



*United States Attorney
Southern District of New York*

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November 18, 2016

FILED BY ECF

The Honorable Richard M. Berman
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States v. Reza Zarrab, a/k/a "Riza Sirraf," S2 15 Cr. 867 (RMB)*

Dear Judge Berman:

The Government respectfully submits this letter to advise the Court of potential conflicts of interest presented by the representation of the defendant, Reza Zarrab, by the law firm Kirkland & Ellis, LLP ("K&E") and to request that the Court hold a hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982). K&E currently simultaneously represents both the defendant and at least some of the victims in this action, Deutsche Bank and Bank of America.

BACKGROUND

A. Deutsche Bank and Bank of America Are Victims of Zarrab's Sanctions Evasion Scheme

As alleged in superseding Indictment S2 15 Cr. 867 (RMB) (the "Indictment"), Reza Zarrab and his co-conspirators operated a network of businesses, including currency exchange houses, located in, among other places, Turkey and the United Arab Emirates. Using this network, Zarrab and his co-conspirators helped Iranian entities designated by the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") to engage in prohibited financial transactions that were processed through U.S. financial institutions. To conceal the fact that the true beneficiaries of the transactions were sanctioned Iranian entities, Zarrab and his co-conspirators, among other things, layered the transactions through multiple corporate entities and omitted information revealing the Iranian nexus of the transactions. Through these and other deceptive acts, the co-conspirators tricked numerous U.S. financial institutions into processing barred transactions that they would not otherwise have allowed, and thus exposed them to significant potential loss, including scrutiny from and civil penalties levied by OFAC. Among the financial institutions allegedly defrauded by the defendant and his co-conspirators are Deutsche Bank and Bank of America.

B. Bancroft PLLC's Representation of Zarrab

Zarrab was arrested in connection with the charges contained in the Indictment on March 19, 2016. At his initial appearance before the Court, and ever since, the defendant has been represented by Brafman & Associates P.C. ("Brafman"). In or about June and July 2016, attorneys with the law firm Bancroft PLLC ("Bancroft") filed motions to appear *pro hac vice* on behalf of Zarrab, which were granted by the Court. After their admission, the Bancroft attorneys participated extensively in the litigation, including by submitting, along with certain of the defendant's other counsel, motions on behalf of Zarrab, including a motion to dismiss the Indictment, to recuse the Court, and to suppress evidence. A Bancroft attorney also argued the motion to dismiss the indictment at oral argument before the Court on October 5, 2016.

C. K&E's Acquisition of Bancroft and Representation of Deutsche Bank and Bank of America

On September 12, 2016, K&E announced that it had acquired Bancroft. As part of the acquisition, at least three of the Bancroft attorneys who had previously represented Zarrab joined K&E. They continued to represent Zarrab after the acquisition.

Prior to, and continuing after the acquisition, K&E represents Deutsche Bank in a wide range of matters, including several pending cases in this District. These include large-scale litigation in which Deutsche Bank was accused of financial misconduct, including in areas that overlapped with Zarrab's business, such as a class action lawsuit that accuses Deutsche Bank of manipulating the foreign currency exchange market. *See In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13 Civ. 7789 (LGS) (S.D.N.Y.). Similarly, although the details of the representation do not appear to have been publicly disclosed, K&E also lists Bank of America as one of its clients on its website.

DISCUSSION

I. Applicable Law

"The Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation." *United States v. Gonzalez*, 105 F. Supp. 2d 220, 222 (S.D.N.Y. 2000) (citing *United States v. Rogers*, 209 F.3d 139, 143 (2d Cir. 2000)). When a district court is confronted with a possible conflict of interest, it must first determine whether "the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *United States v. Cain*, 671 F.3d 271, 293 (2d Cir. 2012). An *actual* conflict of interest exists when, "during the course of representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action," or where the attorney's representation to the defendant is "impaired by loyalty owed a former client." *United States v. Blau*, 159 F.3d 68, 74-75 (2d Cir. 1998) (internal citation omitted). "A potential conflict of interest exists if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." *United States v. Kliti*, 156 F.3d 150, 153 n.3 (2d Cir. 1998).

If the district court determines that an actual or potential conflict exists but that it would not fundamentally impair the lawyer's representation, the district court "should address the defendant directly and determine whether he wishes to make a knowing and intentional waiver of his right to conflict-free counsel in conformity with the procedures set out in [*United States v. Curcio*, 694 F.2d 14, 24–25 (2d Cir. 1982)]." *Id.*¹ Because a defendant who chooses to waive his right to conflict-free counsel gives up important rights -- and, in certain cases, may be required to "abandon a particular defense or line of questioning," *United States v. Perez*, 325 F.3d 115, 127 (2d Cir. 2003) -- the Second Circuit has prescribed in detail what procedures must be followed in a *Curcio* proceeding to effectuate the waiver:

At such a hearing, the trial court (1) advises the defendant of his right to representation by an attorney who has no conflict of interest, (2) instructs the defendant as to the dangers arising from particular conflicts, (3) permits the defendant to confer with his chosen counsel, (4) encourages the defendant to seek advice from independent counsel, (5) allows a reasonable time for the defendant to make a decision, and (6) determines, preferably by means of questions that are likely to be answered in the narrative form, whether the defendant understands the risk of representation by his present counsel and freely chooses to run them.

Perez, 325 F.3d at 127.

Where such procedures are followed successfully, and the defendant is fully informed of the dangers inherent in simultaneous representation, the client's wishes should generally be respected absent some indication that the conflict is so serious "that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation." *Cain*, 672 F.3d at 294.

II. The Court Should Hold a *Curcio* Hearing

K&E's simultaneous representation of Zarrab and at least two victims in this matter, Deutsche Bank and Bank of America, presents a conflict. The Government has charged Zarrab with defrauding these and other financial institutions by duping them into processing financial transactions that they would not otherwise have engaged in, and in doing so, exposing them to the possibility of substantial harm. As victims of the offense, Deutsche Bank and Bank of America would have certain rights in the event that the defendant was convicted, the exercise of which would be directly contradictory to Zarrab's interest. For example, these victims would be able to address the Court at sentencing, and to describe the harm that Zarrab's conduct caused them. *See* 18 U.S.C. § 3771(a)(4) (victim of crime has right to be "reasonably heard" at sentencing). Similarly, these victims would have the right to mandatory restitution for any pecuniary loss they suffered, which includes property lost as a result of the offense and "expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *See* 18 U.S.C. § 3663A(b)(4) & (c)(1)(A)(ii). Moreover, at a trial, representatives of these financial institutions could testify about the potential harm to the banks caused by the defendant's scheme. Given that Zarrab has already signaled that he intends to argue that the U.S.

¹ New York Disciplinary Rule 5-105 requires that both clients that are subject to the conflict waive the conflict in writing.

Proposed *Curcio* Examination
United States v. Reza Zarrab, S2 15 Cr. 867 (RMB)

A) **Introductory Questions To Establish Competence**

1. Age
2. Education
3. Current medications
4. Alcohol, drugs, medications within past 24 hours
5. Is anything interfering with your ability to understand what is happening here today?

B) **Potential Conflict Of Interest Posed By Kirkland & Ellis's Representation**

1. Are you satisfied with the services of your attorneys thus far in the case?
2. Do you understand that your lawyers are employed by several different law firms, and that they have different obligations to the other clients of those law firms?
3. Has Mr. Clement, Mr. Dinh, Mr. Harris, or Mr. Lacour informed you that the law firm with which they were previously associated, Bancroft PLLC, was recently acquired by another law firm, named Kirkland & Ellis?
4. Have any of your attorneys from the law firm of Kirkland & Ellis informed you that their law firm currently represents several banks that the Government alleges are victims of the conspiracies charged in the Indictment against you in this case?
5. Have any of your attorneys from the law firm of Kirkland & Ellis informed you that even though they personally may not participate in the representations of those banks, that they nevertheless have ethical obligations to those banks because they are clients of the law firm that your lawyers also work for?
6. How long have you been aware of this issue? How much time have you spent discussing this issue with them?
7. Do you understand that the fact that your lawyers from Kirkland & Ellis represent you and simultaneously represent banks alleged to be victims in this case may lead them to have loyalties divided between yourself and those banks?
8. Do you understand that in some cases your lawyers from Kirkland & Ellis might have an incentive to put the interests of those banks before yours?

9. Let me give you some examples of the ways in which the allegiance of your lawyers from Kirkland & Ellis could adversely affect their representation of you in this case. This representation could affect the way that your lawyers from Kirkland & Ellis consider and advise you:
 - a. Whether, and when, you should plead guilty;
 - b. Whether you should seek to cooperate with the Government;
 - c. What defenses you should raise;
 - d. Whether you should testify at trial;
 - e. Which witnesses should be cross examined, and what questions they should be asked;
 - f. Which witnesses should be called, and what other evidence to offer on your behalf;
 - g. What arguments to make on your behalf to the jury;
 - h. What arguments to make to the Court, and what facts to bring to the Court's attention, before trial, during trial, or at your sentencing.
10. Let me expand on some of those examples.
 - a. Do you understand that your attorneys from Kirkland & Ellis may not wish to take positions in this case before trial, during trial, or at sentencing that are critical of banks that are clients of their law firm, even if criticizing them might help your defense?
 - b. Do you understand that your attorneys from Kirkland & Ellis may not vigorously cross examine witnesses who are employees of those banks, should they testify at your trial, if your lawyers from Kirkland & Ellis believe that such cross examination may be harmful to their client banks' interests?
 - c. Are you aware that your attorneys from Kirkland & Ellis may have access to or may have learned information from the banks they represent that may be helpful in defending you, but that they are absolutely prohibited from using it to defend you because of the attorney client privilege that applies to the communications between your attorneys from Kirkland & Ellis and their bank clients?
 - d. Do you understand that your attorneys from Kirkland & Ellis may be limited in making arguments about your level of involvement in the offense, role in the offense, and culpability?
 - e. Do you understand each of the examples that I have given you?
11. Tell me in your own words what your understanding is of the potential conflicts of interest arising in this situation.

12. Do you understand that the greatest danger to you is in the inability to foresee all of the possible conflicts that might arise because of Kirkland & Ellis's simultaneous representation of some of the banks alleged to be victims in this case, on the one hand, and the firm's representation of you, on the other?
13. Do you understand that the potential conflict already has existed since Mr. Clement, Mr. Dinh, Mr. Harris, and Mr. Lacour joined the firm of Kirkland & Ellis in September 2016?

C) **The Right To Conflict-Free Representation**

1. Do you understand that, in every criminal case, including this one, the defendant is entitled to assistance of counsel whose loyalty to him is undivided, who is not subject to any factor that might in any way intrude upon an attorney's loyalty to his interests? In other words, do you understand that you are entitled to attorneys who have only your interests in mind, and not the interests of any other client?
2. Have you received any inducements, promises or threats with regard to your choice of counsel in this case?
3. Have you consulted with any attorneys other than Mr. Clement, Mr. Dinh, Mr. Harris, and Mr. Lacour about the dangers to you of this potential conflict of interest?
4. Do you understand that you have a right to consult with an attorney free from any conflict of interest about this issue, and that the Court will give you an opportunity to do that if there is any aspect of the information that I have conveyed to you today that you wish to discuss with a conflict-free attorney?
5. Have you consulted with independent counsel about the conflict or potential conflict of interest that I have described to you today? Has counsel fully advised you about the situation? Do you wish to receive additional time to consult with independent counsel?
6. After considering all that I have said today about the ways in which Kirkland & Ellis's representation of the banks alleged to be victims in your case may adversely affect your defense, do you believe that it is in your best interest to continue with Kirkland & Ellis as one of the law firms representing you? Is that your wish?
7. Do you understand that by choosing to continue with Kirkland & Ellis as one of the law firms representing you, you are waiving your right to be represented solely by attorneys who have no potential conflict of interest?
8. Are you knowingly and voluntarily waiving your right to conflict-free representation?
9. Do you waive any post-conviction argument, on appeal or otherwise, that by virtue of Kirkland & Ellis's representation of banks alleged to be victims in this case, you were denied effective assistance of counsel?

D) Conclusion

1. Is there anything that I have said that you wish to have explained further?

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