UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705	Case No. 18-MC-00176 (BAH) **UNDER SEAL**

NON-PARTY [redacted] RESPONSE TO THE GOVERNMENT'S SUPPLEMENTAL BRIEFING REGARDING CONSENT TO PERSONAL JURISDICTION

In 2007, [redacted] executed an Assurances Commitment and Consent to Jurisdiction Commitment of [redacted] ("Consent") as part of an application submitted to the Board of Governors of the Federal Reserve System ("Federal Reserve") to establish a branch in the United States. *See* Gov't Supp. Br. Ex. A. The Consent provides that [redacted] "consents to the jurisdiction of the federal courts of the United States . . . in any matter arising under U.S. Banking Law." *Id.* It defines U.S. Banking Law to include "all federal criminal laws of which violation(s) arise(s): . . . (d) the Bank Secrecy Act . . . ." *Id.*[1]

The Government argues that the Consent applies here because (i) the anti-money laundering statute codified at 18 U.S.C. § 1956 is a part of the Bank Secrecy Act ("BSA") and violations of the anti-money laundering statute are criminal violations of the BSA for purposes of the Consent, and (ii) the Consent covers investigations into possible criminal violations of the BSA

[1] [redacted] notes that this clause is grammatically incorrect, and to the extent that it creates any ambiguities in the meaning of the Consent, the terms should be construed against the Government as the drafter of the Consent. *See infra* Part A.

by any entity or individual, even if [redacted] itself is not being investigated, and the Government is investigating Mingzheng for alleged violations of the anti-money laundering statute.

The Government's arguments fail, however, and the Consent does not apply here. Consents to jurisdiction are to be strictly construed, and because the Government drafted the Consent, any ambiguities are to be construed against the Government. Turning to the Government's arguments: (i) the anti-money laundering statute at issue is not part of the BSA. Consequently, the Consent does not apply to money laundering investigations; and (ii) even if the Consent did apply to money laundering investigations, it should be construed only to cover investigations involving alleged violations by [redacted], not by other parties, and [redacted] itself is not under investigation here.

ARGUMENT

A. Consents to Jurisdiction Are To Be Narrowly Construed and Any Ambiguities in the Consent Drafted by the Government Should Be Construed Against the Government

Consents to jurisdiction should be construed narrowly. *See Viko v. World Vision, Inc.*, No. 2:08-cv-221, 2009 U.S. Dist. LEXIS 133923, at *21 (D. Vt. Apr. 27, 2009) ("Consents to jurisdiction are narrowly construed, and will not be extended beyond their plain meaning and scope") (citing *First Nat'l Bank v. Avtek, Inc.*, 134 Vt. 392, 399 (1976)); *SCM Group, USA, Inc. v. Proteck Mach. Co.*, 136 Wash. App. 569, 574 (2007) ("Effective consent to jurisdiction requires 'strict conformity with the terms of the consent'") (citing Restatement (Second) of Conflict of Laws § 32 (1988)).

Moreover, all ambiguities in the Consent should be construed against the Government as the sole drafter of the provision. *Mesa Air Group v. DOT*, 87 F.3d 498, 506 (D.C. Cir. 1996) ("[I]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from

whom a writing otherwise proceeds.") (quoting Restatement (Second) of Contracts § 206 (1979)). Both of these principles dictate the conclusion that the Consent should not have the expansive meaning proposed by the Government.

B. The Anti-Money Laundering Provision in 18 U.S.C. § 1956 Is Not Part of the BSA

Fundamental to the Government's argument is its assertion that the anti-money laundering statute at issue is part of the BSA.[2] This is not correct.

The Bank Secrecy Act, which was enacted in 1970, is codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1959 and 31 U.S.C. §§ 5311-5322.[3] Declaration of Daniel Levin ("Levin Decl.") Ex. C (Bank Secrecy Act obtained through Federal Reserve Regulatory Service). The Money Laundering Control Act of 1986 separately enacted 18 U.S.C. §§ 1956 and 1957 in addition to implementing other title amendments. The Money Laundering Control Act identifies 18 U.S.C. §§ 1956 and 1957 as "new offense[s] for the laundering of monetary instruments," but does not state that these provisions are amendments or additions to the Bank Secrecy Act. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207, 3207-18 (1986).

Moreover, the Government's assertion is not consistent with the Federal Reserve's definition of the BSA, and the Federal Reserve's interpretation should govern since the Consent is in its form application. The Federal Reserve is a member of the Federal Financial Institutions Examination Council ("FFIEC"), an interagency body authorized to "prescribe uniform principles, standards, and report forms and to promote uniformity in the supervision of financial institutions." Levin Decl. Ex. D (Bank Secrecy Act/Anti-Money Laundering Examination Manual), at 1 n.1.[4]

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[2] Other referenced parts of the BSA do not apply extra-territorially and so are not relevant here. *See infra* Part D.

[3] The Bank Secrecy Act is formally referred to as the Currency and Foreign Transactions Reporting Act. The Consent treats these two statutory names as synonymous. *See* Govt. Supp. Br. Ex. A.

[4] The FFIEC is comprised of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Consumer

The FFIEC's Bank Secrecy Act/Anti-Money Laundering Examination Manual defines the BSA to include "31 USC 5311 *et seq.*, 12 USC 1829b, and 1951-1959" and also refers to "12 USC 1818(s) (federally insured depository institutions) and 12 USC 1786(q) (federally insured credit unions)," but does not reference 18 U.S.C. §§ 1956 and 1957. *Id.* at 3 n.2.

The Government relies on the fact that an entirely different organization, the Financial Crimes Enforcement Network (FinCEN), includes 18 U.S.C. §§ 1956 and 1957 as part of what it calls the Bank Secrecy Act on its website. Gov't Supp. Br. at 3 n. 1. This is likely because FinCEN's regulations at 31 C.F.R. 1010.100 currently define the Bank Secrecy Act, for FinCEN purposes, to include these provisions. 31 C.F.R. § 1010.100 (e) (2018).

But there are two problems with the Government's argument. First, because this is a Federal Reserve form and not a FinCEN one, it is the Federal Reserve's definition, not FinCEN's, that is relevant.

Second, even if the FinCEN definition were relevant, the expanded FinCEN definition of the Bank Secrecy Act that includes 18 U.S.C. § 1956 was first proposed in 2008 and did not become effective until March 1, 2011, after [redacted] executed its Consent in 2007.[5] The FinCEN regulations actually in place at the time that [redacted] executed the Consent define the Bank Secrecy Act, just as the Federal Reserve does, without reference to 18 U.S.C. §§ 1956 and 1957.[6] Likewise, FinCEN's website from 2008 also does not include the expanded definition of the Bank

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Financial Protection Bureau, and the State Liaison Committee. Levin Decl. Ex. D (Bank Secrecy Act/Anti-Money Laundering Examination Manual) at 1 n.1.

[5] This definition of Bank Secrecy Act in the FinCEN regulations was added when FinCEN moved its BSA regulations from 31 C.F.R. part 103 to 31 C.F.R. Chapter X in 2010. 31 C.F.R. Chapter X became effective as of March 1, 2011. *See* Transfer and Reorganization of Bank Secrecy Regulations, 75 Fed. Reg. 65,806, 65,813 (Oct. 26, 2010) (effective Mar. 1, 2011).

[6] *See* 31 C.F.R. 103.18 (in effect as of Feb. 28, 2011) (defining BSA as "Pub. L. 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5330"). This same definition of the BSA was included in other FinCEN regulations as well. *See* 31 C.F.R. 103.15 (for mutual funds), 103.16 (for insurance companies), 103.17 (for futures commission merchants and introducing brokers in commodities), 103.19 (for securities brokers and dealers), 103.20 (for money services businesses), and 103.21 (for casinos).

Secrecy Act. Levin Decl. Ex. E (Bank Secrecy Act webpage from the FinCEN website). [redacted] has never been asked to sign a new Consent, and FinCEN's later expansion of its definition of the Bank Secrecy Act to encompass the anti-money laundering statutes should not apply to the Consent that [redacted] signed before these changes took effect.[7]

Of course, if there were any doubt about this, the principles of strict construction of consents and resolving ambiguities against the Government would dictate the narrower interpretation, which does not include 18 U.S.C. § 1956.

C. Assuming *Arguendo* 18 U.S.C. § 1956 Were Part of the BSA, the Consent Should Only Apply to Investigations of Possible Violations By [redacted], Not Others

Even if the money laundering statute at 18 U.S.C. § 1956 were part of the BSA for purposes of the Consent, the Consent should only apply where [redacted] itself is under investigation for violating this provision (or any other provision covered by the Consent). There is no textually-based limitation to the Government's expansive interpretation of the Consent, which would require the Court to find consent to jurisdiction by any foreign bank with a branch in the U.S. to any investigation of any individual or entity anywhere in the world for money laundering (or any of the other statutes covered by the Consent), no matter how unrelated to the bank's own conduct.

Properly construed, the Consent covers any governmental proceeding in which the bank itself is being investigated for criminal violations of the BSA. So construed, the Consent means that the head office and other relevant non-U.S. branches of the bank have consented to jurisdiction in such an investigation – a perfectly sensible requirement for the Federal Reserve to impose.

[7] The Government also cites to an article prepared by the Commodities Futures Trading Commission in support of its definition of the Bank Secrecy Act, but that article discusses FinCEN's current regulations implementing the Bank Secrecy Act, which include an expanded definition of the BSA. *See* Gov't Supp. Br. at 2-3; Commodity Futures Trading Commission, *Compliance with Suspicious Activity Reporting Requirements and Office of Foreign Assets Control Economic Sanctions Programs*, available at 2016 WL 36554433, at *2 n. 1 (citing 31 CFR Chapter X).

Indeed, [redacted] interpretation of the Consent is more consistent with the purpose of the application form. The Federal Reserve issued the application form pursuant to its authority under the Foreign Bank Supervision Enhancement Act of 1991 to review and approve applications for the establishment of U.S. branches of foreign banks. *See* Federal Reserve, *Form K-2 Applications for Foreign Banking Organizations Seeking to Open a Branch in the U.S.*, https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZJhWd3qpXPeQ== (last visited March 11, 2019). The Federal Reserve's primary concern was to ensure that it could "regulate and supervise" foreign banks establishing branches in the United States, including these banks' compliance with applicable U.S. banking laws. *Id.* The Consent should be read as a means for the federal banking authorities to enlist the help of the federal courts in ensuring that U.S. branches of foreign banks comply with these laws.

D. No Other Alleged Criminal Violation of the BSA Provides a Basis for Finding Consent

The Government's passing references to other alleged violations of the BSA (outside of the anti-money laundering act) also do not establish that [redacted] has consented to jurisdiction here. *See* Gov't Supp. Br. at 3 (referencing allegations that Mingzheng (and other entities) have violated the BSA at 31 U.S.C. § 5318 and that FTB has violated "the Bank Secrecy Act codified at 31 U.S.C. § 5322").

First, while those provisions, unlike 18 U.S.C. § 1956, are actually part of the BSA, they do not apply extraterritorially. For example, although 31 U.S.C. § 5318 establishes requirements for the reporting of suspicious transactions to the Secretary of the Treasury, the implementation of anti-money laundering programs, and the establishment of due diligence processes to monitor U.S. correspondent accounts maintained by foreign entities, these requirements apply only to U.S.-

based financial institutions.[8] Moreover, 31 U.S.C. § 5322 is solely a penalties provision and it is not apparent how any party could be in violation of it. 31 U.S.C. § 5322 (2006). These statutory provisions are therefore not applicable to Mingzheng, which is alleged to be a "front company" and not a financial institution, is incorporated in Hong Kong, and is not alleged to have any U.S.-based subsidiaries or operations. *See* Gov't Mot. Compel at 1-2. Even if the Consent applied to investigations into violations by others rather than by [redacted], it would be unreasonable for the Court to conclude that [redacted] has waived jurisdiction on the basis of Mingzheng's alleged criminal violation of the BSA, if those provisions of the BSA do not even apply to Mingzheng. Moreover, although Government asserts that its investigation covers financial institutions both in the U.S. and abroad, it does not allege that any U.S.-based financial institutions (which are subject to the BSA) have engaged in criminal violations of the act, as is required to fall within the scope of the Consent. *See* Gov't Supp. Br. Ex. A.

Second, even if they did apply to Mingzheng or others, as argued above, the Consent should be read only to apply to investigations of [redacted] own conduct.

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The Consent does not encompass investigations for violations of anti-money laundering statutes that are not a part of the BSA. Moreover, it is not a blanket waiver of jurisdiction covering

[8] FinCEN, which is a bureau of the Department of the Treasury, defines "financial institution" as "each agent, agency, branch, or office *within the United States* of any person doing business, whether or not on a regular basis or as an organized business concern . . . ." 31 C.F.R. 1010.100(t) (2018) (emphasis added). Moreover, bank, as one type of entity included in "financial institution," is defined under 31 C.F.R. 1010.100(d) (providing that "bank" includes "[e]ach agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below . . . (8) A bank organized under foreign law"). Additionally, although 31 U.S.C. § 5318(k) establishes the summons power of the Secretary of the Treasury over foreign banks maintaining correspondent accounts in the U.S. through a codification of a PATRIOT Act provision, that provision does not appear to be relevant to Mingzheng as there is no allegation that it is in criminal violation of a PATRIOT Act subpoena (or that such a subpoena could even apply to Mingzheng).

violations of the BSA by persons or entities other than [redacted]. Consequently, it does not apply here.

Respectfully Submitted,

By: [signature]

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