



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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UNITED STATES OF AMERICA,
Government,

15 Cr 867 (RMB)

-against-

ORDER

REZA ZARRAB,
Defendant(s).
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In connection with the Curcio proceedings in this case, the Court requests the parties' responses to these supplemental questions:

(i) Whether Mr. Clement's written and oral comments in support of Mr. Zarrab's motion to dismiss, dated July 18, 2016, were consistent with Professor Giller's admonition that Kirkland and Ellis (and formerly Bancroft) lawyers could not provide representation to Mr. Zarrab regarding arguments, defenses, or strategies that might be adverse to the banks, including as HSBC. (See e.g., "There is simply no indication . . . that a bank would face a real threat of loss on account of processing a transaction that, unbeknownst to the bank, was meant to evade OFAC sanctions." (Mot. to Dismiss at 28.); "Even where a bank is deceived, a jury cannot infer the defendant attempted to victimize the bank [because] the actual exposure of [the] bank to losses is unclear, remote, or non-existent." (Mot. to Dismiss at 28.); see also Transcript of Proceedings held on October 5, 2016 ("10/5/16 Tr") at 20:1-5 (Mr. Clement: "I think what makes this bank [fraud] different from every other case of bank fraud of which I am aware is that, if this scheme were to succeed here, the U.S. bank is better off. They process [the] wire transfer. They have gotten some compensation for that. If the scheme works, the bank is better off.") ; at 21: 8-12 (Mr. Clement: "My client [Mr. Zarrab] indirectly paid for a service of making these wire transfers to go through a U.S. bank. The U.S. bank was better off, if the U.S. bank was

suspicious, they would stop it, in which case the U.S. bank is not worse off.”); at 65:11-14 (Mr. Clement: “What’s happening here is, a bank is processing a transaction that it wouldn’t process if it were fully informed, but it’s a profitable transaction. And if the conspiracy or the scheme is effectuated, they are better off, not worse off.”);

(ii) Whether it is likely or foreseeable that (former Bancroft) attorneys current efforts in the Second Circuit Court of Appeals to keep sealed HSBC monitor Michael Cherkasky’s First Annual Report are “adverse” to Mr. Zarrab’s defense. The Introduction to the relevant brief submitted to the Second Circuit Court of Appeals states the following:

After a criminal investigation that lasted over four years and spanned the globe, HSBC and the United States entered into a deferred prosecution agreement (“DPA”) resolving charges that HSBC had failed to maintain adequate anti-money laundering and sanctions controls. The Justice Department agreed to dismiss the charges after five years if HSBC forfeited more than \$1.25 billion and undertook sweeping remedial measures. The DPA vested the Department with ‘sole discretion’ to determine whether HSBC had satisfied its obligations. To inform that determination, the DPA required the appointment of an independent Monitor to send the Department annual reports evaluating HSBC’s controls, policies, and procedures related to its compliance with anti-money laundering and sanctions laws and the specific remedial measures identified in the DPA. Because these reports would include extensive confidential information about HSBC’s internal activities, as well as highly sensitive information protected by the laws of foreign jurisdictions whose regulators supervise HSBC affiliates, the DPA expressly required that the Monitor’s reports remain ‘non-public’;

(iii) What is the value or significance of an “ethical wall” or “information wall” if, as here, the wall can be breached at defense counsel’s election?;

(iv) What is the significance to these Curcio proceedings, if any, of the fact that HSBC acknowledged in the EDNY in a deferred prosecution agreement, dated December 11, 2012, the following:

a)“From at least 2000 through 2006, HSBC Group knowingly and willfully engaged in conduct and practices outside the United States that caused HSBC Bank USA and other financial institutions located in the United States to process payments in violation of U.S.

sanctions. To hide these transactions, HSBC Group Affiliates altered and routed payment messages in a manner that ensured that payments involving sanctioned countries and entities cleared without difficulty through HSBC Bank USA and other U.S. financial institutions in New York County and elsewhere. The total value of OFAC-prohibited transactions for the period of HSBC Group's review, from 2000 through 2006, was approximately \$660 million. This includes approximately . . . \$183 million on behalf of Sanctioned Entities in Iran . . ." (§63 Statement of Facts)

b) "[B]eginning in the 1990s, , HSBC Bank plc . . . devised a procedure whereby the Sanctioned Entities put a cautionary note in their SWIFT payment messages including, among others, "care sanctioned country", "do not mention our name in NY", "do not mention Iran". Payments with these cautionary notes automatically fell into what HSBC Europe termed a 'repair queue' where HSBC Europe employees manually removed all references to the Sanctioned Entities. The payments were then sent to HSBC Bank USA and other financial institutions in the United States without reference to the Sanctioned Entities, ensuring that the payments would be processed without delay and not be blocked or rejected and referred to OFAC." (§65 Statement of Facts);

(v) What is the significance to these Curcio proceedings, if any, of the fact that defense counsel were made aware that HSBC had been identified as a "victim" bank by the Government between June 1, 2016 and August 26, 2016. See, Government letter, dated December 2, 2016 at 1, fn 1 ("Data from the banks alleged to be victims in this case reflecting the transfers described herein and identifying the banks executing those transfers was produced to the defendant in the Government's discovery productions dated June 1, 2016; July 12, 2016; and August 26, 2016.").

In addition to Government and Defense counsels' responses to these questions, Defense counsel are requested to obtain a supplemental letter from Professor Gillers. Defense counsel is also requested to produce a copy of the written waiver by Mr. Zarrab referred to in Professor Giller's original letter.

Kindly submit all responses by January 25, 2017.

Dated: New York, New York
January 19, 2017



Hon. Richard M. Berman, U.S.D.J.