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JUDGE REFUSES TO APPROVE A JOINT CONSENT MOTION DESPITE GOVERNMENT CHAMPIONING CORPORATE SELF-DISCLOSURE

The government's blessing is not the last hurdle to resolution of an international corruption investigation even when a company provides self-disclosure of its conduct. While not entirely discounting the defendant's voluntary self-disclosure and cooperation with the government, Judge Leon of the United States District Court for the District of Columbia clearly expected greater sanctions to be imposed upon the defendant, including a larger fine and some sort of monitor. Declaring he is not "a rubber stamp," the judge denied the parties' joint consent motion for exclusion of time under the Speedy Trial Act and refused to approve a deferred prosecution agreement as drafted. *United States v. Fokker Servs., B.V.,* No. 14-cr-121, 2015 U.S. Dist. LEXIS 13941 (D.D.C. Feb. 5. 2015).

The underlying criminal information charged Fokker with, inter alia, conspiracy to unlawfully export US-origin goods and services to Iran, Sudan, and Burma. The conspiracy spanned five years with gross revenues from the shipments approximating US$21 million. Alongside the information, the Government filed a Deferred Prosecution Agreement and a motion for the court to toll time under Speedy Trial Act so the company could demonstrate its good conduct for 18 months. In a memorandum supporting the DPA, the government asserted that the defendant's decision to voluntarily disclose its violations was a factor that "heavily" weighed in favor of mitigation. While both parties argued that Judge Leon's role was "extremely limited," Judge Leon took the position that his role was not so limited.

To the contrary, Judge Leon felt that since "the mechanism chosen by the parties to resolve charged criminal activity requires Court approval, it is this Court's duty to consider carefully whether that approval should be given." In denying approval, the court focused on the fact that the defendant was charged with violating and evading export laws "for the benefit, largely, of Iran and its military during the post-9/11 world when we were engaged in a two-front war against terror in the Middle East." Judge Leon was particularly concerned that the defendant would not be required to pay as its fine any more than the revenue it collected for its allegedly illegal transactions; no individuals were being prosecuted under the DPA; a number of employees involved in the transactions were remaining with the company; and that the DPA did not call for an independent monitor or for any reports to be made to the Court or the government. Judge Leon also disagreed that the sanctions were sufficient in light of the defendant's voluntary self-disclosure of the conduct at issue, cooperation and remediation efforts, and precarious financial condition. He concluded that the DPA, as presented, was "grossly disproportionate" to the conduct at issue, and that he could not approve it in its current form.

In support of its denial, the court referenced a 2013 decision out of the Eastern District of New York in which that judge ultimately approved a DPA after requesting the parties to explain why the DPA at issue "adequately reflect[ed] the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme." *United States v. HSBC Bank USA, N.A.,* 11-civ-7387, 2013 U.S. Dist. LEXIS 92438 (E.D.N.Y. July 1, 2013). Interestingly, Judge Leon's decision did not reference the Second Circuit's decision from last summer, *United States SEC v. Citigroup Global Mkts.,* 752 F.3d 285, 294 (2d Cir. 2014). In that decision the Second Circuit reversed a similar denial by a district court that declared it would not be a "mere handmaiden" to a privately negotiated settlement involving a public agency. The Second Circuit held the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires the lower court to determine whether proposed consent decree is fair and reasonable, and that the public interest would not be disserved. Additionally, the Second Circuit noted that whether the consent decree served the public interest "rest[ed] squarely with the [government agency], and its decision merits significant deference."

It remains to be seen whether the parties in Fokker will appeal the decision (as the parties did in Citigroup) or choose to submit a revised DPA as Judge Leon appears to encourage them to do. Nonetheless, the holding demonstrates that judges are taking a closer look at agreements than parties may be accustomed to. Companies should take this second layer of review into account when negotiating agreements that will require court approval.

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