* Corporate Compliance Monitor, ECF No. 3-4. The monitor will report regularly to the DOJ regarding HSBC's compliance with and/or violation of the DPA. Corporate Compliance Monitor ¶¶ 3, 8. The monitor is charged

with making recommendations for improving HSBC's effectiveness in implementing compliance and remedial measures; HSBC is required, under the DPA, to comply with such recommendations. *Id*. ¶ 5.

In addition to remedial measures, the DPA also requires HSBC to forfeit $1.256 *billion* and to admit to criminal wrongdoing, as set forth in the Statement of Facts. *Id*. ¶¶ 1-2, 7; *see also* Statement of Facts. Considered together, the DPA imposes upon HSBC significant, and in some respect extraordinary, measures. Indeed, taking into account the fact that a company cannot be imprisoned, it appears to me that much of what might have been accomplished by a criminal conviction has been agreed to in the DPA. In any event, in light of the broad deference owed by the Court to the prosecutor's actions, I approve without hesitation both the DPA and the manner in which it has been implemented thus far.

C. *The Court Retains Supervisory Power over the Implementation of the DPA*

As long as the government asks the Court to keep this criminal case on its docket, the Court retains the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court. Accordingly, the parties are directed to file quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA. Doubts about whether a development is significant should be resolved in favor of inclusion. The Court will notify the parties if, in its view, hearings or other appearances are necessary or appropriate.

So ordered.

John Gleeson, U.S.D.J.

Dated: July 1, 2013
Brooklyn, New York