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The Deutsche Bank LIBOR Case: When Justice Is Outsourced

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In October 2019, former Deutsche Bank traders Matthew Connolly and Gavin Black were convicted by a jury in the U.S. District Court for the Southern District of New York of wire fraud and conspiracy charges related to alleged manipulation of the London Interbank Offered Rate (LIBOR). In January 2022, the U.S. Court of Appeals for the Second Circuit reversed their convictions and ordered the entry of judgments of acquittal because the prosecution had "failed to prove" that Connolly or Black had engaged in any criminal conduct. *United States v. Connolly*, 24 F.4th 821, 843 (2d Cir. 2022).

The story of this case, and the conviction and ultimate exoneration of two individuals who had committed no crime, highlights two alarming trends: first, U.S. Department of Justice (DOJ) outsourcing its criminal investigations to private law firms, and second, targeted institutions placing the blame for alleged wrongdoing on relatively low-level employees to avoid more serious criminal consequences themselves.

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A 2010 letter from the government to Deutsche Bank made clear that the government had its eyes on the bank's potential criminal liability, and "expect[ed]" the bank to "cooperate fully" in its investigation. *United Sates v. Connolly*, 2019 WL 2120523 ("Order"), at *2 (S.D.N.Y. May 2, 2019) (quoting DX 9072). This "cooperation" would include having an outside counsel "voluntarily" conduct a full review of the bank's relevant practices, and provide all information gleaned

from that review back to the government. Only such cooperation would help save the bank; the consequences of a felony plea or verdict could cause it to "los[e] business in virtually all aspects of its operations" (citing 2015 Deutsche Bank "White Paper"). And so, Deutsche Bank "immediately decided" to "go all-in" on cooperating with the government.

To do so, Deutsche Bank hired Paul, Weiss, Rifkind, Wharton & Garrison to conduct what would ultimately be a five-year-long "internal" investigation (although then-Chief Judge Colleen McMahon, who presided over the trial, said on the record: "[B]y no standard known to this court can the investigation that Paul Weiss conducted be accurately characterized as an 'internal' investigation").

This investigation would end up being "the largest and most expensive internal investigation in the respective histories of both Deutsche Bank and Paul Weiss." The law firm conducted nearly 200 interviews of more than 50 bank employees, reviewed 158 million documents and listened to hundreds of thousands of hours of audio tapes—and, as promised, shared their results with DOJ.

Deutsche Bank and the DOJ interacted "on hundreds if not thousands of occasions," including during "weekly update calls" meant to provide the DOJ with the opportunity to "make new requests" of Paul Weiss (quoting DX 862). Often, the government directed who should be interviewed, when, and on what topics, giving the firm "considerable direction…both about what to do and about how to do it." One government official explicitly told a Paul Weiss partner to approach these interviews "as if he were a prosecutor" (quoting Dkt. 233-4).

No one can fault the Paul Weiss firm; it simply did what it was asked to do.

Importantly, Deutsche Bank knew that "[s]enior management's lack of awareness of or involvement in the misconduct [was] critical to the DOJ's charging decision." *Black v. Deutsche Bank AG, et.al.*, Case No. 150762/2023, New York County (N.Y.), Dkt. 13 ¶ 88 (citing White Paper). The focus on keeping senior management out of the government's case is demonstrated, in part, by the stark differences between an original draft of Deutsche Bank's deferred prosecution agreement (DPA) and the one that was ultimately adopted. *Compare* Dkt. 399-12 (April 15, 2015 draft statement of facts) *with* April 23, 2015 DPA, Attachment A ("Statement of Facts").

For instance, a section originally titled "DB Management Awareness of the Conduct, Tolerance of the Conflicts of Interest and Promotion of Culpable Individuals" (Dkt. 399-12 at 50) was changed to simply "DB Management" (Statement of Facts at 66); the finalized section highlighted only a single senior manager (rather than multiple, as had been present in the draft); and a sentence alleging that "DB senior managers and managers" had "recklessly disregarded" information was removed. Dkt. 399-12 ¶ 101.

Deutsche Bank avoided its worst-case scenarios. Its senior management was almost universally spared from public condemnation (*see also* Sentencing Tr. 85:10-16, "none of [those indicted] was at the highest levels"), it paid a reduced fine (Dkt. 409-27 at 12; DPA did not

include “the maximum [financial] penalty”) and it avoided corporate guilty pleas for all but one non-public subsidiary. Order at *8. In return, the DOJ was handed the bulk of its trial evidence against Connolly and Black on a silver platter.

McMahon was blunt in her description of events, calling the investigation “a conspicuous success” for Deutsche Bank, which allowed the DOJ to “let the Bank carry its water for it” and “save itself the trouble of doing its own work.” It was “indisputable” that Deutsche Bank’s cooperation with the DOJ yielded a “vindicat[ion]” of the bank’s “purely private interests and responsibilities by cooperating with the Government to the uttermost.”

Equally clear was the fact that such an arrangement “saves the government considerable time and precious resources to permit counsel for the target of an investigation to do the heavy lifting of ferreting out the truth[.]”

Her post-verdict warning was prophetic: “[T]here are profound implications if the government, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position vis-à-vis potential targets of criminal activity.”

One such “profound implication” was the shocking introduction of a Deutsche Bank witness’ perjury uncovered at trial. The witness testified that documents that the DOJ represented to the court were the Bank’s original business records, but which had actually been created by a third party using a smaller and specially chosen data subset (Connolly alleges, convincingly, that the purpose of the perjured testimony was to conceal a “cut and paste[]” of data from multiple records to make him appear guilty when he was not. *Connolly v. Deutsche Bank Ag*, 22-CV-9811 (JMF), S.D.N.Y., Dkt. 23 ¶¶ 93-95.)

The testifying witness had signed an affidavit that the documents as presented to the court were kept in the regular course of Deutsche Bank’s business. Trial Tr. 808:23-809:22. But under cross-examination, he explained that the affidavit had come from “the lawyers within DB” who he understood to be “working with the Department of Justice.” He agreed that the statement about the documents’ origin was not true and was something he “should have never said.” Although both the DOJ and Deutsche Bank were “aware” that the first affidavit was false, he said both parties had him sign a second affidavit containing similar statements that failed to identify the actual source of the documents.

McMahon told a DOJ attorney that the first affidavit “was an outright lie, and you all should be ashamed of yourself for having given it to [the witness] because I know damn well he didn’t write it.” The DOJ’s plea that there had been “no intent to deceive” was not well-received (the court: “Oy vey…Forgive me if I’m underwhelmed by the government’s bona fideness”).

The judge also admonished another DOJ lawyer, “You lied to me… you made a misrepresentation to this Court.” And she repeatedly called the conduct “appalling.”

In another troubling instance, McMahon chastised the DOJ about the existence of Deutsche Bank information that the DOJ

seemed to say it did not have, because she did "not believe that the government did not have access to everything at Deutsche Bank," since "they would have given you their first-born children to get out of the mess they were in[.]" She provided defense counsel with a "great argument" he could make, which focused on "the fact that Deutsche Bank appears to have a small office in the Department of Justice where it goes every day," so that it would be up to the jury "to decide that the people who are representing Deutsche Bank are—I can't say it, what my grandmother would have said, at least not on the record."

Connolly and Black were, the defense could argue, "being framed; they are the scapegoats, in the truest biblical sense, for a corporation that has done so much wrong that it needs to cooperate for and atone for and expiate for." And the judge made a ruling that "[t]he defense has the right to elicit…the fact that Deutsche Bank continues to have an interest in making the government happy." *United States v. Connolly*, Case No. 16-cr-370 (CM), S.D.N.Y., Dkt. 330, at 1.

Even after the short-lived guilty verdicts, she included in her comments at sentencing that it was "fair to say that the government has used Connolly and Black, as well as a few other people—none of whom was at the highest levels—as proxy wrongdoers, to make them an example for the wrongdoings of those…institutions, [including] Deutsche Bank[.]" Sentencing Tr. 85:10-16.

The story does not end with the Second Circuit's exoneration of Connolly and Black. By 2023, Connolly and Black had filed separate lawsuits against Deutsche Bank for malicious prosecution. The legal theory, while perhaps novel in some respects, has thus far been successful—in both cases, the judges (one in state court, one federal) denied Deutsche Bank's motions to dismiss with, as one said, "little trouble." *Connolly v. Deutsche Bank Ag*, Dkt. 49 at 2.

The lawsuits' survival may reflect a growing distaste for allowing DOJ to outsource its investigations to the very entities which are the original targets of its criminal investigations. As Connolly put it in his amended complaint, this is "a well-trod and corrupt path." And the reality of costly litigation may cause large institutions to hesitate before agreeing to the DOJ's "voluntary" partnership in the future, rather than (as McMahon described it) doing "everything that the government could, should and would have done had the government been doing its own work." Order at *12.

What will happen next time?

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