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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Case No. 14-CR-00175-WHA

RESPONSE TO REQUEST FOR BRIEFING ON STATUTORY LIMIT TO TERM OF PROBATION AND ON PUBLIC DISCLOSURE OF MONITOR REPORTS

Judge: Hon. William Alsup
Date: April 16, 2019

Defendant Pacific Gas and Electric Company ("PG&E") respectfully submits this memorandum in response to the Court's April 2, 2019 Minute Order directing the parties to submit briefing on (i) whether the Court can extend PG&E's term of probation in light of the Court's finding of a violation and (ii) whether the federal monitor reports should be made public at this time. With respect to the first issue, the Court has already imposed the five-year statutory maximum probation period on PG&E, and that term cannot be extended further. With respect to the second issue, revealing the Monitor's reports to the public could impede the Monitor's work by discouraging candor; instead, the Court should adhere to its previous determination to release a final public report following a process by which the Monitor and PG&E can protect confidential information.

I. The Court Cannot Extend PG&E's Probation Term Beyond The Five-Year Maximum Already Imposed

The Court has asked whether it can extend the term of PG&E's probation in light of the Court's finding of a violation. Based on statute, PG&E's probation cannot be extended beyond the statutory maximum already imposed. "[T]he authorized term[] of probation" is "for a felony, not less than one nor more than five years." 18 U.S.C. § 3561(c)(1). Because the five-year maximum sentence of probation has already been imposed, the Court is prohibited by statute from further extending PG&E's probation.

The five-year limit on probation has been a feature of the Probation Act since 1925. "[T]he Supreme Court, in an early decision interpreting the Probation Act, read [its] five-year proviso as if it contained the word total: 'The only limitation, and this applies to both the grant and modification of it, is that the total period of probation shall not exceed five years.'" *United States v. Albano*, 698 F.2d 144, 147 (2d Cir. 1983) (quoting *Burns v. United States*, 287 U.S. 216, 221 (1932)); *see also United States v. McCrae*, 714 F.2d 83, 86 (9th Cir. 1983) ("[P]robation may be extended up to the five year limit when probation is later revoked."); *Thurman v. United States*, 423 F.2d 988, 990 (9th Cir. 1970) ("If execution of a sentence is to be suspended and a defendant placed on probation, the maximum permissible term of probation is five years.").

The Comprehensive Crime Control Act of 1984, which amended the probation statute, did not affect that five-year limit: "[T]he new legislation enacted the same requirement that the term of probation

should not last more than five years." *United States v. Fryar*, 920 F.3d 252, 257 (5th Cir. 1990); *see also United States v. Mele*, 117 F.3d 73, 75 (2d Cir. 1997) ("[T]his amendment was intended to clarify the prior law, not change it."); *United States v. Yancey*, 827 F.2d 83, 88 (7th Cir. 1987) ("[T]he legislature did not, in enacting the new legislation, believe it inconsistent to limit the term to five years, while allowing revocation at any time before the term of probation expires.").

Nothing in the probation statute empowers a court to impose a probation period extending beyond the maximum term of five years, even when a defendant has committed a probation violation. The statute concerning the extension of a term of probation, 18 U.S.C. § 3564(d), which a court may order following a finding of a probation violation, *id.* § 3565(a)(1), permits an extension only "if less than the maximum authorized term was previously imposed." *Id.* § 3564(d). Thus, if the maximum authorized term of probation was imposed initially—as it was here—a court may not further extend the term of probation. Indeed, in the one case we have located in which the district court did impose an additional term of probation on a defendant who had already received the five-year maximum, the government conceded error on appeal. The Second Circuit reversed and remanded with an instruction to remove the additional two years from the district court's judgment. As the government had acknowledged, "to the extent the judgment extend[ed] Jones's probation by two years, it [was] illegal." *United States v. Jones*, 182 F.3d 901, 1999 WL 385739, at *1 (2d Cir. 1999) (table).

Furthermore, even where the maximum authorized term was *not* previously imposed, an extension must be made "pursuant to the provisions applicable to the initial setting of the term of probation." 18 U.S.C. § 3564(d). And those provisions, as discussed above, state that the maximum term of probation for a felony is five years. *Id.* § 3561(c)(1). Thus, the total term of probation, including any extension, may not exceed five years. *See United States v. Eidson*, 31 F. App'x 153 (5th Cir. 2001) (holding that when the initial sentence imposed three years of probation, the court was authorized "to extend . . . probation another two years"); *United States v. Fuentes-Mendoza*, 56 F.3d 1113, 1115 (9th Cir. 1995) (interpreting a similarly worded provision concerning the extension of a term of supervised release and holding that "if less than the maximum authorized term of supervised release was initially imposed, a defendant's supervised release term can later be extended *up to the maximum originally allowable term*. We do not read it to allow an

extension beyond the originally allowable maximum." (emphasis in original)); *United States v. Tham*, 884 F.2d 1262, 1264 (9th Cir. 1989) (Even where probation is revoked and a new term of probation imposed, "the period of probation may not exceed five years.").

Nor may a court circumvent the five-year limit on probation by resentencing a defendant to consecutive probation terms, each for a different offense of conviction. The statute is clear that "[m]ultiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other." 18 U.S.C. § 3564(b); *see also United States v. Hughes*, 964 F.2d 536, 538 n.1 (6th Cir. 1992) (noting that the probation statute "prohibits consecutive terms of probation totaling more than five years on separate counts of one indictment"); *United States v. Deffes*, 874 F.2d 1501, 1502 (11th Cir. 1989) ("It seems clear that" the probation statute "prohibits a district court from imposing consecutive terms of probation totaling more than five years on separate counts of one indictment."). Indeed, "[a] term of probation" even "runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation." *Id.*

Accordingly, PG&E's probation cannot be extended beyond the statutory maximum already imposed.

II. Making The Monitor's Interim Reports Publicly Available Could Impair The Monitor's Ability To Meet The Goals Set Forth In The Monitor Order

PG&E defers to the Monitor on this issue but believes that public disclosure of the Monitor's interim reports could impair the efficacy of the monitorship by increasing the risk that PG&E employees will not report adverse issues or concerns to the Monitor, and not provide full and candid responses to the Monitor's inquiries. PG&E actively encourages its employees to provide unvarnished information to the Monitor team and to engage with them openly and transparently but recognizes that there may be a chilling effect if employees fear that information they provide to the Monitor will soon become public. Employee candor is foundational to the Monitor's ability to timely detect and fully understand issues that arise or are being investigated. And it is critically important to PG&E, in turn, that the Monitor obtain truthful, complete and candid information. PG&E is trying to become a company where every employee feels

empowered and obligated to speak up regarding safety concerns, and PG&E believes the Monitor's analyses and insights will help PG&E become safer and improve its culture and operations.

PG&E believes the appropriate time for public disclosure is as this Court originally determined: in the Monitor's final written report. That process ensures that the Monitor's ongoing work will not be compromised, and it is consistent with the government's past support for the confidentiality of monitor reports in order to promote candor and accuracy in employee reporting. *See, e.g.*, Letter in Support of the United States' Motion for Leave to File Monitor's Report Under Seal, at 8-12, attached hereto as Exhibit A [hereinafter *DOJ HSBC Letter*]; Mot. Summ. J. by U.S. Dep't of Justice, Decl. of Tarek J. Helou, ¶¶ 13-17, attached hereto as Exhibit B [hereinafter *Helou Declaration*].[1] The Department of Justice's rationale applies here with equal force. In those cases, as here, the Monitor "relies on the full, open and candid cooperation of [monitored] employees"—employees who "might well become concerned that they would suffer negative repercussions from their statements, or information they have provided, being made public." *DOJ HSBC Letter* at 9-10 (quoting Aff. of Michael G. Cherkasky, ¶ 11, attached hereto as Exhibit C). Given the media attention surrounding PG&E, employees may be less candid with the Monitor if they fear they will be publicly identified. Making public interim reports could have a chilling effect even if the Monitor does not use names in his reports or makes targeted redactions, as employees may reasonably fear that sufficient details will be included to ultimately identify individual employees.

The reporting regime set forth in this Court's January 26, 2017 order has three phases: first, an initial report "to PG&E, the Probation Officer, the USAO, and the Board of Directors of PG&E" containing the Monitor's preliminary assessments and recommendations, as well as a proposed budget and the steps necessary to conduct an effective review; second, a series of reports every six months containing the monitor's updated assessments and recommendations, provided to the same recipients; and third, "a final

[1] For example, in *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115 (D.D.C. 2017), the government argued in connection with the Siemens monitorship that making such reports public would discourage candor and voluntary disclosure of misconduct by employees, would deter other companies from agreeing to monitorships in the future, and would provide a road map to the monitor's methods and strategy, enabling other companies under monitorship to circumvent their respective monitor's efforts. *See Helou Declaration*.

written report for public release setting forth the Monitor's assessment of the monitorship and PG&E's compliance with the goals of the monitorship." Order at 8-9, ECF No. 916. For the final written report, the order permits the Monitor to "take whatever steps the Monitor deems appropriate to protect the confidentiality of individuals, if any, mentioned in the final written report." *Id.* at 9. This regime was carefully constructed to encourage sincere cooperation with the Monitor during the monitorship while providing the public with information after the conclusion of the monitorship.

In the interest of promoting a successful monitorship, the Court should adhere to the reporting process set forth in the Court's January 26, 2017 Order.

III. Conclusion

For the foregoing reasons, the Court should decline to extend PG&E's term of probation beyond the statutory maximum and should decline to make the Monitor's reports public.

Respectfully Submitted,

Dated: April 16, 2019

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EXHIBIT A

U.S. Department of Justice

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DSS/CMT
F. #2009R02380

June 1, 2015

By ECF

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 (JG)

Dear Judge Gleeson:

The government respectfully submits this letter in support of its request to file the Monitor's "First Annual Follow-Up Review Report" (the "Monitor's Report" or "Report") with the Court under seal. A copy of the Monitor's Report will be submitted to the Court as a sealed appendix to this letter.

I. Background

On December 11, 2012, the government filed a criminal Information charging HSBC Bank USA, N.A. ("HSBC Bank USA")[1] with violations of the Bank Secrecy Act ("BSA"), Title 31, United States Code, Section 5311 et seq., namely: willfully failing to maintain an effective anti-money laundering ("AML") program in violation of 31 U.S.C. § 5318(h) and willfully failing to conduct and maintain adequate due diligence on correspondent bank accounts held on behalf of foreign entities in violation of 31 U.S.C. § 5318(i). The criminal Information also charged HSBC Holdings plc ("HSBC Holdings")[2]

[1] HSBC Bank USA is a federally chartered banking institution and subsidiary of HSBC North America Holdings, Inc. ("HSBC North America"). HSBC North America is an indirect subsidiary of HSBC Holdings plc.

[2] HSBC Holdings is the ultimate parent company of HSBC North America and is one of the world's largest banking and financial services groups (collectively, 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 and 1705, and the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 3, 5, and 16.

On the day the Information was filed, a deferred prosecution agreement ("DPA"), statement of facts, and a corporate compliance monitor agreement were also filed with the Court. The government also submitted a letter requesting that the Court place this matter in abeyance for sixty months pursuant to the terms of the DPA and exclude that time from the period within which trial ordinarily must commence pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(2).

The DPA imposes a number of stringent conditions on HSBC Group. Perhaps most significantly, the DPA requires HSBC Group to implement enhanced AML standards globally. Specifically, all HSBC Group Affiliates are required to follow the highest or most effective AML standards available in any location where HSBC Group operates. Docket Entry 3-2 at ¶ 5. That means, at a minimum, all HSBC Group Affiliates worldwide must adhere to U.S. AML standards. Docket Entry 3-2 at ¶ 5. As the Court itself noted, "the DPA imposes upon HSBC significant, and in some respects extraordinary, measures" and "it accomplishes a great deal." Docket Entry 23 at 15, 20. To oversee the implementation of these global standards and the other remedial measures, the DPA requires HSBC Holdings to retain an independent compliance monitor (the "Monitor"). Docket Entry 3-2 at ¶¶ 9-13. The Monitor is required to provide annual reports to the government on HSBC's compliance with the terms of the DPA. Docket Entry 3-4. The Court has no role in the selection or removal of the Monitor. Rather, the Monitor was selected by the Department of Justice from a pool of candidates proposed by HSBC and officially assumed his responsibilities on July 22, 2013. See Docket Entry 3-2 at ¶ 9. Since then, in accordance with the Court's July 1, 2013 Order, the government has filed quarterly reports with the Court regarding the implementation of the DPA. In these reports, the government has carefully presented a high-level overview of the Monitor's annual findings in an effort to comply with the Court's order while avoiding revealing confidential details or otherwise inviting any of the negative consequences discussed below.

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and its subsidiaries are the "HSBC Group"). HSBC Group is comprised of financial institutions throughout the world ("HSBC Group Affiliates" or "Affiliates") that are owned by various intermediate holding companies and ultimately, but indirectly, by HSBC Holdings, which is incorporated and headquartered in the United Kingdom.

In addition to serving as the Monitor under the DPA, the Monitor serves a similar role for the United Kingdom's Financial Conduct Authority ("FCA")[3] and the Board of Governors of the Federal Reserve System ("Federal Reserve").[4] Because the Monitor serves multiple roles that involve similar and overlapping responsibilities, the Monitor's annual reports integrate information, analysis, and findings related to the work performed in all three capacities.

In January 2015, the Monitor issued his First Annual Follow-Up Review Report (the "Monitor's Report" or "Report") which set forth his findings and assessment of the then-current state of HSBC Group's AML and sanctions compliance program and of its progress over the course of the preceding year in improving its AML and sanctions compliance functions. The Report was provided to the Department of Justice, FCA, and Federal Reserve, and the government provided a general overview of the Report's key findings in its court-ordered periodic update. On April 28, 2015, the Court ordered the government to file the Monitor's Report with the Court. The government submits this letter and the attached submissions from the Monitor, FCA, Federal Reserve, Hong Kong Monetary Authority,[5] and Bank Negara Malaysia in support of filing the Monitor's Report under seal.

II. Applicable Standards

The public has a "general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). Similarly, under the First Amendment, the public has a "qualified … right to attend judicial proceedings and to access certain judicial documents." Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004); see also Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 9 (1986).

In applying the common law right of access to determine whether an item can be filed under seal, a district court must (1) determine whether the item is a "judicial

[3] The FCA has a statutory objective to protect and enhance the integrity of the UK financial system. In doing this, the FCA is focused on a number of priorities, including preventing the UK financial system from being used for a purpose connected with financial crime.

[4] The Federal Reserve is the consolidated supervisor of HSBC North America and the primary U.S. federal regulator of HSBC Holdings.

[5] The Hong Kong Monetary Authority has asked that we inform the Court that the views expressed in its letter are its own and were not made in coordination with any other parties.

document," (2) determine the weight of the presumption of access to any judicial document and (3) balance countervailing interests against the presumption of access. Lugosch v. Pyramid Co., 435 F.3d 110, 119-20 (2d Cir. 2006). The test for whether an item is a "judicial document" is not whether it is filed with the court, United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I"), but rather whether the item is "relevant to the performance of the judicial function and useful in the judicial process." Id. The weight of the presumption of access to a judicial document, which falls along a "continuum," is determined by "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995) ("Amodeo II").

In assessing whether the public's qualified First Amendment right of access attaches to a particular document, courts in the Second Circuit have applied two approaches. The first is the "experience and logic" test, which assesses "whether the document[] ha[s] historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." Lugosch, 435 F.3d at 120 (internal quotation omitted). The second approach considers the extent to which the document is derived from, or is a necessary corollary of, the capacity to attend the relevant proceedings. Id. Even where the First Amendment right applies to a document, it still may be sealed "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and [the sealing] is narrowly tailored to serve that interest." Id. (internal quotation marks omitted). Thus, both the First Amendment and common law doctrines of public access entail a balancing of factors that may necessitate sealing of particular documents or records.

Countervailing factors that must be balanced against the common law and First Amendment rights of access are case-specific, but have been found to include the danger of impairing law enforcement activities and protecting the privacy interests of third parties. Amodeo II, 71 F.3d at 1050-51. In assessing the danger of impairing law enforcement activities, courts have considered the integrity of ongoing investigations, Amodeo I, 44 F.3d at 147, and the ability of law enforcement officers to secure current and future cooperation from persons desiring confidentiality, Amodeo II, 71 F.3d at 1050.

III. Discussion

In this case, there is no common law or First Amendment right of access to the Monitor's Report. Therefore, the Court need not conduct the balancing test described above. However, even if there was a right of access, it would be outweighed by the negative effect that public disclosure would have on the monitorship, the implementation of the DPA, global regulators' ability to supervise HSBC, the risk that criminals would use the Report to exploit

weaknesses in HSBC's and other financial institutions' AML and sanctions compliance programs, and the potential impact on monitors of other institutions.

A. Common Law Right of Access

In order for the common law right of access to attach, the Court must conclude that the Monitor's Report is a "judicial document." See Lugosch, 435 F.3d at 119. To be a "judicial document" it must be "relevant to the performance of the judicial function and useful in the judicial process." Amodeo I, 44 F.3d at 145. As described in the government's January 30, 2013 Memorandum in Support of the DPA, the government maintains that the Court's authority in connection with the DPA is limited to approval of the exclusion of time under the Speedy Trial Act. However, in its July 1, 2013 Memorandum and Order, the Court found that it had limited authority to approve or reject the DPA and oversee the implementation of the DPA pursuant to its supervisory power. Docket Entry 23 at 6. Nonetheless, in approving the DPA, the Court noted that it was "as mindful of the limits of the supervisory power as I am of its existence." Docket Entry 23 at 13. The Court stated that its function during the term of the agreement is "to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court." Docket Entry 23 at 20. The Court provided a non-exhaustive list of circumstances that would "warrant judicial intervention to protect the integrity of the Court," including cooperation requirements that would violate a company's attorney-client privilege, work product protections, or its employees' Fifth or Sixth Amendment rights, or a remediation requirement that would be unethical or create a conflict of interest. Docket Entry 23 at 11-12.

The Monitor's Report had not even been written when the Court approved the DPA and excluded time under the Speedy Trial Act, so the Report could have played no role in the Court's decision. Rather, the Monitor's annual reports are progress reports for the government and for HSBC's regulators regarding HSBC's compliance with certain terms of the DPA and the efficacy of HSBC's AML and sanctions compliance programs. At their core, the reports are a tool to help the government determine whether HSBC has complied with the terms of the agreement or if HSBC has breached the agreement such as to warrant seeking an additional penalty or voiding the DPA and prosecuting HSBC. As the Court noted in its Memorandum and Order, "[t]he Executive Branch alone is vested with the power to decide whether or not to prosecute." Docket Entry 23 at 14. The Court highlighted that the exercise of prosecutorial discretion is "particularly ill-suited to judicial review." Docket Entry 23 at 14 quoting Wayte v. United States, 470 U.S. 598, 607 (1985). Therefore, even assuming the Court's stated limited supervisory power over the implementation of the DPA, the Monitor's Report is not relevant to this limited judicial function as it concerns none of the circumstances described in the Court's July 1, 2013 Order.

The Monitor's role is akin to that of the independent consultant in S.E.C. v. American Intern. Group. See 712 F.3d 1 (D.C. Cir. 2013). In that case, an independent consultant appointed pursuant to a consent agreement had no relationship with the court. Id. at 4. The court did not select or supervise the independent consultant and had no authority to extend the consultant's tenure or modify his authority. Id. The consent decree did not give the independent consultant any powers unique to an individual possessing judicial authority. Id. Especially important to the D.C. Circuit was that the independent consultant's reports could not "record, explain, or justify the court's decision in any way" to approve the consent decree. Id. Ultimately, for these reasons, the D.C. Circuit found that the independent consultant's reports were not judicial documents. Id. at 3-4. The same should be the finding here, where the Monitor's reports in no way impacted the decision of this Court to approve the DPA and toll the Speedy Trial clock; the Court had no role in selecting the Monitor or otherwise determining the content or focus of his reports; and the Court's limited, stated authority over the DPA is to ensure that the DPA remains within the bounds of lawfulness and respects the integrity of this Court.

In Amodeo I, the Second Circuit relied on a diametrically different set of material facts to hold that a Court Officer's report qualified as a judicial document. In Amodeo I, the question presented was whether a report generated by a Court Officer and already filed with the district court qualified as a judicial document. In that case, a consent decree provided for a Court Officer to be appointed and authorized that Officer to exercise a number of judicial powers including the authority to subpoena witnesses and documents and to take testimony under oath. See 44 F.3d at 143. In particular, the Court Officer in Amodeo I was entitled to "all of the powers, privileges, and immunities of a person appointed pursuant to Rule 66 Fed.R.Civ.Pro. and which are customary for court appointed officers performing similar assignments." Id. (quotations omitted). Importantly, under the Amodeo I consent decree, the district court was charged with the authority and responsibility to enforce and grant relief from any of the consent decree's provisions. Id. at 146. In finding the Court Officer's report was a judicial document, the Second Circuit relied on the district court's authority to grant relief from the Court Officer's efforts and, in so doing, the necessity of the district court "considering the record of all proceedings." Id. In other words, for the Amodeo I district court to exercise its authority to grant relief from the Court Officer's judicial powers, it necessarily would rely on the record before it, including the Court Officer's report and any other pleadings filed by the parties. By contrast, the Department-appointed Monitor in this case exercises no judicial powers, and the Court is charged neither with enforcing or granting relief from the Monitor's efforts nor with playing any role in the Monitor's work. The absence in this case of the factors that rendered the Court Officer's report a judicial document in Amodeo I support the conclusion that the common law right of access does not attach to the Monitor's report.

In the event the Court determines that the Monitor's Report is a judicial document subject to the public right of access, the weight of the presumption of access would be extremely low. See Amodeo II, 71 F.3d at 1049 ("the weight to be given the presumption of access … will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance."). As discussed in more detail below, this presumption is easily overcome here by overwhelming competing considerations against public disclosure.

B. First Amendment Right of Access

To determine whether a First Amendment right of access attaches, a court must consider whether the document has historically been available to the press and general public and plays a significant positive role in the functioning of the particular process in question (the "experience and logic" test) or whether it is derived from, or a necessary corollary of, the capacity to attend a relevant proceeding.

Documents used by the government to determine whether a defendant is abiding by the terms of a DPA have never been available to the press and general public. There are no public proceedings relating to charging decisions – indeed, those decisions are necessarily cloaked in secrecy. See United States v. Haller, 837 F.2d 84, 87-88 (2d Cir. 1988) (internal quotation omitted) (finding "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" because if grand jury proceedings became public, among other things, "prospective witnesses may be deterred from testifying, those who do testify may be less likely to do so truthfully, targets of investigations may flee, and person who are the subject of an ultimately meritless investigation may face public embarrassment."). As such, the press and general public are generally not entitled to access to documents that inform these decisions, meaning that the First Amendment right of access does not apply to the Monitor's Report. See also United States v. Belfort, No. 98 CR 0859, 2014 WL 2612508, at *4 (E.D.N.Y. June 11, 2014) (Gleeson, J.) (finding no First Amendment right of access to a list of victims' names when there is "no historic basis for disclosing the type of document and there is no 'logic' in public access to this information playing 'a significant positive role' in the process" and "[a]ccess to [the] information is [] in no respect 'a necessary corollary of the capacity to attend'" a relevant proceeding.).

C. Competing Interests

Because there is no common law or First Amendment right of access to the Monitor's Report, the Court need not conduct the further analysis of balancing those rights against competing considerations. However, in the event the Court concludes that either a common law or First Amendment right of access does attach, it must balance those rights against countervailing interests that nevertheless warrant sealing. In cases where a First

Amendment right applies, the Court must make "specific, on the record findings [] demonstrating that closure is essential to preserve higher values and [the sealing] is narrowly tailored to serve that interest." Lugosch, 435 F.3d at 120 (internal quotation omitted).

In this case, if the Monitor's Report were to be made public: (1) the Monitor's and the government's ability to assess whether HSBC is complying with the terms of the DPA will be negatively impacted; (2) the ability of the FCA, Federal Reserve and other regulators to fully discharge their supervisory responsibilities over HSBC will be negatively affected; (3) criminals would be given a road map for exploiting current weaknesses in the AML and sanctions compliance programs at HSBC and potentially other financial institutions; and (4) the ability of monitors and regulators of other institutions to effectively perform their duties would suffer.

1. The Monitor's Ability to Assess HSBC's Compliance with the DPA

If the Monitor's Report is made public, the Monitor's ability to assess whether HSBC is complying with the terms of the DPA will be negatively impacted. Indeed, the government and the Monitor believe that there is a real possibility that the consequences of public disclosure would be so great that the Monitor would be unable to perform the work he is required to do under the terms of the DPA. This danger of impairing law enforcement activities is the type of countervailing interest that courts have found to overcome the presumptive right to access judicial documents, especially in circumstances where law enforcement is reliant on the cooperation of others who want or need confidentiality. See Amodeo II, 71 F.3d at 1050 ("Unlimited access, while perhaps aiding the professional and public monitoring of courts, might adversely affect law enforcement interests or judicial performance. Officials with law enforcement responsibilities may be heavily reliant upon the voluntary cooperation of persons who may want or need confidentiality. If that confidentiality cannot be assured, cooperation will not be forthcoming. … If release is likely to cause persons in the particular or future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access."). In this case, the cooperation of both foreign regulators and HSBC employees, both of whom the Monitor relies on to execute his responsibilities under the DPA, will be negatively affected if the Monitor's Report is publicly released.

The cooperation of foreign regulators is essential to the Monitor's work. Pursuant to the DPA, as well as the FCA and Federal Reserve agreements under which the Monitor operates, the Monitor is required to conduct testing and make assessments of HSBC Group Affiliates around the world. Performing this function requires the cooperation of foreign regulators. It is the confidential nature of the Monitor's Report that "allows the Monitor to operate with important support from banking regulators in the jurisdictions in

which HSBC Group operates." Monitor's Letter at ¶ 8. Indeed, according to the Monitor, many jurisdictions already visited by the Monitor in 2013 and 2014 agreed to allow the Monitor access only when they were given express assurances that his reports would remain confidential. FCA Letter at ¶ 20(a). Furthermore, according to the FCA, "[i]f the report was made public, there is a significant risk that these jurisdictions (and possibly others which the Monitor might wish to visit in 2015 and future years) would refuse to agree to allow the Monitor to assess HSBC's operations in those jurisdictions throughout the remaining term of the DPA." Id. Without access to HSBC Group Affiliates, the Monitor cannot properly assess HSBC's compliance with the terms of the DPA.

To be fully effective, the Monitor needs access to confidential client information, including, among other things, names, nationality, source of wealth, transaction history and suspicious activity alerts. Monitor Letter at ¶ 8. According to the Monitor, without this information, his ability to accurately assess HSBC's compliance with certain provisions of the DPA would be materially curtailed. Id. Based on meetings with more than a dozen regulators, the Monitor believes that the presumption of confidentiality has been a critical component in obtaining foreign regulators' agreement to access confidential client information and to rely on it in preparing his reports. Monitor Letter at ¶ 9. Specifically, "[i]n one European country, [the Monitor and his team] were told that if review of confidential materials were not restricted to the FCA, DOJ and [Federal Reserve], that country's regulator would limit our access to those materials." Id. Furthermore, as noted by the Malaysian regulator Bank Negara Malaysia, the Monitor was only granted access to confidential information in Malaysia based on assurances that the Report "would be treated with utmost confidentiality, consistent with the confidentiality provisions in our legislation i.e. the Financial Services Act 2013, the Islamic Financial Services Act 2013, the Central Bank of Malaysia Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001" and that the Report "would only be disclosed to DOJ, the Federal Reserve Board and UK's Financial Conduct Authority." Bank Negara Letter at ¶ 2. Therefore, if the Monitor's Report becomes public, even in countries where the Monitor is still permitted access, it is likely that his work will be negatively affected based on a lack of access to key information.

The Monitor also relies on the full, open and candid cooperation of HSBC employees. According to the Monitor, to this point, he has received an appropriate level of cooperation from HSBC employees. Monitor Letter at ¶ 11. However, public disclosure of the Monitor's Report would likely negatively impact this cooperation. The Monitor believes that "releasing this report publicly would have a chilling effect on [HSBC] employees, and the level of cooperation and candor I receive could decrease substantially. The employees might well become concerned that they would suffer negative repercussions from their statements, or information they have provided, being made public." Id. The Hong Kong

Monetary Authority similarly believes that public disclosure of the Report may "inadvertently limit[] the extent to which whistle blowers and staff will come forward and candidly communicate with the Monitor." Hong Kong Monetary Authority Letter at 2. Furthermore, the FCA has said that "were key employees to be aware that future reports may criticise them by name or by title they may be less likely to continue to support HSBC's reform efforts, potentially leaving the organisation and ultimately slowing HSBC's progress." FCA Letter at ¶ 20(c). If any of these situations were to occur, according to the Monitor, "[t]he result would be that I have less information with which to make my findings and recommendations, which ultimately would not be to the benefit of the public or [HSBC]." Monitor's Letter at ¶ 11.

In addition to the effects on future cooperation, the employees who cooperated with the Monitor for this Report have a privacy interest in the information they provided, as they could face repercussions if the Report is made public. This Court has noted that "the privacy interests of innocent third parties … should weigh heavily in a court's balancing equation." Belfort, No. 98 CR 0859, 2014 WL 2612508, at *3 quoting Amodeo II, 71 F.3d at 1050-51. Therefore, given the potential harm to the innocent HSBC employees who cooperated with the Monitor, the Court should find that the employees' privacy interest outweighs any presumptive right to access. See id. (finding victims' privacy significantly outweighed common law right of access when the information sought was traditionally non-public and the potential harm to victims was significant.).

2. Regulators' Ability to Effectively Supervise

Aside from the effect on the Monitor's ability to fulfill his duties under the DPA, public disclosure of the Monitor's Report will impair the ability of regulators to effectively supervise HSBC. Given the overlapping responsibilities of the Monitor, any negative impact on his ability to perform under the DPA will similarly affect his ability to perform under the agreements with the FCA and Federal Reserve. According to the FCA, if the Monitor is unable to perform his functions under their agreement, "[t]he impact of this for the FCA would be that we would be unable to discharge fully our supervisory responsibilities in respect of HSBC Group and that the FCA's market integrity objective could be compromised." FCA Letter at ¶ 20(a).

Beyond the ability of the Monitor to perform under the various agreements, the FCA and the Federal Reserve have a regulatory interest in the information obtained in the Monitor's Report. Open and candid communications between financial institutions and regulators are critical to effective supervision. As the Federal Reserve points out, the information contained in the Monitor's Report is analogous to information protected by the bank examination privilege. "[T]he bank examination privilege – which protects the

confidentiality of certain deliberative information – exists to preserve the relationship between examiners and regulated organizations so that this type of communication will take place." Federal Reserve Letter at 3 citing In re Subpoena Served Upon Comptroller of Currency, 967 F.2d 630, 633-34 (D.C. Cir. 1992). If confidentiality for this type of information is not protected, "[i]t could impact Federal Reserve examiners [], thereby reducing the effectiveness of the Federal Reserve's supervision." Id.

3. A Road Map to Exploit Weaknesses at HSBC and Other Financial Institutions

The Monitor's Report identifies specific current deficiencies in HSBC's AML and sanctions compliance program that are in the process of remediation. This includes deficiencies at the Group level as well as in specific countries. As general examples, the Monitor identifies certain areas within HSBC Group where the understanding of money laundering and financial crime red flags continues to lag. The Monitor also identifies areas where new compliance policies have not yet been implemented, including areas where the lack of due diligence currently exposes HSBC to serious money laundering and sanctions risks. To be clear, the Monitor has not concluded that these deficiencies are the result of intentional misconduct or bad faith. Rather, the fact that the Monitor's review to date has revealed areas in need of improvement demonstrates the benefits of the monitorship to ensure that these problems are identified and corrected. However, if made public, these deficiencies could be exploited by those who would promote criminal activity, transfer the proceeds of crime, or evade U.S. sanctions. Furthermore, the FCA has expressed concern that the deficiencies identified at HSBC could be used to exploit similar weaknesses at other banks. FCA Letter at ¶ 23. The law enforcement purpose behind the remedial measures in the DPA would be undermined if, in disclosing the Monitor's Report, the Monitor's work is used as a road map by criminal actors to exploit compliance weaknesses at HSBC and other banks.

4. Negative Impact on Other Cases

The consequences of public disclosure of the Monitor's Report will not only affect this case, but may negatively impact other current and future cases. Foreign regulators around the world will take notice of whether or not this Report is publicly disclosed. If the Report is disclosed, there is likely to be a presumption in other countries that these types of reports will be made public in other cases. The FCA believes that this may lead some countries to refuse access to independent monitors of other organizations. FCA Letter at ¶ 20(b). Without the ability to effectively use independent monitors to scrutinize the behavior of complex global institutions, it becomes more difficult for the Department of Justice to meaningfully impose the types of remedial measures that prevent and deter financial crime.

Public disclosure of the Monitor's Report may also impact the relationship between the Department of Justice and financial regulators in the future when independent monitors are imposed. In situations, like this case, where the Department of Justice and one or more regulators impose monitorships, there are efficiencies to be gained by appointing the same person to perform both roles. When the same monitor is used, both the Department of Justice and the regulator benefit from the monitor's broader view of the organization. Furthermore, appointing the same person as monitor avoids inconsistencies and inefficiencies that could arise when different people are assigned to assess similar aspects of a company's operations.

Despite these benefits, the Federal Reserve has indicated that if having the same monitor as the Department of Justice would increase the likelihood that a monitor's work would become public, "the Federal Reserve might feel compelled to forego the advantages of efficiency and the broad view of the organization that the monitor's work provides in order to protect the confidentiality of the [Federal Reserve's Independent Consultant's] work product." Federal Reserve Letter at 4. It is likely that other regulators might also reach similar conclusions. Thus, if the Monitor's Report is publicly disclosed, the benefits of one individual serving as monitor for the Department of Justice and multiple financial regulators may be lost.

D. Narrowly Tailored

If the Court finds that a First Amendment right of access applies, but that sealing is essential to preserve countervailing values, the Court must also find that the sealing is narrowly tailored to serve that interest. See Lugosch, 435 F.3d at 120 (internal quotation omitted). Given the nature of the interests at play in this case, sealing the entire Monitor's Report is necessary to serve those interests.

Filing a redacted copy of the Monitor's report is neither practicable nor likely to eliminate the confidentiality concerns of foreign and domestic regulators. Foreign regulators would have no ultimate control over what is redacted. Thus, the only way for foreign regulators to be sure that certain information is not publicly disclosed would be to refuse to give the Monitor access to certain information or jurisdictions or to refuse to allow the Monitor to share the results of his assessment with the Department of Justice (thereby undermining the primary purpose of the monitorship). In other words, public disclosure of a redacted report would not preserve the Monitor's ability to carry out his mandate.

Furthermore, as both the Monitor and FCA point out, if all of the sensitive information were to be redacted from Report, which is approximately 1,000 pages long, what is left would be bereft of context, incomprehensible in parts, and more likely to mislead than inform the public. Monitor's Letter at ¶ 13 and FCA Letter at ¶ 24. In situations like this,

sealing the entire report is the appropriate, most narrowly tailored result. See Amodeo II, 71 F.3d at 1052 (finding that sealing of "Part 1" of a report in its entirety was appropriate where it was "rendered unintelligible as a result of redactions" and "thus more likely to mislead than to inform the public."). To date, the government has taken great care in its periodic reports to the Court to provide sufficient information and context regarding the Monitor's efforts and findings to assure the Court that "the implementation of the DPA remains within the bounds of lawfulness and respects the [Court's] integrity," Docket Entry 23 at 20, without revealing confidential information that would have one of the negative consequences discussed above.

IV. Conclusion

For the reasons set forth above, the government requests that the Court accept the Monitor's Report for filing under seal. The Monitor's active and rigorous review of HSBC's operations helps the government ensure that HSBC meets the stringent requirements of the DPA. Indeed, if HSBC fails to meet these requirements the government stands ready to impose consequences on the defendants. The government requests that the Monitor's Report be sealed to ensure that the government receives the most comprehensive, unfettered information as to whether HSBC has fully complied with the DPA.

Respectfully submitted,

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cc: Counsel for Defendants (via ECF)

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

100 REPORTERS LLC, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 14-1264 RC

DECLARATION OF TAREK J. HELOU

I, Tarek J. Helou, declare pursuant to Title 28, United States Code, Section 1746 as follows:

1. I am an Assistant Chief in the Foreign Corrupt Practices Act Unit in the Fraud Section of the Criminal Division of the U.S. Department of Justice. I have held that position since 2014. My duties include supervising other prosecutors who investigate violations of the FCPA and related crimes. I also investigate and prosecute violations of the FCPA and related crimes myself. From 2012 to 2014, I was a Trial Attorney and Senior Trial Attorney in the FCPA Unit, where I investigated and prosecuted violations of the FCPA and related crimes. From 2007 to 2012, I was an Assistant U.S. Attorney in the U.S. Attorney's Office for the Northern District of California. Prior to that, I worked at a law firm.

2. I make this declaration based on my work related to the FCPA, including FCPA cases, some with monitors; my work in criminal cases and investigations, including FCPA investigations; my participation in matters related to the FCPA investigation of Siemens, AG ("Siemens"), including my review of documents obtained during the Justice Department's

investigation of Siemens and related entities; conversations that I have had with other attorneys, including an attorney who oversaw the corporate monitorship that was part of Siemens's plea agreement with the Justice Department; and my review of court filings and monitorship documents from resolutions that the Justice Department entered into with Siemens and related entities.

3. On December 15, 2008, Siemens, a multinational engineering company headquartered in Munich, Germany, pleaded guilty to a two-count information charging it with violating the provisions of the FCPA concerning books and records[1] and internal accounting controls.[2] *See United States v. Siemens Aktiengesellschaft*, Case No. 08-cr-367 (RJL) (D.D.C.). Three Siemens affiliates, located in Argentina, Bangladesh, and Venezuela, respectively, also pleaded guilty. Siemens cooperated with the Justice Department's investigation. The evidence collected in the investigation revealed that Siemens's misconduct was facilitated by its systemic failure to maintain sufficient anti-corruption controls and to circumvent internal controls and falsify books and records.

4. Siemens needed to remediate these problems, so the company agreed to significantly enhance its internal control system and compliance program in its plea agreement. To ensure that Siemens fulfilled these obligations, the company agreed to retain an independent monitor for up to four years. Siemens retained Dr. Theo Waigel as its monitor and attorney F.

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[1] The FCPA requires certain issuers of publicly-traded securities like Siemens to keep books, records and accounts that accurately reflect transactions and disposition of company assets, and prohibits the knowing falsification thereof. 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a).

[2] The FCPA also requires certain issuers of publicly-traded securities to maintain internal accounting controls to reasonably assure that: (a) transactions are executed as authorized by management; and (b) transactions are recorded as necessary to permit preparation of proper financial statements and maintain accountability for assets; (c) access to assets is properly authorized; and (d) asset account records are compared to actual accounts at reasonable intervals. 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

Joseph Warin, Esq. as his U.S. counsel. The roles of monitors are discussed in greater detail below.

5. On December 12, 2011, a grand jury sitting in the Southern District of New York handed up an indictment charging eight former executives and agents of Siemens and its subsidiaries in connection with a scheme to pay bribes to win a project to provide national identity cards in Argentina. *United States v. Uriel Sharef, et al.*, Case No. 11-cr-1056-DLC (S.D.N.Y.). I became involved in that case in 2013 and am the attorney in my office who is now handling that prosecution. On September 30, 2015, one of those defendants pleaded guilty to conspiring to violate the FCPA and to commit wire fraud. (*See id.*, dkt. entry 19). Siemens's cooperation helped the Justice Department charge the eight defendants in *Sharef*. Siemens conducted an extensive internal investigation, shared the results of its investigation with the Justice Department, and provided the Justice Department with documents related to the identity card scheme, including translations of documents.

6. FCPA investigations usually focus on individual subjects or targets and corporations that are subjects or targets. Investigations of individuals or corporations can result in an indictment, an agreed-upon resolution, or a declination, where no charges are brought.[3] Corporate resolutions are memorialized in either: (1) a plea agreement, in which a company admits guilt; (2) a deferred prosecution agreement ("DPA"), where the Justice Department files criminal charges but agrees to dismiss them if the company meets the terms of the DPA; or (3) a non-prosecution agreement ("NPA"), which lays out criminal conduct, but is not filed as long as the company satisfies the terms of the NPA.

[3] An indictment could ultimately result in a resolution.

7. In my experience, many FCPA matters involve corporations whose employees engaged in a pattern of wrongdoing, which can indicate systematic breakdowns in the company's anti-corruption compliance programs and internal control systems. One important factor in determining whether to seek a monitor as part of a corporate resolution is whether the Justice Department is confident that the company's compliance program is effective in detecting and preventing misconduct and will remain effective in the future. Accordingly, when the Justice Department resolves a corporate investigation, the offending company will often agree to enhance these internal safeguards and to retain an independent expert to serve as a corporate monitor who examines and evaluates these efforts. A compliance program is a formal program specifying a corporation's policies, procedures, actions, and processes that help prevent and detect violations of laws and regulations. Companies establish compliance programs to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable laws and regulations.

8. A monitor's primary responsibility is to assess and monitor the company's compliance with the terms of the settlement agreement. This includes ensuring that the company's compliance program can address and reduce the risk of recurrence of the misconduct. In this way, monitors perform an important service to the Justice Department and the public by ensuring that the company will implement a truly effective compliance program that significantly reduces the likelihood of recidivism.

9. During the monitorship, the monitor evaluates the effectiveness of the company's internal accounting controls, record-keeping, and financial reporting policies and procedures as they relate to the company's ongoing compliance with the FCPA and other anti-corruption laws. The monitor does this by meeting with employees from all levels of the company, reviewing

documents, assessing the company's internal audit function, reviewing the company's compliance program, and testing the company's internal controls.

10. The monitor then conveys to the Justice Department relevant portions of the information that it obtains. That information often includes confidential commercial and financial information that is disclosed only to the monitor. This information is generally conveyed in three ways:

a. Meetings with the Justice Department: During the monitorship, the Justice Department meets regularly with the monitor. During those meetings, the monitor discusses proposed work plans, discusses his strategy for approaching the monitorship, presents his findings, and proposes subsequent work plans. The monitor often presents PowerPoint slides explaining that information. The Justice Department learns about the status of the company's compliance program and the progress that the company has made toward making its compliance program satisfactory. Those meetings also help the Justice Department ensure that the monitor satisfies its obligations by making sure that the company carries out its responsibilities under the resolution.

b. Written work plans: The monitor writes periodic work plans (generally each year) that explain what work will be done to evaluate and test the company's compliance program. The monitor shares his work plan with the Justice Department, and the Justice Department analyzes the work plan and can comment on it. That process helps the Justice Department ensure that the work plan will address and fix problems with the company's compliance program.

c. Annual reports: The monitor then implements the work plan and reports the findings to the Justice Department periodically. The monitor also prepares a formal, written

report (again, generally each year) that explains the work plan and the monitor's observations and findings. The written reports are comprehensive and can be several hundred pages. Communications with the monitor, including written reports or other documents, are treated confidentially and are not shared outside the Justice Department or Securities and Exchange Commission ("SEC").[4]

11. Throughout the monitorship, the Justice Department undertakes an ongoing process of evaluating the monitorship and the company's progress in implementing an effective compliance program. In the course of that evaluation, the Justice Department relies heavily on information that it receives from the monitor. The Justice Department's deliberative process is driven largely by the information that the monitor provides it. The Justice Department relies on that information when providing suggested changes to subsequent work plans and reviewing annual reports. That information can directly impact the Justice Department's decision whether to: (a) determine that the company has breached its obligations under the resolution; (b) continue a monitorship; (c) extend a monitorship that would have otherwise ended; or (d) terminate a monitorship because the company has complied with its obligations.

12. Throughout the monitorship and at its conclusion, the monitor will evaluate and decide whether he or she believes that the company's compliance program is reasonably designed and implemented to detect and prevent violations of anti-corruption laws, and is functioning effectively. If the monitor believes so, then he or she will certify as such at the end of each year. The Justice Department then deliberates – with significant input from the monitor

[4] When the Justice Department investigates companies that are issuers of securities under the FCPA, like Siemens, the SEC often conducts an independent, parallel investigation. The two investigations often focus on the same facts and people, and some of the same statutes. Consequently, like Siemens, issuers that cooperate with one agency usually cooperate with both.

and significant reliance on the information described in paragraph 10 – whether it will dismiss the DPA or end the NPA; extend the DPA or NPA and monitorship; or breach the DPA or NPA. The consequences of that decision are important. If the Justice Department extends the monitorship, then the company will have to work with the monitor for an additional year, which can take substantial resources. If the Justice Department breaches the DPA or NPA, then the company will have already admitted the facts underlying criminal charges, which can have severe financial and reputational impacts on the company. Without the monitor's reports, opinions and other input, the Justice Department would have difficulty in making that determination in each case.

13. The Justice Department has a strong interest in ensuring that information it receives from the offending company and monitors, like Dr. Waigel, is accurate and complete. If the information that the Justice Department receives from monitors, discussed above in paragraph 10, is subject to public disclosure, then the extent and quality of the information that the monitor receives from companies – and thus give to the Justice Department – would likely, in at least some cases, be diminished because it would be incomplete and less accurate, as explained in paragraph 14. In some cases, monitors also would likely be less forthcoming with the Justice Department, as explained in paragraph 15. This would ultimately hinder the Justice Department's ability to enforce criminal laws and reduce crime.

14. Public disclosure of the information described above in paragraph 10 would likely make some companies reluctant to share information with monitors, including reporting new misconduct or problems with their compliance programs. That effect would make it more difficult to reduce corporate criminal recidivism because monitors help companies establish and implement effective compliance programs, which in turn make it more difficult for companies'

employees to commit crimes. This process would be harmed if companies and monitors cannot communicate candidly and openly without fear that information that they exchange will become public. For a monitor to be successful, he or she must be able to get truthful and timely confidential information from employees of a company. If employees of a company that has already admitted to committing crimes believe that their statements to a monitor will be released to outside parties, some of those employees likely would be less forthcoming. Absent credible assurances of confidentiality, some employees of monitored companies likely would be reluctant to provide information to a monitor, including confidential commercial information and proprietary information about a company's compliance program, out of fear that it could damage their employer and their standing at the company and future job prospects. This is particularly important when monitors deal with companies in jurisdictions where people view government entities – and especially law enforcement – with distrust. Consequently, publicly disclosing information that the monitor gives the Justice Department likely would lead to monitors and the Justice Department receiving less credible or reliable information and receiving information in a less timely manner.

15. If the information described in paragraph 10 were not treated confidentially, some monitors would be less likely to provide complete information to the Justice Department. For example, if the monitor believed that the work plan would be available to anyone, including people who were attempting to circumvent the company's internal controls, then the monitor would be less likely to disclose all relevant information to the Justice Department. Additionally, disclosure of this information could give people, including employees at the company under the monitorship, companies that are subject to other monitorships, and companies that may in the future become subject to monitorships, a detailed roadmap of a monitor's strategy and methods

of operating. That information could help them circumvent monitors' efforts to carry out their mandates, and thus would likely adversely affect the Justice Department's ability to prosecute corporate misconduct.

16. If companies believed that the information they share with a monitor would not be confidential, then some companies would be less likely to agree to retain monitors for the reasons discussed above in paragraphs 14 and 15. The Justice Department needs companies to agree to retain monitors for two reasons, beyond the factors described above. First, the Justice Department cannot compel companies to retain monitors with broad powers like those exercised by Dr. Waigel, who oversaw the Siemens monitorship. Companies must agree to retain monitors. Second, the Justice Department could not conduct the kind of reviews that monitors conduct because our limited resources are focused on investigating and prosecuting violations of the FCPA, not acting as monitors. I believe, based on my experience, including my review of documents related to the Siemens FCPA matters, that Siemens gave the monitor virtually unlimited access to its information, spent substantial sums of money enhancing its compliance programs, agreed to extend the monitor's term to four years, and implemented all 152 of the monitor's recommendations that were designed to improve Siemens's compliance program. I believe, based on my experience, including my experience in FCPA matters, that it is unlikely that a company in Siemens's position would have taken all of these measures had it known that its monitor's reports, which contained its confidential and commercial information and road maps of its internal controls, could become available to its competitors merely upon the filing of a FOIA request.

17. Finally, if information that companies share with a monitor would not be confidential, then some companies would be less likely to voluntarily disclose misconduct to the

Justice Department in spite of the other benefits that companies receive from voluntarily self-disclosing criminal conduct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 22nd day of March 2016.

TAREK J. HELOU
Assistant Chief, FCPA Unit

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. HSBC BANK USA, N.A. and HSBC HOLDINGS PLC, *Defendants*.	Cr. No. 12-763 **AFFIDAVIT OF** **MICHAEL G. CHERKASKY**

Michael G. Cherkasky, Esq., being duly sworn, deposes and says:

1. Since July 22, 2013, I have served as the independent corporate compliance monitor (the "Monitor") for HSBC Holdings plc and its subsidiaries and affiliates (collectively, "HSBC Group" or "the Bank").
2. I was appointed as Monitor for HSBC Group pursuant to: a) the deferred prosecution agreement (the "DPA"), dated December 11, 2012, between the U.S. Department of Justice ("DOJ"), HSBC Holdings Plc ("Holdings"), and HSBC Bank USA, N.A. ("HBUS") in this matter; and b) a Direction (the "FCA Direction"), dated April 2, 2013, issued to Holdings by the UK Financial Conduct Authority ("FCA"). Additionally, under a related Order to Cease and Desist (the "FRB C&D"), dated December 11, 2012, issued to Holdings by the U.S. Board of Governors of the Federal Reserve System ("FRB"), the Bank appointed me as an Independent Consultant to perform certain tasks required by the FRB C&D. Each of these (together, the "DPA and Related Orders") concluded that HSBC Group had engaged in conduct that violated the money laundering and sanctions laws of the U.S. and UK.
3. Pursuant to the DPA and the FCA Direction, in January 2014, I issued a report (the "Initial Review Report"), which set forth my findings and assessment, based on information provided by HSBC Group, of the then-current and planned future states of HSBC Group's anti-money laundering ("AML") and sanctions compliance program, and I issued recommendations to HSBC Group.
4. Pursuant to the DPA and the FCA Direction, in January 2015, I issued the first of four required annual follow-up reports (the "First Annual Follow-Up Review Report"), which set forth my findings and assessment of the then-current state of HSBC Group's AML and sanctions compliance program and of the Bank's progress over the course of the preceding year in improving its AML and sanctions compliance program. My findings and assessment described in the First Annual Follow-Up

Review Report were based, among other things, on independent testing conducted by me and by the AML and sanctions compliance professionals who support me in my role as Monitor (the "Monitor Team"). I also issued additional recommendations to HSBC Group.

5. I understand that the Court has issued an order directing the DOJ to file with the Court the First Annual Follow-Up Review Report.

6. I likewise understand that the DOJ will request that the Court file the First Annual Follow-Up Review Report under seal.

7. I support a request by the DOJ to file the First Annual Follow-Up Review Report under seal. I do not take this position lightly, as I am a strong supporter of the interest of the public in transparency in government, and believe that issues involving money laundering and sanctions violations are important public issues. Further, I have no interest in keeping the status of HSBC Group's compliance with the DPA from public view. I do believe, however, that there are times when such interests must be balanced against competing interests, and I believe that this is a case where competing interests weigh in favor of maintaining the confidentiality of the First Annual Follow-Up Review Report. Simply put, confidentiality under these circumstances is in the best interests of an effective monitorship.

8. First, I believe that maintaining the non-public, confidential status of the First Annual Follow-Up Review Report, as set forth in paragraph 9 of Attachment B to the DPA, is in the interest of an effective monitorship because confidentiality allows the Monitor to operate with important support from banking regulators in the jurisdictions in which HSBC Group operates. As Monitor, I conduct testing and assessment activities throughout the world. To be fully effective, these activities should include to the extent possible examination of confidential client information, including, among other things, names, nationality, source of wealth, transaction history and suspicious activity alerts. Without this information, my ability to accurately assess HSBC Group's compliance with some of the provisions of the DPA could be materially negatively impacted.

9. HSBC Group is overseen by more than 400 regulators, and the availability of this critical client information is dependent on these regulators and the various laws and regulations of the different jurisdictions in which HSBC Group operates. I have had the opportunity to meet with representatives of these regulators as a group, as well as with more than a dozen individual regulators. In these interactions, the presumption of confidentiality has been a critical component in obtaining foreign regulators' agreement to access confidential client information and to rely on it in preparing my reports. For example, in one Asian jurisdiction the issue of confidentiality was a continual source of discussion, and my in-person assurance to those regulators that their countrymen's information would be reviewed in confidence – and the results shared only with the FCA, DOJ, and FRB – was crucial to being allowed to see unredacted client files. In one European country, we were told that if review of confidential materials were not restricted to the FCA, DOJ and FRB, that country's regulator would limit our access to those materials.

10. As a result of these experiences, I believe that, if the First Annual Follow-Up Review Report were to be made public, the level of support that I would receive from foreign banking regulators could decrease substantially. I believe that some regulators would be concerned that public disclosure of the work I conduct in their jurisdictions could interfere with their own work. Other regulators might believe that they would be criticized for failing to address any compliance deficiencies in HSBC Group's operations that I might identify, and could seek to preclude me from having an opportunity to identify those deficiencies in the first place. Accordingly, in light of the number of banking regulators with whom I have engaged and will continue to engage during the course of the monitorship, I believe that public disclosure of the report could trigger action by regulators that would negatively impact my work.

11. Second, I believe that maintaining the confidentiality of the First Annual Follow-Up Review Report is in the interest of an effective monitorship because it is clear to me that confidentiality encourages cooperation from the employees of HSBC Group. Much of my work as Monitor depends on full, open, and candid cooperation from employees at all levels of the Bank, and thus far, I have enjoyed an appropriate level of such cooperation from employees of HSBC Group. I believe, however, that releasing this report publicly would have a chilling effect on those employees, and the level of cooperation and candor that I would receive could decrease substantially. The employees might well become concerned that they would suffer negative repercussions from their statements, or information they have provided, being made public. The result would be that I would have less information with which to make my findings and recommendations, which ultimately would not be to the benefit of the public or the Bank.

12. Third, I believe that maintaining the confidentiality of the First Annual Follow-Up Review Report will help to ensure that those who seek to use HSBC Group's financial network to launder funds or violate the sanctions laws do not have sensitive information that they could use to further their criminal objectives. The First Annual Follow-Up Review Report identifies significant, current deficiencies in HSBC Group's AML and sanctions compliance program. If made public, those deficiencies could be exploited to promote criminal activity, to transfer or deposit the proceeds of crime, or to evade sanctions controls.

13. I have also considered the possibility that the DOJ might file a version of the First Annual Follow-Up Review Report that has sensitive information redacted. I believe that a redacted report that does not negatively impact the Monitor's work can be produced. However, the report with all of its components is more than 1,000 pages long, and if the sensitive factual content were to be redacted, the report likely would be materially changed. Such a redacted report might lack the factual support that gives it its critical context and meaning and might appear to be too conclusory to be persuasive, or even to be fully comprehensible.

Dated: June 1, 2015

/s/ Michael G. Cherkasky
Michael G. Cherkasky, Esq.